

CONFERENCE

THE DEATH PENALTY IN THE TWENTY-FIRST CENTURY

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INTRODUCTION*

The following pages contain excerpts from recent panel discussions held at The American University, Washington College of Law, sponsored by the Criminal Law Society (CLS). The theme of each event was the death penalty in the twenty-first century. As such a passionate and complex issue often does, the death penalty inevitably creates controversy. Through these panel discussions, CLS aimed to create a forum for an intellectual discussion about the facts and the impact of modern death penalty jurisprudence in the United States.

The Washington College of Law officially recognized CLS in the spring of 1993. The idea for the organization was born out of an experience that its co-founders had when volunteering at the Department of Justice, Office for the Victims of Crime. The students attended a "homicide survivor's group" meeting with their supervisor and his wife, Jack and Trudi Collins. The purpose of the meeting was to join together family and friends of homicide victims for both support and the exchange of information. The survivors were not there to grieve for their lost ones; rather, they wanted to discuss their encounters with the criminal justice system. The survivors shared stories about the police, about how each had learned of the death of their lost one, and about arrested suspects. They told each other who to contact at the various prosecutors' offices and how to become part of the crime victims' fund. One family shared a story about how they appeared before the parole board and helped convince the board not to release the person convicted of killing their brother. Each survivor learned something new about the system. The students recognized the difficulty in organizing a group like the "homicide survivors group" and how little the average citizen knows about the criminal justice process. Guest lecturers and lawyers in the field attended each meeting to counsel the survivors about different aspects of the system. With this in mind, the students devised a plan to start an informational group called the Criminal Law Society of the Washington College of Law. CLS' goal is to provide students with unique opportunities to interact with individuals, in academia and in the community, who are somehow affected by the criminal justice system.

In CLS' first year, students researched and wrote editorial and informational pieces addressing contemporary problems in criminal

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law in a monthly newsletter entitled "Malice Aforethought." Also, students hosted occasional guest speakers, which later developed into a weekly luncheon series with guest lecturers from local prosecutor, public defender, public interest and private practice organizations. Students participated in tours of the Lorton Prison Facility and the Oak Hill Detention Center; while still others accompanied local police officers on "ride-ons."

On November 9, 1994, CLS sponsored a panel discussion on the highly controversial Racial Justice Act. Although the Act never made it through Congress, the problems and issues that it raised are ongoing and perhaps timeless. In addition to the other experts on the panel, two representatives from the Government Accounting Office (GAO) served on the panel and responded to numerous questions and concerns about the data compilation and statistical analysis used in the GAO's Report on Race and the Death Penalty. This was the first opportunity for the public to address the GAO directly about their findings. Excerpts from this panel discussion are presented below in Part VI, "Statistics and the Death Penalty: Is Race a Factor?"

On March 23, 1995, CLS hosted a conference entitled, "The Death Penalty in the Twenty-First Century—Where Is It Going?" An all-day event consisting of four panels and a keynote address by Stephen Bright, Director of the Southern Center for Human Rights, the conference brought together practitioners, professors, victims, journalists, public interest advocates, and students to debate some of the most controversial questions of the day. Recognizing that a purely technical discussion of death penalty jurisprudence would disregard important political, psychological, and emotional issues, CLS organized panels that debated the legal and political implications of the death penalty; the rights and responsibilities of the media with respect to broadcasting executions; and the effect of the death penalty on individuals—from crime victims and their relatives to the average person on the street to potential criminals to convicted inmates on death row. In addition, Professor Bright provided an inspirational keynote address about current death penalty jurisprudence and its practical implications. Professor Bright's speech is reprinted in full in Part IV, "Capital Punishment and the Criminal Justice System: Courts of Vengeance or Justice."

Two of the panels from this March conference are excerpted below. Part III discusses the effects of Justice Blackmun's dissent from the denial of certiorari in *Callins v. Collins*. As discussed in more detail in the panel discussions, Justice Blackmun changed his position on the

death penalty late in his career. In *Callins*, he encouraged the Court to grant the petition to vacate the death sentence and declare the death penalty unconstitutional. He was, however, unable to persuade the other members of the Court. Part V addresses contemporary society and the death penalty.

Over one hundred students, faculty, professionals, journalists and others attended these panels. *The American University Law Review*** is publishing portions of these panel discussions so that an even broader audience may benefit from the important insights regarding the future of the death penalty in American society.***

CLS' success is the result of the extraordinary effort and dedication of past and present students at the Washington College of Law. CLS would be remiss if credit was not specifically extended to Professor Ira Robbins, who agreed at the outset to serve as CLS' advisor, and Associate Dean Jamin Raskin, the Student Bar Association, and the WCL administration for their continued support.

I. OPENING REMARKS

DEAN RASKIN: Today the Criminal Law Society at the Washington College of Law deals with an issue that is of pressing importance, and this conference comes not a moment too soon. Everyday, we read about the death penalty. It's been reinstated in New York.¹ It was a critical issue in the election of Governor Pataki in New York.²

We read yesterday that the United States Attorney in Washington has decided to seek the death penalty in a criminal case in the District of Columbia for the first time.³

** The participants and *The Law Review* staff made minor editorial changes when necessary for clarity. *The Law Review* staff also supplied the citations.

*** Questions or comments about the death penalty transcripts or the Criminal Law Society may be addressed to:

Criminal Law Society
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1. See Act of Mar. 7, 1995, ch. 1, 1995 N.Y. Laws 1 (reinstating death penalty effective Sept. 1, 1995).

2. See James Dao, *Death Penalty in New York Reinstated After 18 Years; Pataki Sees Justice Served*, N.Y. TIMES, Mar. 8, 1995, at A6 (indicating fulfillment of Governor Pataki's campaign goal to sign death penalty bill into law); Ellen Warren, *Governor's Mansions to Take on Republican Decoration; Democrats Lose in N.Y., Texas, Pennsylvania*, CHI. TRIB., Nov. 9, 1994, at 23 (commenting that Governor Pataki's platform was largely based on reinstatement of death penalty).

3. See Toni Locy, *U.S. to Seek Death in D.C. Case; Prosecutor Accedes to Reno's Decision in Officer's Slaying*, WASH. POST, Mar. 21, 1995, at A1 (stating that, if convicted, defendant accused of murdering police officer would be first person to be executed in Washington, D.C. since 1957).

This conference could not be more timely. We have the best experts in the country here to discuss not just the law of the death penalty, but the politics, the media, and what the death penalty means in society.

I would like to now introduce my esteemed colleague, Ira Robbins, who will give a brief opening address this morning.

II. THE DEATH PENALTY IN THE TWENTY-FIRST CENTURY: QUESTIONS AND DIRECTIONS

PROF. ROBBINS: Good morning. As Dean Raskin properly pointed out, the death penalty is a hot topic, and maybe it always will be. It is a topic of debate in most state legislatures. The Supreme Court continues to develop death penalty jurisprudence every Term.⁴ And it is a regular part of the rhetoric of political campaigns in almost every jurisdiction at almost every level of government.

Here are some very recent death penalty items in the news:

- This week, the State of Illinois held its first double execution in more than forty years.⁵
- This week, in the District of Columbia, a non-death penalty jurisdiction, the United States Attorney, who earlier had decided not to seek the death penalty under new federal law in a particular case, was persuaded by the Justice Department to reverse his decision.⁶
- A few weeks ago, the State of New York became the thirty-eighth state to enact a death penalty in an extremely complicated, thirty-one page statute.⁷ Within days, the District Attorney for the Bronx announced that he would not seek the death penalty in any case, but rather, in his discretion, would ask for

4. See WELSH S. WHITE, *THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* 28 n.64 (1991) (listing recent Supreme Court death penalty cases); Stephen Gilles, *Proving the Prejudice of Death-Qualified Juries After Adams v. Texas*, 47 U. PITT. L. REV. 219, app. at 254 (1985) (listing 32 significant Supreme Court death penalty cases from 1968 to 1985); Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513, 532-34 (1988) (discussing wealth of current Supreme Court cases on "capital system"); Denise G. Brodsky, Comment, *Murray v. Giarrantano: Execution of the Unrepresented*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 211, 215 n.36 (1991) (noting that Supreme Court constantly modifies death penalty case law).

5. See *Double Execution by Injection in Illinois*, S.F. CHRON., Mar. 23, 1995, at A2 (discussing executions of James Free and Hernando Williams); *Double Execution Is Illinois' 1st Since '52*, PHOENIX GAZETTE, Mar. 22, 1995, at A3 (same); Paul Leavitt, *Executions*, USA TODAY, Mar. 23, 1995, at A3 (same).

6. See Locy, *supra* note 3, at A1.

7. See Act of Mar. 7, 1995, ch. 1, 1995 N.Y. Laws 1 (reinstating death penalty effective Sept. 1, 1995).

the punishment of life in prison without parole.⁸ The District Attorney for Manhattan wrote in an editorial in *The New York Times* that the death penalty actually *hinders* a prosecution's fight against crime.⁹

- And, of course, the Contract with America puts its own gloss on capital punishment and the means of reviewing it.¹⁰

Like most other major social issues of our day, there is little consensus concerning the death penalty, nor do we expect to achieve a consensus today.

Today's conference is less a *debate* about the death penalty than it is a *discussion* about some of the more subtle questions concerning capital punishment, such as:

- Is the death penalty effective?
- Is it administered fairly?
- Is the quality of review of death sentences sufficient?
- What is the effect of the death penalty on the political process?
- We know that race affects the imposition of the death penalty¹¹ (the race of the victim more so than the race of the defendant). How does the factor of race affect the *political debate* about the death penalty?
- What will be the ramifications of broadcasting executions? Will the results be positive or negative?

8. See *Level-Headed DA*, NEWSDAY, Mar. 10, 1995, at A32 (discussing statements made by Bronx District Attorney Robert T. Johnson); see also John Shanahan, *Pataki Warns DAs to Enforce Death Penalty or Step Aside*, BUFFALO NEWS, Sept. 2, 1995, at A6 (relating Governor Pataki's instructions to district attorneys to set aside any personal reservations about New York's new death penalty statute).

9. See Robert M. Morgenthau, *What Prosecutors Won't Tell You*, N.Y. TIMES, Feb. 7, 1995, at A25 (arguing that New York should not adopt death penalty statute because death penalty serves no deterrent effect and is more expensive and time consuming than penalty of life imprisonment).

10. See Judi Hasson, *GOP Plans to "Fix" Crime Bill*, USA TODAY, Dec. 5, 1994, at A2 (discussing Contract with America and its death penalty provisions, including plans that would limit appeals for death row inmates and allow juries to recommend death penalty if there are aggravating circumstances); Christopher Johns, *What Does "Tough on Crime" Really Mean?*, ARIZ. REPUBLIC, Dec. 4, 1994, at E3 (discussing capital punishment provision in Contract with America).

11. See generally DAVID E. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990) (discussing racial bias in death penalty implementation); GREGORY D. RUSSELL, *THE DEATH PENALTY AND RACIAL BIAS: OVERTURNING SUPREME COURT ASSUMPTIONS* (1994) (demonstrating that capital punishment is not uniformly applied due to racial factors); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparity in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984) (finding racial discrimination in imposition of death penalty under post-Furman statutes in eight states examined); Symposium, *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of Its Prevention, Detection, and Correction*, 15 WASH. & LEE L. REV. 359 (1994) (discussing racial factors in capital punishment cases); Marvin E. Wolfgang & Marc Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 119 (1973) (finding race as motivating factor in death penalty cases).

- What is the role of the media with respect not only to the death penalty, but also to crime and victims more generally?

In short, this is a conference about what it means to have a death penalty and what its consequences are, both short term and long term.

For example, will the existence now of capital punishment in New York dry up the prolific pool of pro bono attorneys who, instead of volunteering their time in death penalty cases across the country, will now spend their time representing New York capital defendants and New York death row inmates? If so, what will the consequences of that be for the already meager pool of volunteer attorneys in other parts of the country?

In addition, like so many other things in life, the death penalty has economic ramifications.¹² Important recent studies have found that it costs a jurisdiction approximately three times as much to have capital punishment than to use the punishment of life in prison without parole.¹³ New York now has a new death penalty law. However—due to judicial review of the thirty-one-page statute with numerous provisions and their application to particular cases—it is doubtful that there will be an execution in that state in this decade. Will the economics of judicial review cause a shift in the public attitude toward the death penalty? If funding goes into the death penalty and its review, it has got to come from somewhere else. Does the public know about this? Where will it come from?

The discussion of these and other questions will take place today among some of the most knowledgeable individuals in the country—journalists, academics, authors, members of victims' rights organizations, and lawyers on both sides of the aisle.

The topic of today's conference is "The Death Penalty in the Twenty-First Century—Where Is It Going?" Will politicians and members of the public be persuaded to change their positions over

12. See PHILLIP J. COOK & DONNA B. SLAWSON, *THE COST OF PROCESSING MURDER CASES IN NORTH CAROLINA I*, 98 (1993) (finding that death penalty is more costly punishment than life imprisonment); David J. Gottlieb, *The Death Penalty in the Legislature: Some Thoughts About Money, Myth, and Morality*, 37 KAN. L. REV. 443, 447-48 & n.19 (1989) (confirming that it is cheaper to confine inmates for life rather than to execute them); Robert L. Spangenberg & Elizabeth R. Walsh, *Capital Punishment or Life Imprisonment? Some Cost Considerations*, 23 LOY. L.A. L. REV. 45, 47-58 (1989) (summarizing findings of various studies measuring cost of capital punishment); Margot Carey, Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221, 1245-62 (1985) (explaining high costs of capital punishment in comparison to life imprisonment); see also Pamela Manson, *Matters of Life or Death: Capital Punishment Costly Despite Public Perception It's Cheaper to Keep Killers in Prison*, ARIZ. REPUBLIC, Aug. 23, 1993, at A1 (summarizing recent death penalty cost studies).

13. See COOK & SLAWSON, *supra* note 12, at 1, 98 (citing studies analyzing cost differences between death penalty and life imprisonment).

time, just as two early staunch supporters of the death penalty ultimately did? I have in mind Justice Harry Blackmun, while he was still on the Supreme Court—in *Callins v. Collins*,¹⁴ and again in *McFarland v. Scott*¹⁵—and Justice Lewis Powell, after he left the Court.¹⁶

My own position is that, if we are going to have a death penalty, it must be one that is fairly administered. Ours emphatically is not.¹⁷ I firmly believe that, in the twenty-first century, the death penalty will be abolished. Wholly apart from the debate over deterrence, I believe that the American people will come to realize that the death penalty constitutes cruel and unusual punishment, that it costs too much, that it is incapable of being fairly administered, and that its goals can be accomplished by other means.

But I am not here today to persuade; rather, I am here only to inaugurate this day-long conference on a topic of immense importance throughout the United States.

III. BLACKMUN'S DISSENT: HAS IT BECOME THE MAJORITY OPINION?

PROF. CHIKOFFSKY: Good morning. Justice Blackmun's dissent from the Court's denial of review in *Callins* is an appropriate starting point because it revisited a great many issues that have been talked about over the last twenty years but have not been carefully focused on. It invites us, in effect, to revisit first principles of what exactly we are doing in setting up a jurisprudence of capital punishment.

Justice Blackmun, in 1972, as a relatively new member of the Court, dissented from the Court's decision in *Furman v. Georgia*,¹⁸ which was

14. 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting) (arguing that Supreme Court's "experiment" with capital punishment "has failed").

15. 114 S. Ct. 2785, 2790 (1994) (Blackmun, J., dissenting from denial of certiorari) (arguing that Court should grant certiorari because death penalty is unconstitutional and that Court should vacate death sentence).

16. See David Von Drehle, *Retired Justice Changes Stand on Death Penalty, Powell is Said to Favor Ending Executions*, WASH. POST, June 10, 1994, at A1 (discussing Justice Powell's change of mind to disapprove of capital punishment); Ernie Freda, *Change of Heart*, ATLANTA CONST., June 14, 1994, at A6 (discussing Justice Powell's new opinion on death penalty); see also Patrick V. Murphy, *Death Penalty Useless*, USA TODAY, Feb. 23, 1995, at A11 (indicating that Justices Powell and Blackmun have changed their views about capital punishment).

17. See IRA P. ROBBINS, *TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES* (1990) (making recommendations concerning habeas corpus review of death sentences).

18. 408 U.S. 238, 405 (1972) (per curiam) (Blackmun, J., dissenting).

the first case in which the Court overturned virtually the entire nationwide system of capital punishment administration that had been run by the states. The Court's basis was that states were operating in too haphazard a fashion in deciding which defendants who committed homicides lived versus those who died. The Court concluded that the existing system had insufficient procedural checks on sentences exercising discretion in making the ultimate life or death choice.¹⁹

A more structured system that provided greater procedural safeguards was necessary. Unfortunately, the main problem was that *Furman* gave very little guidance to the states in how they were to operate this new system. *Furman* basically swept all the chessmen off the table and invited the states to start fresh and draft statutes that would provide greater guidance in how sentencing discretion was to be exercised.

At that time, the Supreme Court had written very little that provided any normative content to the Eighth Amendment.²⁰ Occasional decisions, such as *Witherspoon v. Illinois*,²¹ provided some guidance and there was vagrant dicta in *McGautha v. California*²² that discussed how discretion might properly be exercised.²³

Accordingly, when the states went back basically to rewrite their statutes, they had very little to go on. Ironically, they ended up falling back on procedures that had been devised by no less an authority than Professor Herbert Wechsler, when he was one of the principle

19. *Furman v. Georgia*, 408 U.S. 238, 239 (1972) (per curiam); see BARRY NAKELL & KENNETH A. HARDY, *THE ARBITRARINESS OF THE DEATH PENALTY* 8-10 (1987) (discussing capital juries' unfettered discretion); RAYMOND PATERNOSTER, *CAPITAL PUNISHMENT IN AMERICA* 15-19, 45-54, 115 (1991) (discussing pre-*Furman* juries' virtual unstructured freedom to return death sentence); Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1152 (1991) (describing *Furman* as "the legal equivalent of the Big Bang for capital punishment").

20. See PATERNOSTER, *supra* note 19, at 40, 51-53 (stating that Supreme Court's pre-*Furman* decisions adopted fixed historical meaning of cruel and unusual punishment and not until *Furman* did Court adopt clearer interpretation).

21. *Witherspoon v. Illinois*, 391 U.S. 510 (1968). In *Witherspoon*, the Court struck down the state practice of excluding jurors who voiced general objections to the death penalty when, at the time, juries were given no standards to apply to their capital decisions and no procedures were in place to structure their discretion. *Id.* at 518-19 & n.15. The Court indicated that:

one of the most important functions any jury can perform in making such a selection [between life imprisonment and the death penalty] is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect the evolving standards of decency that mark the progress of a maturing society.

Id. at 519 n.15 (internal quotation marks and citations omitted).

22. 402 U.S. 183 (1971).

23. *McGautha v. California*, 402 U.S. 183, 203-09, 220-21 (1971) (upholding death penalty statutes that allowed for single-verdict proceedings and standardless juries, discussing proposed Model Penal Code standards, and assessing nation's rejection of mandatory death sentences based on evolving social values).

reporters and draftsmen of the American Law Institute Model Penal Code back in the 1950s.²⁴ The Wechsler formulation sought to provide greater guidance on how the capital trial and sentencing should be conducted. The so-called A-line Model Penal Code test basically set forth two requirements.²⁵

First, the sentencing proceeding should be clearly separate and apart from the guilt-innocence phase of the trial.²⁶ The drafters believed that separation was necessary for two reasons. Prior to *Furman*, many states had a unitary system in which the jury or the sentencer would render both verdict and sentence in the same proceeding. There was no separate sentencing proceeding whereby a defendant could put forth mitigating evidence, or testify, if he so chose. Also, from the state's point of view, it was forbidden from introducing whatever aggravating evidence it felt necessary that might be admissible at sentencing but nonetheless would be clearly inadmissible at the guilt-innocence phase as being unduly prejudicial.²⁷ Clearly, a bifurcated proceeding was deemed necessary by both the defense and prosecution.²⁸

Second, Professor Wechsler believed that some guidance to the sentencer should be given with regard to how to decide which defendants should be sentenced to death, of the entire universe of defendants eligible to receive the death penalty.²⁹ He suggested that that might be done by setting forth illustrative lists of aggravating circumstances, on the one hand, and mitigating circumstances on the

24. See MODEL PENAL CODE § 201.6, at 59-63 (Tentative Draft No. 9 1959) (Herbert Wechsler, Chief Reporter) (currently § 210.6 of the Official Draft) (describing American Law Institute's model for determining death sentences that neither endorses nor abolishes death penalty, but encourages more detailed listing of types of murder that could be punishable by death); cf. Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 313 ("Despite its apparent formal complexity, the Model Penal Code's proposed capital sentencing law only minimally constrains the jury's discretion.")

25. See MODEL PENAL CODE § 210.6, at 107-10 (Official Draft with Revised Comments 1980) (adopted May 24, 1962) [hereinafter MODEL PENAL CODE] (setting out two main requirements needed to properly determine death sentences). See Weisberg, *supra* note 24, at 349-50 (utilizing pyramid metaphor in explicating Georgia penalty scheme).

26. See MODEL PENAL CODE, *supra* note 25, § 210.6, commentary at 144-48, 153-71 (setting forth rationale for separate proceedings to determine sentence and discussing subsequent constitutional development).

27. See NAKELL & HARDY, *supra* note 19, at 9-10 (stating that advantage of two-stage trial procedure is that jury may consider evidence relevant to sentence at penalty phase of trial without prejudicing determination of guilt or innocence).

28. See NAKELL & HARDY, *supra* note 19, at 9 (discussing single deliberation process of guilt and penalty phases without allowing additional evidence); PATERNOSTER, *supra* note 19, at 15-19, 45-54 (discussing pre-*Furman* capital jury systems).

29. See MODEL PENAL CODE, *supra* note 25, § 210.6, at 109-10, commentary at 136-42 (rejecting unguided discretion approach to capital jury deliberation process and adopting more informative delineation of critical but non-exclusive aggravating and mitigating factors to be weighed).

other hand, allowing the sentencer to decide, based upon these illustrative factors, whether the defendant was entitled to mercy or whether the death sentence should be imposed.³⁰

The pyramid system provided that at sentencing, the prosecution had to prove to the sentencer's satisfaction at least one aggravating factor, and provided illustrative lists: e.g., (1) the prior record of the defendant, (2) the nature of the crime involved, (3) multiple victims, (4) danger to a great many people, (5) murder for pecuniary gain as opposed to a crime of passion, and more. As long as the sentencer found at least one aggravating factor, then a death sentence could be imposed after the sentencer had considered all other aggravating and mitigating factors.³¹

Basically, the various state systems developed along that line, and they were finally reviewed in 1976 in a quintet of cases under the rubric of *Gregg v. Georgia*.³² In *Gregg*, the Court reviewed two different lines of cases. One line involved certain states that provided mandatory death sentences so as to eliminate all discretion; if convicted for a particular capital offense, then you must be punished by death.³³ Then there were the Georgia³⁴ and Florida³⁵ statutes whereby sentences were given broad discretion.

30. See MODEL PENAL CODE, *supra* note 25, § 210.6, at 109-10 (listing non-exclusive test of aggravating factors such as whether murder was committed by defendant while imprisoned; whether defendant has prior murder or violent felony conviction; whether defendant murdered more than one person; whether defendant knowingly placed large number of people at risk of death; whether homicide occurred during commission of felony, during attempted escape, or for monetary gain; and heinousness of crime; and listing non-exclusive test of mitigating factors such as whether defendant lacks prior criminal history; whether defendant committed murder while under extreme mental or emotional disturbance; whether victim participated in homicide; whether defendant believed moral justification for action; whether defendant played minor role as accomplice; whether defendant acted under control of another; whether defendant operated under mental disease or defect; and age of defendant). Sundby, *supra* note 19, at 1154-55 & nn.26-27.

31. See Weisberg, *supra* note 24, at 313 & n.29 (stating that Model Penal Code requires jury to find at least one statutory aggravating factor, after which it can consider any additional aggravating or mitigating factors, statutory or non-statutory).

32. 428 U.S. 153 (1976). The other cases were *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); and *Proffitt v. Florida*, 428 U.S. 242 (1976).

33. See *Roberts*, 428 U.S. at 331-36 (holding unconstitutional Louisiana's statute that mandated death sentence for those convicted of first-degree murder, aggravated rape, aggravated kidnapping, or treason); *Woodson*, 428 U.S. at 300-05 (holding unconstitutional North Carolina's mandatory death sentence for person convicted of first-degree murder).

34. See *Gregg*, 428 U.S. at 196-98, 204-07 (upholding constitutionality of Georgia's capital sentencing statute requiring jury consideration of enumerated aggravating and mitigating circumstances).

35. See *Proffitt*, 428 U.S. at 251-60 (upholding constitutionality of Florida's capital sentencing scheme requiring sentencing judge to consider statutorily specified aggravating and mitigating circumstances before imposing sentence).

The Supreme Court sustained those statutes that allowed for discretion and struck down those statutes that deprived the sentencer of any discretion, believing that there had to be some kind of flexibility allowing the sentencer to take into account aggravating and mitigating circumstances.³⁶

That broad outline is the death penalty jurisprudence that has developed since *Furman* in 1972. Significantly, however, over the course of the last twenty years, the Supreme Court has been attempting to fine tune the various states' systems. The Court has been attempting to decide which particular procedural safeguards are required under the Eighth Amendment and which ones are strictly at the discretion of the states. What I found significant, and wanted to discuss today, is how that Eighth Amendment jurisprudence has, in effect, been evolving.

We've assembled a panel across a wide spectrum of experience and philosophical points of view with regard to these kinds of cases. There are three issues that I'd like for us to talk about and then to throw open the floor to questions.

The *Callins* dissent, in a sense, invited us to go back and take a look at how the Supreme Court has evolved an Eighth Amendment jurisprudence that they really never had before. While the Court had decided procedural due process questions in the general run of criminal cases, under the Fifth³⁷ and Sixth Amendments,³⁸ particularly during the Warren Court era,³⁹ the Court had never specifically

36. See *Jurek*, 428 U.S. at 276 (holding that Texas' statutory requirement that at least one aggravating circumstance existed before death sentence could be imposed for first-degree murder gave jury enough guidance to make its decision); *Proffitt*, 428 U.S. at 259-60 (holding that Florida's death penalty sentencing scheme would prevent "wanton" or "freakish" death sentences); *Gregg*, 428 U.S. at 206-07 (indicating Georgia's capital sentencing statute focused jury decisionmaking process to consider individual crime and individual defendant). But see *Roberts*, 428 U.S. at 331-36 (striking down Louisiana's law that mandated death sentence after conviction for certain crimes); *Woodson*, 428 U.S. at 302-03 (striking down North Carolina's mandatory death sentence for first-degree murder). See generally Weisberg, *supra* note 24, at 318-22 (summarizing impact of *Gregg* trilogy, *Roberts*, and *Woodson*).

37. U.S. CONST. amend. V.

38. U.S. CONST. amend. VI.

39. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 444-45, 498-99 (1966) (finding Sixth Amendment right to counsel in police interrogations but permitting uncounseled waiver of such right); *Pointer v. Texas*, 380 U.S. 400, 406-08 (1965) (finding Sixth Amendment confrontation clause includes right to cross examination and is applicable to states under Fourteenth Amendment); *Malloy v. Hogan*, 378 U.S. 1, 11-14 (1964) (holding that privilege against self-incrimination applies to statutory inquiry as well as criminal prosecutions under Fifth and Fourteenth Amendments); *Gideon v. Wainwright*, 372 U.S. 335, 336-45 (1963) (ruling that indigent defendants in criminal trials have right to assistance of counsel as requirement under Sixth and Fourteenth Amendments). See generally Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253 (1982) (examining selective incorporation doctrine from perspective gained through 20 years of its application and suggesting that key to Court's adherence to doctrine has been flexibility in constitutional interpretation).

focused on capital punishment and the Eighth Amendment until the very late 1960s and early 1970s. Therefore, the Eighth Amendment body of law that the Supreme Court has established is of relatively new vintage.

What I propose this panel do is place ourselves in the role of legislative counsel to Governor Pataki in New York, and draft a capital punishment statute, and base that statute only upon what the Supreme Court has said is constitutionally necessary under the Eighth Amendment, but not provide any further frills; simply base it on what the Supreme Court would say qualifies, in the breakfast–food analogy, as the “minimum daily requirements” of the Eighth Amendment.

In an extraordinary number of instances, the Supreme Court has held that a great many procedural safeguards that ordinarily we would think would be necessary are not compelled under the Eighth Amendment.⁴⁰

To give a few illustrative examples. The Supreme Court has stated that states need not provide any specific method for balancing aggravating and mitigating factors nor give any specific weight to any of those factors.⁴¹ In effect, sentencers are basically told they may consider aggravators, they may consider mitigators, but they are given no further instruction as to how to go about weighing them. If they choose to find that aggravators outweigh mitigators, by whatever reasoning process, they may impose a sentence of death.⁴²

The Court has even affirmed some statutes where the sentencer has been instructed that it *shall* impose a sentence of death, making it almost a quasi-mandatory statute.⁴³

40. See *Callins v. Collins*, 114 S. Ct. 1127, 1128-38 (1994) (Blackmun, J., dissenting) (tracing Court's retreat from requiring procedural safeguards that many consider as essential to effectuate Eighth Amendment).

41. See *Zant v. Stephens*, 462 U.S. 862, 876 n.13 (1983) (acknowledging that specific guidance in balancing aggravating and mitigating factors when imposing death penalty is not constitutionally required); see also Stephen Hornbuckle, Note, *Capital Sentencing Procedure: A Lethal Oddity in the Supreme Court's Case Law*, 73 TEX. L. REV. 441, 447-54, 457-59 (1994) (discussing Court's two approaches to “weighing” and “nonweighing” states).

42. See Hornbuckle, *supra* note 41, at 457-59 (citing sources documenting Court's willingness to allow unguided weighing of death penalty factors in some instances).

43. See *Boyde v. California*, 494 U.S. 370, 386 (1990) (holding that mandatory language listing factors jury must consider did not violate Eighth Amendment); *Blystone v. Pennsylvania*, 494 U.S. 299, 303, 306-07 (1990) (upholding constitutionality of statute requiring imposition of death penalty if jury found at least one aggravating factor and no mitigating factors or if jury unanimously found at least one aggravating factor that outweighed mitigating factors because statute was not overly mandatory). See generally Stephen P. Garvey, Note, *Politicizing Who Dies*, 101 YALE L.J. 187 (1991) (discussing “quasi-mandatory” statutes).

The Supreme Court has also held that there is no necessity even to have jury sentencing,⁴⁴ that trial judges may be sentencers without offending the Eighth Amendment, so that we no longer need to have jury sentencing.⁴⁵ We no longer need to have, under the Eighth Amendment, appellate proportionality review, which means that it is not necessary, under the Eighth Amendment, for state appellate courts to consider whether or not the particular death sentence in one case is proportional in terms of the Eighth Amendment, or by comparison with other cases in other jurisdictions.⁴⁶

So the question becomes, realistically, how broad are the limitations that have been placed on how a capital trial may be run, and are we, in fact, providing adequate procedural due process protection for defendants under the Eighth Amendment?

Paul, let me ask you to start off.

MR. KAMENAR: Thank you very much.

While this issue is obviously a good one in terms of seeing where we are going at this point, the topic of this particular panel is the effect of Justice Blackmun's dissent in *Callins v. Collins*. It's very unusual one would talk about the effect of a dissenting opinion, much less a dissenting opinion in a denial of certiorari of a case.

But I would like to begin by referring to Justice Scalia's concurring opinion⁴⁷ in *Callins*, where he takes issue with Justice Blackmun by saying, as follows:

Though Justice Blackmun joins those of us who have acknowledged the incompatibility of the Court's *Furman* and *Lockett-Edding's* lines of jurisprudence, he unfortunately draws the wrong conclusion from the acknowledgement. . . . Surely a different conclusion commends itself—to wit, that at least one of these judicially announced irreconcilable commands which cause the Constitution to prohibit what its text explicitly permits must be wrong.

Convictions in opposition to the death penalty are often passionate and deeply held. That would be no excuse for reading them into a Constitution that does not contain them, even if they represented the convictions of a majority of Americans. Much less

44. See *Spaziano v. Florida*, 468 U.S. 447, 465 (1984) (holding that Sixth and Eighth Amendments do not guarantee right to jury determination of imposition of death penalty). See generally Vivian Berger, "Black Box Decisions" on Life or Death—If They're Arbitrary, Don't Blame the Jury: A Reply to Judge Patrick Higginbotham, 41 CASE W. RES. L. REV. 1067 (1991) (noting arbitrariness of judicial sentencing in capital cases as compared to general perception of arbitrary jury sentences in similar cases).

45. See *Spaziano*, 468 U.S. at 457-65 (stating that there is no constitutional imperative that jury have responsibility to decide imposing death penalty).

46. See *Fulley v. Harris*, 465 U.S. 37, 44-45 (1984) (holding that Eighth Amendment does not always require state appellate court to engage in proportionality review).

47. *Callins v. Collins*, 114 S. Ct. 1127, 1128 (Scalia, J., concurring).

is there any excuse for using that course to thrust a minority's view upon the people.⁴⁸

Just to interject here, seventy-six percent of the American people support the death penalty.⁴⁹ Scalia continues:

Justice Blackmun begins his statement by describing with poignancy the death of a convicted murderer by lethal injection. He chooses, as the case in which to make that statement, one of the less brutal of the murders that regularly come before us—the murder of a man ripped by a bullet suddenly and unexpectedly, with no opportunity to prepare himself and his affairs, and left to bleed to death on the floor of a tavern. The death-by-injection which Justice Blackmun describes looks pretty desirable next to that. It looks even better next to some of the other cases currently before us which Justice Blackmun did not select as the vehicle for his announcement that the death penalty is always unconstitutional—for example, the case of the 11-year-old girl raped by four men and then killed by stuffing her panties down her throat.⁵⁰

In terms of where we've been since *Furman*, the issue, as Professor Chikofsky properly put it, was that the Court required some kind of due process in channeling the discretion of the jury at the penalty phase.

And *Gregg v. Georgia* came back in '76 and the Court did find then that the procedures that Georgia imposed to cure the defects were satisfied. Namely, there was the bifurcation of the guilt and innocent phase from the penalty phase, and a weighing of the aggravating and mitigating circumstances. I would submit that, essentially, that's all you really need under the Constitution.

So, if I were advising Governor Pataki in terms of having a death penalty statute, I would essentially say, that's all you really need. What they've done in this thirty-page statute was to take into account concerns by others in society and by other Supreme Court decisions that seem to suggest that other requirements are necessary. They limit New York to only seven capital crimes.⁵¹ A defendant under eighteen cannot be executed.⁵² Lethal injection is the method to be used.⁵³ And they have all the panoply of procedural devices that I

48. *Id.* (Scalia, J., concurring) (citations omitted).

49. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1992, at 205 tbl. 2.54 (1993).

50. *Callins*, 114 S. Ct. at 1128 (Scalia, J., concurring) (referring to *North Carolina v. McCollum*, 433 S.E.2d 144 (N.C. 1993), *cert. denied*, 114 S. Ct. 2784 (1994)).

51. Act of Mar. 7, 1995, ch. 1, § 7, 1995 N.Y. Laws 1, 2 (enumerating capital crimes).

52. *Id.* § 7b, 1995 N.Y. Laws at 3 (restricting imposition of death penalty to defendants who were more than 18-years old at time of commission of crime).

53. N.Y. CORRECT. LAW § 658 (McKinney 1987 & Supp. 1996).

dare say may afford defense counsel a number of opportunities to delay the imposition of the death penalty in New York, as it's being done in other states.

After the *Furman* decision came down, a number of lower courts, yet never the Supreme Court, struck down federal death penalty laws because they did not have the legislatively-mandated, aggravating and mitigating circumstances,⁵⁴ as you had in *Gregg v. Georgia*.⁵⁵

The interesting decision I would like to make reference to was a case by the Fifth Circuit in 1977, *United States v. Kaiser*.⁵⁶ There was a federal murder statute, somebody was killed on federal property.⁵⁷ The U.S. Attorney wanted to impose the death penalty but the Court of Appeals said, no, we can't do that after the *Furman* decision.⁵⁸ The *Furman* decision said you had to have the bifurcation procedure and consideration of aggravating and mitigating circumstances to reduce the wholly arbitrary imposition of the death penalty, or at least the possibility of that. The majority in *Kaiser* struck down the application of the death penalty there, citing the *Furman* decision, applying it and, I think, revealing the court's personal distaste for applying the death penalty, rather than any constitutional analysis, when it said, "The true course of wisdom may lie in abandoning the hangman's trade. . . . In this instance, at least, the Constitution prohibits society from adding another barbarous, degrading act to the horrible deed of which the defendant before us stands convicted."⁵⁹

But now what was the context? In *Furman*, you had the problem of minorities being arbitrarily subject to the death penalty without any discretion being applied. But interestingly enough, the Fifth Circuit's reliance on *Furman* rings hollow because, in the *Kaiser* case, you had a white defendant who bragged to his friends that he had "shot a nigger."⁶⁰

54. See, e.g., *United States v. Watson*, 496 F.2d 1125, 1127-29 (4th Cir. 1973) (accepting Government's argument that death penalty provision in 18 U.S.C. § 1111 was probably rendered invalid after *Furman*); *United States v. Woods*, 484 F.2d 127, 138 (4th Cir. 1973) (holding that only punishment available under 18 U.S.C. § 1111 after *Furman* was life imprisonment), cert. denied, 415 U.S. 979 (1974); *United States v. Freeman*, 380 F. Supp. 1004, 1005 (D.N.D. 1974) (holding that death penalty under 18 U.S.C. § 1111 was unconstitutional after *Furman*).

55. See *Gregg v. Georgia*, 428 U.S. 153, 188-95 (1976) (stating that concerns expressed in *Furman* can be met by crafting statute that provides sentencing authority with sufficient information and guidance).

56. 545 F.2d 467 (5th Cir. 1977).

57. *United States v. Kaiser*, 545 F.2d 467, 469 (5th Cir. 1977) (considering defendant's appeal from first-degree murder conviction under 18 U.S.C. § 1111 for killing victim on Fort Benning military installation).

58. See *id.* at 472-75 (holding that 18 U.S.C. § 1111 lacks sentencing standards, thus rendering statute unconstitutional after *Furman*).

59. *Id.* at 478.

60. *Id.* The defendant was assisted by his friend who also bragged about the incident. *Id.*

Accordingly, as I argued in my law review article, there was no risk in the *Kaiser* case that the defendant would be sentenced to death because he, the white defendant, was not a minority.⁶¹ If anything, the very fact that the murder may have been racially motivated could be properly considered as an aggravating circumstance of the murder itself, and thereby further justify the imposition of the death sentence.

So what I suggest is that over the years, we have had the jurisprudence evolve around the whole notion of the death penalty and, in my view, I think a death penalty provision that simply mirrors what we have in federal cases in federal courts right now is sufficient.

Namely, you have a guilt and innocent phase, and then you have the punishment phase, whether you're committing a murder, robbing a bank, or any other federal crime; most states also have a separate sentencing hearing where you focus on the aggravating and mitigating circumstances.

The prosecutor brings out the aggravating circumstances, the defendant can bring out anything he wants. He can say that the reason he killed somebody was because he had a poor childhood or his dad didn't take him to a baseball game when he was three-years old, or whatever. Fine. Let it all in and let the sentencing authority determine what it should be. Should it be the jury, should it be the judge? The Constitution does not require that the jury do that. In the federal system, you have a judge imposing the sentence, you don't have juries imposing the sentence.

If society or a state wants to have that, fine. If society wants to have it as they do in Alabama⁶² and Florida⁶³ and a couple other states, to have the judge override the jury's recommendation for a particular reason, that's constitutionally permissible as well.⁶⁴

61. See Paul D. Kamemar, *Death Penalty Legislation for Espionage and Other Federal Crimes Is Unnecessary: It Just Needs a Little Re-Enforcement*, 24 WAKE FOREST L. REV. 881, 886 n.19 (1989) (arguing that Justices' concern in *Furman* that minorities would arbitrarily face death penalty is not valid concern in context of *Kaiser* case because defendant was white male).

62. See *Harris v. Alabama*, 115 S. Ct. 1031, 1034-37 (1995) (upholding constitutionality of Alabama's capital punishment system that allows judge to overrule jury's sentencing decision without specifying weight judge must give to jury's recommendation).

63. See *Spaziano v. Florida*, 468 U.S. 447, 457-65 (1984) (upholding constitutionality under Sixth and Eighth Amendments of Florida's capital punishment statute that renders as advisory jury's sentencing recommendation in capital cases, leaving trial court judges to conduct their own weighing of aggravating and mitigating factors).

64. See Kathryn K. Russell, *The Constitutionality of Jury Override in Alabama Death Penalty Cases*, 46 ALA. L. REV. 5, 9-10 (1994) (stating that in addition to Alabama and Florida, Delaware and Indiana have jury override death penalty systems); cf. Justice Stevens' *Harris* dissent, in which he notes that elective judges are far more likely to override jury's mercy recommendation and impose death, thereby questioning whether judge or jury accurately reflects "conscience of the community." *Harris*, 115 S. Ct. at 1039 (Stevens, J., dissenting) (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968)).

I think that as these state laws are now being developed and indeed at the federal level, you have federal capital crimes again with a panoply of procedural protections and devices which, as a policy matter, may be fine, but I think as a constitutional matter, are not required.

PROF. CHIKOFFSKY: There's a question I want to follow up on, particularly what you said just at the end, with William Otis.

It seems to me that you're arguing in effect largely that the process presently due in non-capital cases seems to be largely good enough for capital cases. Are you satisfied that that, in fact, is the case in terms of the way sentences are evaluating the life and death decision?

MR. OTIS: As a constitutional matter, I'm satisfied with that.

Let me say at the outset, as I have to put in a disclaimer in all such conferences, I am speaking here simply for myself and not as a representative of the U.S. Attorney, the Department of Justice, or the Clinton administration.

The Eighth Amendment proscribes cruel and unusual punishment. Evidently, the Supreme Court has been unable to figure out, and I have been unable to figure out, what the Eighth Amendment has to say about specific, particular procedures that must be invoked in order to impose the death penalty.

Unless we are to adopt a system in which judges are free to announce as constitutionally required their own view of what procedures are desirable, I think they are restricted to what the Constitution says. At the time of the Constitution, sentences of death and other sentences could be imposed by both the judge and the jury, so it seems unlikely that the Constitution forbids either judge or jury sentencing in death cases. In addition, neither the Eighth Amendment nor any other part of the Constitution says anything about proportionality review. What right, then, does the Supreme Court have to impose its preference for such review—or, more realistically, its view of whether the sentence is actually "proportional" for any given set of offenses—on an electoral majority that believes differently and that has acted differently through its state legislatures.

PROF. CHIKOFFSKY: Well, do you draw any distinction in the rubric that the Supreme Court has used for many years of death being different? Justice Harlan said many years ago that he didn't agree that whatever process may be due in a non-capital case, or in a

case in which property, not life, was involved, would necessarily comport with the process that's due in a capital case.⁶⁵

MR. OTIS: Death is different. No doubt about that. And it is therefore, in my judgment, desirable that the standards applied to capital sentencing exceed those applied in non-capital cases, at least to the extent of trying to insure to a moral certainty that we have the person who did it.

One of the significant problems with the death penalty today is not that there is too little process, but that there is too much. It is an average of nine and a half years between the time that the defendant is convicted and the time that the execution is carried out, if it's carried out at all.⁶⁶ We then hear that the death penalty does not have a sufficient deterrent effect to justify its imposition.

Well, if I park my car illegally, and I know it is going to be towed, but it is not going to be towed for nine and a half years, that's probably not much of a deterrent against my parking it where it should not be.

In human life, people act based, I think, mostly on what the immediate consequences to them are going to be. Nine and a half years is nothing like immediate.

In addition, where did we get the idea that deterrence is the only thing that counts as a justification for capital sentencing? What about just punishment?

In Professor Robbins' opening address, he talked about some events just over the last couple of days, such as the Illinois double execution and so forth. More disturbing than this "epidemic" of executions, if that's what it is, is the real epidemic, namely, epidemic murder and violence. We hear precious little about those things at seminars like today's, but lots about lawyers. It's puzzling.

One thing I would like to add to Professor Robbins' list is the Colin Ferguson sentencing.⁶⁷ Now of course, New York did not have a death penalty at the time Colin Ferguson decided that he wanted to walk down the aisle of a commuter train, having loaded himself up

65. See *Reid v. Covert*, 354 U.S. 1, 77 (1957) (Harlan, J., concurring) (stating that capital cases "stand on quite a different footing than other offenses").

66. David O. Stewart, *Dealing with Death: The Court Cannot Escape the Issue of Capital Punishment*, A.B.A. J., Nov. 1994, at 50, 50 (noting average time spent in prison for 31 prisoners executed in 1992 was nine and a half years).

67. See John T. McQuisten, *Jury Finds Ferguson Guilty of Slayings on L.I.R.R.*, N.Y. TIMES, Feb. 18, 1995, at A1, A26 (describing how prosecution would seek maximum sentence available, 200 years to life in prison). Ferguson was convicted of murdering six people on a Long Island commuter train. *Id.*

with a machine gun, and just blow the heads off the first six people he saw.

We all have seen what was left. We didn't hear from any of the people that he killed, obviously; they can't talk for themselves anymore. However ineffective, or poorly trained, or poorly paid, the lawyers for criminal defendants are, at least they can talk. The people the defendant killed cannot. Their survivors, their family members, who are grieving and who will never be the same, or the other people that got shot in the course of this murderous escapade, and are living paralyzed or with only part of their faces or part of their legs. They can still talk at least. The people who are dead cannot.

What process is due to the victims? What process is due to the public? Our present system is long on process, at least for the defendant, but short on results, if by "results" we mean adequate protection for ordinary people. Why shouldn't the public have the final say rather than a privileged class of lifetime appointed and unelected judges? Why shouldn't the public be able to determine the kind of justice system it wants to provide for its safety when coming home from work on a train?

PROF. CHIKOFFSKY: I know that Mark Twain said that there are three kinds of numbers in the world. There are lies, damn lies, and there are statistics.⁶⁸ But let me throw out a few numbers to put the problem in context.

We have presently on death row in this country almost 3000 inmates.⁶⁹ In the entire nation, where we have about 1,100,000 people incarcerated in federal and state correctional facilities,⁷⁰ about 75,000 inmates, as of about a year ago, were incarcerated for homicide offenses.⁷¹ One of the major problems with the death penalty is whether we can set up a principled system whereby we can, in any kind of really principled discriminating way, meaningfully separate out the small minority of cases in which capital punishment should be imposed from the many homicides that occur annually in this country; the number approaches 20,000 per year for which

68. See 1 S. CLEMENS, MARK TWAIN'S AUTOBIOGRAPHY 246 (1924).

69. See Cornelius F. Murphy, *The Supreme Court and Capital Punishment: A New Hands-off Approach*, USA TODAY, Mar. 1993 (magazine), at 51, 53-54 (reporting number of U.S. inmates currently on death row).

70. See *Number of Inmates in American State and Federal Prisons Is on the Rise*, JET, Aug. 28, 1995, at 59, 59 (discussing number of inmates in state and federal prisons).

71. See Anne Morrison Piehl & John J. Dilulio, Jr., *Does Prison Pay? Revisited*, BROOKINGS REV., Jan. 1995, at 20, 21 (reporting number of inmates in U.S. prisons for homicide).

perhaps 200 death sentences are imposed on an annual basis,⁷² which is to say about one percent.

The question is, whether the system the Supreme Court has ratified over the last twenty years has been able to meaningfully separate the sheep from the goats.

For that, I'd like to turn to Douglas Robinson who has seen a lot of these problems on the grassroots level.

MR. ROBINSON: The statement that the chances of getting the death penalty are approximately equal to being struck by lightning⁷³ is not true anymore. Ironically, as the death penalty is being sought more and more often, particularly in the death belt states, the chances of receiving the death penalty or at least being prosecuted for a capital offense where the prosecution seeks the death penalty are relatively high, particularly in some jurisdictions, and particularly if you are a person of color, or if you are indigent.

So I think probably the statistics are headed away from the direction that you indicated, Ed, but there is still a great deal of arbitrariness in how the sentences are imposed.

I would like to take a minute, if I can, to put a few things in perspective and then respond to something that Paul and Bill said.

You started your discussion of the history of this judicial enterprise with *Furman*. There was actually a case, as you know, a year or so prior to *Furman*, called *McGautha v. California*,⁷⁴ in which Justice Harlan—this was a case much like *Furman* where the sentencing process that was at issue in the case was a completely unfettered discretion kind of procedure where the jury could decide to do anything they wanted to and there was a companion case where the judge could do anything he wanted to in the sentencing without any guidelines.⁷⁵

That was upheld in *McGautha*,⁷⁶ and Justice Harlan wrote the decision, and there is one sentence that I think was quite prophetic.

He said, "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."⁷⁷

72. See Hornbuckle, *supra* note 41, at 443 (discussing inconsistent death sentences among states).

73. *Furman v. Georgia*, 408 U.S. 238, 309 (Stewart, J., concurring).

74. 402 U.S. 183 (1970).

75. *McGautha v. California*, 402 U.S. 183, 185 (1970).

76. *Id.*

77. *Id.* at 204.

Now the Supreme Court in *Furman*, a few months or a year later, decided, and we need to keep this in mind, that there were five members of the Supreme Court in that case who decided that a completely unfettered discretionary statute that allowed juries or judges to impose the death penalty on almost any basis that they chose was unconstitutional under the Eighth Amendment.⁷⁸ Five Justices of the Supreme Court.

That means that the law of the land—because that case has never been overruled, although Justice Scalia is chomping at the bit to do so—the law of this land is that that kind of unfettered discretion violates the Constitution.

In 1976, when *Gregg v. Georgia* and the other cases came along, the Supreme Court said, well, it's now possible to execute people in this country because statutes have been passed which limit discretion and guide the juries and the judges on how they should impose the sentence. In that case, Justice Stewart, writing for the majority, said that, under the Georgia statute at issue, "while some jury discretion still exists, 'the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application.'"⁷⁹

Later he said, no longer should there be "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."⁸⁰

Now, those two statements are far less prophetic than the statement of Justice Harlan in *McGautha*. That is, Justice Stewart in 1976 now thought, well, these new statutes will work, and they will guide juries and we can now have greater assurance that the death penalty will be imposed in appropriate cases and not imposed in other cases.

Ed, as you have correctly pointed out, I think the history of the Supreme Court's jurisprudence since then has indicated that Justice Stewart was wrong and Justice Harlan was right.

Maybe the most dramatic example I can think of has already been put on the table here today—the concurring opinion of Justice Scalia in the *Callins* case,⁸¹ which I think is a very important opinion, almost as important, I think, as Blackmun's opinion in that case.

78. See *Furman v. Georgia*, 408 U.S. 238, 240 (1972) (indicating that under circumstances indicated in case, imposition of death penalty constitutes cruel and unusual punishment).

79. *Gregg v. Georgia*, 428 U.S. 153, 197-98 (1976) (quoting *Coley v. State*, 204 S.E.2d 612, 615 (Ga. 1974)). In *Coley v. State*, the Georgia Supreme Court first applied legislative guidelines to reduce jurors' discretion in imposing capital punishment. *Coley*, 204 S.E.2d at 616.

80. *Id.* at 188.

81. *Callins v. Collins*, 114 S. Ct. 1127, 1127 (1994) (Scalia, J., concurring).

In his concurrence, Justice Scalia, the voice of the right wing of the Supreme Court, now agrees with the left wing of the Supreme Court that the *Furman* experiment and the *Gregg v. Georgia* experiment have not worked.

Put differently, Justice Scalia concludes, as did the dissenters in *Gregg v. Georgia*, that the two principles—guided discretion and the freedom of juries to take into account mitigating circumstances—are irreconcilably in conflict and so the attempt should be abandoned.

In his opinion, as Paul pointed out, Justice Scalia referred to the case of *McCollum*⁸² in which he chastised Justice Blackmun for not choosing a difficult case like that, a case where the facts were particularly horrendous, not taking that case and choosing to use that case to make his statement against the death penalty.

Instead, Justice Blackmun chose *Callins* where the crime was, as these things go, less heinous than most.

At the time Scalia made this comment, *McCollum* was still pending certiorari in the U.S. Supreme Court.

Well, on June 30th of last year, the Supreme Court did decide whether or not to grant certiorari in the *McCollum* case.⁸³ Needless to say, it denied certiorari. But Justice Blackmun, nevertheless, stepped up to the plate and said, this case is exactly what I was talking about.⁸⁴ Buddy McCollum was sentenced to be executed for his part in a brutal crime.⁸⁵ He participated with three other young men in the rape and murder of an eleven-year-old girl.⁸⁶ Each one of them raped the child. McCollum helped hold her down while another young man stuffed her panties down her throat with a stick.⁸⁷ And Justice Blackmun said, as reprehensible as that case was, it did not lead him to the conclusion that he was wrong in his dissent in *Callins*.⁸⁸ He said there is more to the story.

And there is indeed more to the story. Buddy McCollum was mentally retarded.⁸⁹ He had an I.Q. in the sixties.⁹⁰ And in this case, the evidence at trial showed that McCollum was far from being

82. *McCollum v. North Carolina*, 114 S. Ct. 2784 (1994); see *Callins*, 114 S. Ct. at 1128 (Scalia, J., concurring) (discussing Justice Blackmun's dissent).

83. *McCollum*, 114 S. Ct. at 2784.

84. See *id.* at 2784-85 (Blackmun, J., dissenting) (noting that imposition of death penalty for McCollum, despite brutality of crime, reinforces his belief that current administration of death penalty is unconstitutional).

85. *State v. McCollum*, 433 S.E.2d 144 (N.C. 1993), cert. denied, 114 S. Ct. 2784 (1994).

86. *Id.* at 149.

87. *Id.*

88. *McCollum v. North Carolina*, 114 S. Ct. 2784, 2784 (1994) (Blackmun, J., dissenting).

89. *Id.* (Blackmun, J., dissenting).

90. *Id.* (Blackmun, J., dissenting).

the most culpable of the four defendants.⁹¹ He was not the one who initiated the rape.⁹² He was not the one who proposed the murder.⁹³ He was not the one who actually committed the murder.⁹⁴ Nevertheless, he was the only one of the four who was convicted and sentenced to death.⁹⁵ He's the only one who received the death sentence.

Now that is a classic example of what this debate is about. Can we tolerate the kind of discrepancy, discrimination, and arbitrariness that permeates this whole area? It is clear, and there are other people here, I'm sure Steve Bright could give us numerous examples, of situations where an accomplice received the death penalty, a relatively minor player in a murder case has received the death penalty, and the actual perpetrator, the trigger man, appeared before a different jury and got a life sentence.

I think what's happened here in assessing the evolution of the past twenty years is that what we are now back to is addressing an issue that was decided in *Furman*. That is, everybody now has to concede, I believe, that the system is completely arbitrary.

I would tell Governor Pataki that what you have to have is a one-page statute that says the death penalty can be imposed for the following crimes, and list five or six crimes that would include killing a police officer, a killing in the course of the commission of another felony, that sort of thing, which would cover most murder cases, and then you would tell him that the statute has to provide (if you define the crimes) that the jury can consider any mitigating evidence with respect to the defendant's background and the circumstances of the crime.

Then, Governor Pataki would say, well do we have to put that last part in there? And I'd say, yes, you have to put that last part in there but here's the good news, boss. Under current Supreme Court precedent, you don't have to tell the jury about it. The jury can take into account mitigating circumstances, and the lawyers can put on mitigating circumstances.

But you don't have to tell the jury how to take into account those mitigating circumstances, how to give effect to them, what to do with them, how to deal with them. How to deal with, for example, evidence that the defendant is mentally retarded and that his

91. *Id.* at 2785 (Blackmun, J., dissenting).

92. *Id.* (Blackmun, J., dissenting).

93. *Id.* (Blackmun, J., dissenting).

94. *Id.* (Blackmun, J., dissenting).

95. *Id.* (Blackmun, J., dissenting).

propensity to violence may be a result of something that's beyond his control.⁹⁶

So let the jury think that "this is a fellow, because of that evidence, who is going to go out and commit another crime." We don't have to give them the chance, or we don't have to let them know that they can also take that into account on the mitigating side.

So I think that New York has sort of outdone itself by enacting this statute which bends over backwards with all of its various provisions.

But under current law, I don't think the statute has to be anywhere near that specific and to provide as much guidance as that statute does.

PROF. CHIKOFSKY: Let me move on to another topic that flows immediately out of this.

I think that the system that both Paul and Bill contemplate, is a facially neutral one, in which the adversary system functions as optimally as possible between two thoroughly prepared advocates fairly presenting both sides of the questions of guilt or innocence and punishment. That system contemplates that the ultimate trier of fact (and the ultimate sentencer) will be able to make whatever decision they make in balancing the relevant factors on the basis of the most thorough and up-to-date information regarding both the crime and also the defendant.

Now, Doug's personal experience in the *Macias*⁹⁷ case confirmed that, as every litigator who has ever been involved in capital cases understands, the quality of representation that occurs routinely at the trial level in capital cases is frequently inadequate, almost to the point of ineptitude.⁹⁸ One of the causes is that in the overwhelming majority, and we're speaking in terms of well over ninety percent of the representation that is provided, counsel is appointed by the state and paid for by the state. Under these kinds of systems, one of the problems that has been encountered, as Justice Blackmun noted in his dissent on his last day at the Court in June 1994, in a case called *McFarland v. Scott*⁹⁹ is the question of pervasive ineffective assistance of counsel in capital cases.¹⁰⁰

96. See *Penry v. Lynaugh*, 492 U.S. 302, 311 (1989) (allowing jury to hear evidence of retardation but not requiring instructions on how they may evaluate it as mitigating, not aggravating, factor).

97. *Martinez-Macias v. Collins*, 810 F. Supp. 782 (W.D. Tex. 1991), *aff'd*, 979 F.2d 1067 (5th Cir. 1992).

98. See Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 302-05 (1983) (discussing pervasive problem of effectiveness of counsel in trying capital cases).

99. 114 S. Ct. 2568 (1994).

100. *McCullum v. North Carolina*, 114 S. Ct. 2784, 2785 (1994) (Blackmun, J., dissenting).

The real problem in these cases is less that the statutes under which these defendants are tried are unfair, but that the quality of representation they are provided by state-appointed counsel, particularly where the compensation is so grossly inadequate that they cannot afford appropriate defense services, means the trial they receive is an unfair one.

The problem we have to deal with is that if we are going to maintain a capital punishment system, there must be some degree of symmetry of resources between the prosecution and the defense in these kinds of cases so that at least the defense is on relatively equal footing with the prosecution to present its case to the jury.

MR. ROBINSON: Well, there certainly is a serious counsel problem. One of the many things that makes the death penalty arbitrary in this country is the fact that the quality of counsel in capital cases is so irregular.

One would think that counsel in a capital case would tend to be the most competent members of the criminal bar, but my own experience—somewhat limited, although I'm familiar with particular situations in the State of Texas—is that quite the opposite is true. Most criminal defense lawyers, the particularly capable ones, will shy away from these kinds of cases because they are so difficult. They are emotionally draining. They're physically draining. And there is, in many states like Texas, very little in the way of financial reward for participating in such cases.

In fact, I know several lawyers there who have done some of these cases but I think they are unanimously of the view that you cannot make any money representing capital defendants.

So you get some rather remarkable and bizarre situations where counsel is extremely unqualified even though, on the surface, they may appear qualified. And that is continually going to be the problem.

Texas is the state I believe that has the largest death row population, although Florida and California are close. And Texas, by far, kills more people than any other state. It's killed, it's executed more than any other state since 1976.¹⁰¹

In Texas, where they have about 400 people now on death row,¹⁰² many of those people on death row are completely unrepresented.

101. See *56 Executions This Year Are Most Since 1957*, N.Y. TIMES, Dec. 30, 1995, at A28 (discussing fact that Texas has executed 104 people since Supreme Court ended four-year moratorium on capital punishment in 1976).

102. *Id.* (reporting that 411 men and 6 women are on death row in Texas).

They have no lawyers. Many of them are facing execution dates that have been imposed and they are without any lawyers.

In the *McFarland* case,¹⁰³ which was in the Term last year, only a bare five members of the Supreme Court said that, not the Constitution, but the federal statutes that had been adopted in this area give you a right to counsel in federal habeas and give federal courts the right to enjoin any execution until counsel can be obtained and has had a chance to prepare the case.¹⁰⁴

But that was by a bare one-vote margin. The crisis is getting worse, specifically in Texas. There just are not enough lawyers to handle all of those cases. Texas is the worst, but I think the situation is the same elsewhere. There just are not enough lawyers, enough competent lawyers to deal with the flood of capital cases that are in the courts right now.

There are something like 186 cases that could be prosecuted as capital cases, potential capital cases, that are in the docket right now of the state district court that has jurisdiction over Harris County, Houston, Texas, which if it were a state, it would have the second largest number of executions in the United States, second only to the rest of the State of Texas.

So there is no way that there is sufficient counsel to handle all of that need.

So as we continue into the future, it seems to me like this is going to be a particularly severe problem, that the resources on the side of defense are just not there.

I understand now that Congress intends to de-fund the resource centers for the various states. Those are the organizations or offices that have been funded by the Administrative Offices of the Courts to handle particularly post-conviction death penalty cases. They're going to be wiped out if Phil Gramm and other members of Congress have their way.

We can also imagine that the federal funds available for appointed counsel in post-conviction cases will also dry up.

There is a bill that passed the House of Representatives,¹⁰⁵ that is pending in the Senate,¹⁰⁶ which would do away with mandatory

103. 114 S. Ct. 2568 (1994).

104. See *McFarland v. Scott*, 114 S. Ct. 2568, 2574 (1994) (concluding that federal statute entitles capital defendant to "counseled federal habeas corpus proceeding").

105. H.R. Res. 729, 104th Cong., 1st Sess. (1995). The bill passed in the House on February 13, 1995. 141 CONG. REC. H1433-34 (daily ed. Feb. 13, 1995) (passing by vote of 297 to 132).

106. H.R. Res. 729, 104th Cong., 1st sess. (1995). On September 21, 1995, the bill was introduced into the Senate Committee on the Judiciary, where it remains. 141 CONG. REC. S2568 (daily ed. Sept. 21, 1995).

appointment of counsel in federal habeas capital cases.

So the trend is definitely in the direction of making it even more likely that arbitrariness will infect the death penalty system.

PROF. CHIKOFSKY: Two of the problems that we have with regard to the attorney crisis, both on death row and at the pretrial sentencing stages with regard to capital cases, have to do with, at least in part, not only a counsel crisis but also the crisis with regard to federal habeas corpus review of state cases in which the direct appellate process, after which a conviction is affirmed and certiorari is denied by the Supreme Court, is not, as Churchill put it, the beginning of the end, but only the end of the beginning.

The question I have for you both is twofold. One of the major problems in current death penalty litigation is that frequently the first truly competent counsel come into the case only as volunteers at the federal habeas corpus stage. Would not a great deal of both time, effort, as well as the abrasion between federal and state courts, be at least mitigated were states to impose or provide for far greater resources for the appointment and the payment of counsel at the trial stage so that, as Justice Rehnquist put it in *Wainwright v. Sikes*,¹⁰⁷ the trial really is the "main event" rather than the "tryout on the road" before we get into federal post-conviction review? Might not the states' provision of proper services for counsel at the trial level in effect kill two birds with one stone?

Whatever it is the defendant may have done, do you think his attorney can provide him with an adequate defense in a state where the maximum cap for both attorney fees and for payment of defense expenses is \$1500?¹⁰⁸

MR. OTIS: Sometimes yes and sometimes no.

Some cases are complex; others are not complex at all. It depends on each particular case as to whether an adequate defense can be provided.

It also begs the question of what an "adequate defense" means. The kind of defense that is often made for capital defendants is the

107. *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) (stating that federal courts' failure to require compliance with contemporaneous objection rule when resolving habeas corpus claims, tends to undermine trial as "decisive and portentous" event).

108. See Bruce A. Green, *Lethal Fiction: The Meaning of Counsel in the Sixth Amendment*, 78 IOWA L. REV. 433, 434 (1993) (discussing low quality or inexperience of attorneys assigned to indigent defendants due to limited funds); Richard Klein, *The Eleventh Commandment: Thou Shalt Not be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 363 (1993) (discussing increase in number of indigent defendants and increase in expense of providing counsel); Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 5, app. at 207 (1990) (discussing standards set by Supreme Court for petitions for writs of habeas corpus in capital cases, including compensation of appointed counsel).

kind we have heard about today, that is, that the defendant, who raped and held down this eleven-year-old girl is supposedly mentally deficient. This is probably a distinction that was lost on her while she was being humiliated and brutalized by this fellow and while her panties were stuffed down her throat to the point of choking to death.

The killer, despite his low intelligence, was able to form criminal intent, which is to say lust, one of the principal reasons (along with greed) that people commit murder. The problem was not with the killer's intellect. It was with his conscience.

What kind of defense is needed there? Do we need money to buy psychiatric testimony? Everybody's who's been litigating in the system knows that expert testimony is bought and then trotted out to the jury in an attempt to portray the killer as the true victim, the hapless soul beleaguered by a brain deficit or some newly-discovered psychiatric "syndrome." Is that what the money is going to go for?

If that's the definition of adequate defense, simply because it may be a winning defense to get an unjustified acquittal by confusing the jury about the difference between intelligence per se and the ability to form criminal intent, then the answer is this: we are spending too much money, not too little.

The taxpayer should not be forced to underwrite a system designed to create windfall acquittals.

Let me, if I might, respond to a couple of other things about the supposed disproportionality and arbitrariness of the imposition of the death penalty.

The big disproportion is not with defendants who are in poverty or defendants who have low IQs or with black defendants. By far, the greatest disproportion in the percentage of people on death row is men.

Just about everybody on death row, ninety-eight percent of them are men.¹⁰⁹ Know why they're there? It has nothing to do with gender discrimination. Men are almost the exclusive population of death row because men are almost the exclusive population of murderers. They are there because of their conduct. Not because of their race or sex or their IQ. They're there because they committed murder.

109. See Keith Alan Byers, *Incompetency, Execution, and the Use of Antipsychotic Drugs*, 47 ARK. L. REV. 361, 369 (1994) (discussing percentages of men and women on death row in United States).

If we're going to start painting by the numbers and subordinating conduct, I think we've lost what is as central to the idea of fair play in this country as anything in constitutional jurisprudence, which is that people ought to be treated based on what they do and not on what they look like.

As to arbitrariness—that some people involved in these grotesque murders are sentenced to death while others are not—I think that amounts to an argument that because some people are able to get windfall leniency at sentencing, therefore all people should be entitled to windfall leniency at sentencing.

In other words, if we can't have a system that does everything right, let's have a system that does nothing right.

This argument does not particularly commend itself to me as a system we ought to be following.

AUDIENCE: First of all, with respect to the arbitrariness, you mentioned, or somebody mentioned the figure that there are 20,000 homicides a year and so forth, and that having the death penalty applied may be like being struck by lightning, and that may not be as true anymore, but the fact of the matter is that the death penalty has been narrowed because of arguments made by those who oppose the death penalty to require that the jury's discretion be channeled.

In other words, the states had laws that said, if you commit murder, you get the death penalty, that's your punishment. The anti-death penalty foes said, no, you can't have an automatic death penalty for everybody that commits murder. In that situation, there would be no discrepancies. If you commit murder, you get the death penalty.

You have to have the jury discretion channeled and focused on the individual defendant. So that's when *Furman v. Georgia* and the successive case law came about to say, okay, we'll have each case be different. You can't mix apples and oranges, each one of these are different.

So now, you have a system in which defendants come into court and basically say, well, now wait a minute, it's arbitrary because here's somebody that got the death penalty for murder and here's somebody that committed murder and did not.

You can't have it both ways. It's a disingenuous argument.

In fact, the 20,000 homicides are not eligible for the death penalty to begin with, most of them. Homicide is the unlawful taking of a person's life. That includes second-degree murder, it includes manslaughter and so forth. The death penalty is limited to specific, narrow, first-degree murders and that's the universe you have to focus

on. And even then, there are limiting circumstances, was it a police officer, was it in the commission of another felony and so forth.

So your typical murder where two people in a bar just get mad at each other and shoot each other is not in many states even eligible for the death penalty because there was no underlying felony going on, no one was raped or robbed, and so forth.

Society is making these narrowing decisions based on Supreme Court jurisprudence and I think you can't have a perfect system, but I think the system we have now which does apply super-due-process to the death penalty certainly is the best system we have.

Now with respect to the lawyers, their being outgunned and so forth, there are examples that were discussed where lawyers were not the dream team that the defendants would like to have. The question, in my view, is whether or not that was constitutionally required in terms of whether it was ineffective assistance of counsel. Certainly if they have ineffective assistance of counsel, I would argue that their death penalty should not be imposed for that reason.

But you have other ways that you can deal with this problem. The American Bar Association, as I understand it, has a network of attorneys and pro bono attorneys, such as some of the panelists who are here who are excellent attorneys.

I think the legal community needs to step up to the plate in that regard and address some of this problem, if in fact, there is a major problem, which I don't think it is.

MR. OTIS: If I might just chime in here with one more thing. I think the Southern Poverty Law Center and other death penalty organizations do keep track of death penalty cases before they get to the habeas stage.

So we can have outstanding lawyers like Doug and Ed and Tony Amsterdam representing defendants in capital cases. We don't need a change in the system. There is a system already in place in which the very best legal minds in the country can be brought in and occasionally are brought in on behalf of death defendants before we get to this seemingly endless habeas review.

MR. ROBINSON: May I just please, a quick comment on that?

I wish that were true, Bill, but unfortunately, it's not.

The ABA does have a program where they try to recruit lawyers and other organizations who try to recruit lawyers to assist with death penalty cases. But the unfortunate fact is that that program, and its sources have almost entirely dried up. It's almost impossible now to recruit a lawyer in Washington, for example, to represent somebody

who's on death row in a southern state, whereas that was relatively easy to do five or six or eight years ago.

That's because these cases are very difficult cases, they're very draining even for a large law firm. They are done entirely on a pro bono basis. The travel expenses are enormous. It's just very difficult and expensive for a law firm to handle such a case.

While several law firms have done an exemplary job, we're not getting any repeat business with them.

So unfortunately those systems have dried up. And I'm part of the process trying to recruit counsel and sad to say that counsel are just not available from the traditional sources.

I also want to say that I did not make the point about the defense being out-gunned by the prosecution. I'm aware of the fact that prosecutors' computers should work.

The prosecution, as well as the defense, should be able to try a case without having one or both hands tied behind their backs because they don't have adequate resources.

The trial should be the main event. That means that both sides should have adequate resources. The prosecution may not have adequate resources. I believe, however, that the defense is far more strapped than the prosecution in most cases.

If you stop and think about it, there are instances where states impose limitations like \$1500 on an entire representation in a capital case. At \$100 an hour which, if you're a lawyer, you know is a very low fee. If you're out to be a lawyer, you may think that's a magnificent sum, but it isn't. You're going to make very little money if you charge \$100 an hour.

But even at \$100 an hour, that's fifteen hours. Your trial's going to last more than fifteen hours, and that provides no money for preparation. In the case that I had that was referred to before, *Macias*,¹¹⁰ the defense lawyer was paid a total of \$6500 in that case.

That meant that he could try the case. He was a great lawyer on his feet, a good seat-of-the-pants lawyer, but it left him no resources for preparation of the case. And he did virtually no preparation, which is where he was ineffective.

110. *Macias v. State*, 733 S.W.2d 192 (Tex. Crim. App. 1987), cert. denied, 484 U.S. 1079 (1988). Mr. Macias' conviction was reversed on grounds of ineffective assistance of counsel in *Martinez-Macias v. Collins*, 810 F. Supp. 782 (W.D. Tex. 1991), aff'd, 979 F.2d 1067 (5th Cir. 1992). On remand, an El Paso grand jury refused to reindict Mr. Macias and, after nearly 10 years on death row, he was released. Adam Cohen, *The Difference a Million Makes*, TIME, June 19, 1995, at 43.

MR. OTIS: How do public defenders, if I may, how do public defenders fit in all of this?

MR. ROBINSON: Well, public defenders, I assume, are pretty much in the same spot as many of the prosecutors. Public defenders do not have the resources to do what they are doing now plus take on the burden of capital cases. In some states, public defenders do capital cases, in others, they don't.¹¹¹

But I think it should not be difficult for us all to agree that the resources that are devoted to capital cases on both sides are inadequate, vastly inadequate.

We are talking about the death penalty. We are talking about the state taking a human life. There could be nothing more important for society than to make sure it is devoting adequate resources, and doing the right thing, in a particular case. And the resources ought to be made available.

If a state wants to take a human life, which is an extremely grave step, then the state ought to provide the resources so that it's done right, it's done in a way in which we can all be satisfied that it was imposed in the right way, in the right fashion, on the right person.

PROF. CHIKOFFSKY: At this time, I wanted to inform everybody that one of the purposes of this conference was not merely for the panelists to speak at and to each other, but also to open up the floor so that we can start something of a dialogue with the audience as well.

Accordingly, we have an open microphone and while our time is running short, we would like those of you who have some questions for the members of the panel to discuss if they'd come up and raise some questions that may be troubling to them or that some of these discussions have opened up for consideration.

AUDIENCE: One of the problems that you all see, and that you debated among yourselves, was the differences between some of the cases and the factual scenarios that played out between some people getting the death penalty and others not, and with new laws, like the New York law, coming into play. Do you think that, instead of necessarily determining this every time at a jury level, perhaps a special panel could be appointed by the court of appeals of a particular state so that you can get more uniform decisions on death

111. Compare Leigh B. Bienen, *A Good Murder*, 20 FORDHAM URB. L.J. 585, 596 (1993) (discussing Philadelphia's policy of not allowing public defenders to try capital cases) and Panel Discussion, *The Death of Fairness? Counsel Competency and Due Process in Death Penalty Cases*, 31 HOUS. L. REV. 1105, 1129 (1994) (discussing generally lack of public defender systems for capital cases) with Michael A. Mello, *Criminal Law: Is There a Federal Constitutional Right to Counsel in Capital Post-Conviction Proceedings?*, 79 J. CRIM. L. & CRIMINOLOGY 1065, 1076 (1989) (discussing potential federal override of state-by-state laws on trying of capital cases by public defenders).

penalty cases so there isn't so much of a discrepancy. Maybe they could have a better look at how competent counsel is in trying these, so you try and get more uniformity in the decisions, so there isn't as much discrepancy between the cases' outcomes?

PANELIST: Well, just briefly, I'd like to first address that. I think that's a good question.

First of all, with respect to eliminating discrepancy between murders from one state to another, you're never really going to have that, I don't think, because each state, of course, is autonomous and has their own system. So one state may view a particular kind of a murder as not justifying the use of the death penalty, and another state may.

Just as in the O.J. Simpson case, you have a double homicide. Although eligible as a capital crime, capital punishment was not sought and yet in the case in South Carolina regarding Susan Smith killing her two little boys, that is a capital crime, as well, and capital punishment is being sought. So you're always going to have the discrepancies from state to state.

Your question, though, I think is well taken with respect to discrepancy within one jurisdiction.

I'm not a prosecutor, so I can't say how it's done, but I think there are some states and prosecution offices that do have panels, maybe not as elaborate as you've proposed, but they do sit down and try to determine whether or not it is appropriate in that particular case to seek the death penalty. I think one of the factors, of course, is to look at whether there is some discrepancy and unfairness in terms of going after one particular defendant and not another.

But you're never going to have a perfect system. In any system where there has to be some discretion at all, rather than have everything done, turned out by a computer, you're always going to have those kinds of discrepancies. So I'm not sure whether you can eliminate that, but certainly there can be efforts made along the lines you suggested to try to have some uniformity, and I would not be opposed to that.

PROF. CHIKOFFSKY: Let me add a thought concerning the exercise of review at both ends of the process, both at the initiation of prosecution and also at the other end of the process.

I'm unaware of any jurisdiction nationwide, state or federal, that has any kind of formalized overall guidelines or oversight review about how an individual prosecutor's office decides whether or not to seek the death penalty in particular cases. Particular offices in particular counties may have their own particular internal guidelines. We found out from the O.J. Simpson case that apparently there's a panel in the

Los Angeles County District Attorney's Office that considers that,¹¹² but there are, I think, seventy other counties in the State of California that don't have, or have different, if they have any, kind of review.

Getting to the other end of the process, there should be some sort of statewide proportionality review on appeal. One of the problems with the Supreme Court's decision in *Pulley v. Harris*¹¹³ is that, in effect, it denied that the Eighth Amendment requires the states to conduct any meaningful overall proportionality review on either a nationwide or even a statewide basis,¹¹⁴ which meant that a state can provide proportionality review, if it wishes to, under its own law, but it's not compelled under the Eighth Amendment.

This means some states have proportionality review and some states don't. That, of course, is what creates the asymmetry with regard to criminal procedure principles that are not compelled by the Supreme Court under either the Fifth or the Eighth Amendment.

If you don't compel proportionality review and the Supreme Court doesn't, then on a jurisdiction by jurisdiction basis, they're not required to have it, and therein can lie the vice.

Any other questions?

AUDIENCE: You've touched this morning on the real framework of death penalty cases and also the scarce allocation of resources perhaps on both sides.

My question, just briefly, both Mr. Robinson and Mr. Otis alluded to this, is what are the proposals right now in Congress. I believe some of them are for cutting back the appeals process in death penalty cases.

How do you feel about that, and what considerations would you like Congress to talk about?

MR. ROBINSON: There are proposals in Congress to cut back substantially on post-conviction review at the federal habeas level.¹¹⁵

112. Dawn Webber, *DA Panel to Decide on Death Penalty; Prosecution: Defense Attorneys Are Critical of the Committee Method Used to Decide the Approach on Capital Cases*, ORANGE COUNTY REC., July 19, 1994, at A20 (noting that prior to 1991, decision to seek death in Los Angeles County was made by one assistant district attorney); Michelle Caruso, *Nation-World: Death Penalty for O.J.? One Man Will Decide*, SALT LAKE TRIB., Aug. 22, 1994, at A6 (stating that although committee of prosecutors have input in decision to seek death, chairman of committee ultimately decides).

113. 465 U.S. 37 (1984).

114. *Pulley v. Harris*, 465 U.S. 37, 44-45 (1984) (noting that proportionality review may be constitutionally acceptable, but such review is not constitutionally required). Proportionality review refers to a comparison between a given defendant's sentence and sentences imposed on other defendants under similar circumstances. *Id.* at 44.

115. See 141 CONG. REC. H1403 (1995) (reprinting Effective Death Penalty Act of 1995); 141 CONG. REC. S4593 (1995) (setting forth Habeas Corpus Reform Act of 1995).

This is yet another example of returning to a system where discretion is left entirely to the states, virtually entirely to the states, and at the state level in the hands of local juries and judges.

The proposals in Congress include, as I mentioned before, cutting funding for representation of defendants in federal habeas cases,¹¹⁶ and also cutting back substantially on the habeas process.¹¹⁷

As you probably know, the Supreme Court, over the course of the last decade and a half or so, has substantially cut back, by judicial decision, what the habeas corpus statute actually says and has made it more and more difficult for someone to have a sentence overturned in the federal habeas process.¹¹⁸

Now Congress is not only intending to codify most of what the Supreme Court did, but is also intending to go further than that, and to essentially make the federal habeas process a review that would overturn a conviction only in the most egregious of cases where a state strayed far from established precedent.

But among the proposals, among the most serious of the proposals that are being considered are proposals that would in effect say that if the state court judges and courts got the facts approximately right, and they got the law approximately right, more or less right, that is good enough. If this legislation passes, Congress would create an entirely new class of criminal law that we could call "it's good enough for government work" criminal justice.

If the states get it into—if their case falls into that category, even though the state courts did not get the law right, so long as their decisions are not completely unreasonable, that will be good enough for the federal courts and there will be no further review.

PROF. CHIKOFSKY: Let me add a thought. One of the really noxious aspects of that proposal, as Doug said, is that the federal courts would not simply have to find the state court decision clearly erroneous, but that they would have to find it to be literally arbitrary and irrational, which is an impossibly high standard. It would virtually

116. See H.R. REP. NO. 378, 104th Cong., 1st Sess. 36 (1995) (conference report on judiciary appropriations, providing for elimination of funding for organizations previously established to represent death row inmates in federal habeas cases).

117. 141 CONG. REC. H1403, H1407 (1995) (statement of Rep. McCollum) (stating that "underpinnings of this bill [are] to speed up the sentences in this country"); 141 CONG. REC. S4592 (1995) (statement of Sen. Specter) (stating that Senate Bill 623 "sets strict time limits on the filing of habeas corpus petitions and severely restricts the filing of any successive petition").

118. See Joseph L. Hoffmann, *Starting from Scratch: Rethinking Federal Habeas Review of Death*, 20 FLA. ST. U. L. REV. 133, 133 (1992) (noting that Supreme Court decisions in past fifteen years concerning "procedural default, exhaustion, and abuse of writ" increasingly restrict ability of habeas courts to reach merits of claim).

insulate from federal review any state court decision that wasn't in direct and explicit violation of prior Supreme Court decisions.

A serious question is whether or not that would in effect gut any meaningful independent federal habeas review in its entirety.

MR. OTIS: I'm in favor of cutting back on the number of opportunities and the amount of time that is currently afforded defendants. I think defendants ought to have, and really must have at least one opportunity for a full and fair review of all their claims.

But to allow the current game-playing to go on is wrong, and it's a fraud on the public. Defendants squirrel away their claims, and then litigate them one at a time, year after year, for the purpose of just keeping the ball rolling.

If I were in their position, I'd certainly want to do that, but as a matter of public policy, it does not commend itself. People should not be permitted to play games with the criminal justice system. It deprives the death penalty of a good deal of what could be its deterrent effect. It amounts to an attempt by attrition to abolish the death penalty indirectly when the forces opposed to it do not have the political power to do it directly either in the Supreme Court or in the state legislatures. So what you do is just keep the ball rolling and then make the argument that Professor Robbins was making that, well, it's much too costly to do these death penalty cases.

Well, that's right. It's costly to do death penalty cases because the organized defense bar that opposes the death penalty ensures that it is costly. If they'd stop and we could have one full and fair hearing on all the defendant's claims, I think the system would be better off for us all.

PROF. CHIKOFFSKY: Steve?

PROF. BRIGHT: Well, I had two questions for Mr. Otis, but now I have three.

(Laughter.)

MR. OTIS: Now that's more like it. This is what I'm used to.

PROF. BRIGHT: After the last question, I guess my question one would be: How many of these post-conviction matters have you handled, and have you looked at what the standard is for bringing a second petition in federal court, and what the courts have said with regard to whether people get stays of execution? Do you know whether anybody in Texas, for example, is getting stays of execution on a second petition?

But my other questions went to the comments that you made before about the amount of time that took place between the

conviction and the execution, and then whether you spend any money on a case where somebody stuffed panties down a throat.

We used to have a much faster system without any monetary expense; it was called lynching. It was fairly well-known in Alabama, for example, in the 1920s and 1930s, that if a certain crime was committed against a white person, particularly by an African American, very swiftly and very economically, they would be hanged from the nearest tree.

Do you know of any studies that indicate if that worked as a deterrent? It was fairly well known, it was very swift, it was very efficient, and very cost effective.

And the last question with regard to resources is, in Alabama, for example, today, a lawyer will get something like four dollars an hour for defending a capital case.

Do you know of any prosecutor's office, United States Attorneys' office or state offices, or any lawyers, for that matter, doing any kind of legal work in this country today for four dollars an hour?

Do you think that has any kind of impact on the quality of representation that's provided, or does it matter?

MR. OTIS: I mostly agree with what you imply in your question, and I agree with Doug that \$1500 is too low for a defense lawyer. You cannot put on a legitimate defense to a drunk driving charge with \$1500, and it should be raised substantially.

I don't think that's a constitutional requirement, but if I were called as a witness before a congressional committee, my testimony would be I think it's too low and it ought to be raised.

With respect to lynchings, let me say two things. First, it is unfair and wrong to compare today's system, which is loaded down with procedural requirements and review, to lynching. Second, if I'm the prosecutor, anyone engaged in lynching would be charged with first-degree murder, and if I convict them, I would like to see them executed more swiftly than nine and a half years after their crime.

PROF. BRIGHT: My question is, do you see that there is any deterrent value to that? The swiftness.

Literally within hours of arrest a person would be executed, and is there any evidence from that time period in our history that that—and there were a lot of lynchings that took place, particularly in the southern states—that that was effective in deterring crime? That worked as a deterrent?

MR. OTIS: Well, of course it wasn't designed to deter crime. What it was designed to do was terrorize black people, and that's all it was designed to do.

Was it effective in doing that? I suppose so. That doesn't make it right. It wasn't right when it happened, and if you think I'm going to defend lynchings, I'm not. I am, however, going to defend the common sense idea that legitimate punishment is more effective as a deterrent if it is imposed soon after the offense. I didn't think there was a serious doubt about that.

PROF. BRIGHT: My other question is, aside from lynchings. . . .

MR. OTIS: No. The question compares the imposition of the death penalty, the process that you may think is shortsighted and too short and not well enough funded, with lynching.

PROF. BRIGHT: No.

MR. OTIS: And that, to my way of thinking, is not a fair comparison in the slightest.

PROF. BRIGHT: Well, let's make it fair. Let's forget about lynchings.

In the 1930s and 40s, when they didn't have federal habeas corpus like we have it today, regardless of lynchings, executions were carried out much in the way you are advocating, without lengthy delays, it still didn't have any deterrent effect.

So why should we believe that your system, which failed then, would work now?

MR. OTIS: Well, I don't know how you know it has no deterrent effect. Death penalty opponents cite numerous studies saying that there's no deterrent effect.¹¹⁹ Death penalty proponents cite other studies saying that it does.¹²⁰

Let me say two things about that, actually three things.

First, in the 1940s, as now, the number of persons executed was only a small fraction of the number of premeditated murders. In other words, the actual prospect of being caught and executed for murder was very low. It is therefore hardly surprising that the death penalty had only a fraction of its potential deterrent effect. That, however, is not an argument against the death penalty. It is, to the contrary, an argument for its more frequent and consistent imposition.

Secondly, regardless of what these studies say, intuitively, don't we all know that if a policeman were, for example, at the arm of Susan Smith when she decided to drown her two kids, and said to Ms.

119. See David C. Baldus, *Keynote Address: The Death Penalty Dialogue Between Law and Social Science*, 70 IND. L. REV. 1033, 1034 (1995) (stating that "high quality" research has repeatedly failed to discover that death penalty had measurable deterrent effect).

120. *Id.* (pointing out as "notable exceptions" studies by Isaac Ehrlich and Stephen Layson where deterrent effect has been found).

Smith, if you go ahead with that, I'm going to take you to jail and you're probably going to wind up in the electric chair, do you think she would have been able to stop herself?

As a matter of common sense, we all know that if people correctly believed that there's a strong likelihood that if you kill somebody, you actually are going to go to the electric chair, there's going to be a lot less murder.

Do you disagree with that?

AUDIENCE: Yes.

AUDIENCE: There are disagreements and what I'm getting at is that, there are studies, by the way, and this afternoon they'll be available to you, I think, the CQ Researcher, the death penalty debate that covers all these topics, just came out last week, and there is a little blurb in there, and a lot of people in this room are quoted in this article.

But there are some sources of studies for the deterrent effect by Professor Steven Layson and others and so forth.

But you're forgetting one thing, and that is, if the deterrent effect is such that you don't know whether, as Steven Layson found, you can deter nineteen innocent lives by one execution, or if you're not sure, it might be five, it might be one. I'd rather, if there's any doubt about it, err on the side that I'm going to save one innocent human life by having the death penalty, than not having the death penalty and perhaps condemn an innocent human life by having another murderer go out and commit an execution.

Second, and finally, if you throw away the death penalty altogether, the other principle of punishment, retribution, just desserts, can stand alone in terms of validating and justifying the death penalty.

Do people who commit these kinds of heinous, brutal murders deserve the death penalty, regardless of whether it deters others or not?

I think it does. That's the other question that should be addressed and you shouldn't lose sight of that.

PROF. CHIKOFFSKY: At this time, with great regret, I'm afraid I'm going to have to thank our panelists for their participation in this lively debate. For those of you who are going to remain, I'm sure our panelists will be exchanging gunfire over lunch, continuing the dialogue on these same topics.

IV. KEYNOTE ADDRESS: CAPITAL PUNISHMENT AND THE CRIMINAL JUSTICE SYSTEM: COURTS OF VENGEANCE OR COURTS OF JUSTICE?

PROF. BRIGHT: This is an important subject that we cover here today, the death penalty in the twenty-first century. And I want to reflect with you on some of the more difficult moral issues that the death penalty presents, not the question of whether we should have it or not, but a few others.

As Professor Robbins said this morning, in talking about why this is so important, the death penalty is growing in scope, at the same time that Congress and the states are cutting back on the protections for those under death sentences and speeding up the process.

There are now 3000 people on death row.¹²¹ New York¹²² and Kansas,¹²³ have recently adopted the death penalty. There are only twelve states in the Union now that do not have the death penalty.¹²⁴ The federal government recently passed a crime bill providing for over fifty federal capital offenses.¹²⁵

We are in the midst of a crime debate, where the tone is becoming increasingly strident, one in which there are threats to some of the protections of the Bill of Rights and threats to the integrity of our legal system.

There are some things we can agree on, and I want to mention those, and then talk about some other things on which I think there might be agreement, even between those who are for and those who are against the death penalty.

We can agree that we are opposed to crime and to violent crime in our society. I had the pleasure of meeting Anne McCloskey this morning, who is the Chair of the Maryland Coalition Against Crime. Of course there is no Maryland coalition *for* crime. We are all against crime, and all of us could join that coalition because there is nothing more unfair, nothing more arbitrary, nothing more outrageous than for innocent persons to lose their lives or to be put at fear or lose their property.

121. NAACP LEGAL DEFENSE & EDUCATIONAL FUND, DEATH ROW, U.S.A. (Spring 1995), at 1 (stating that there are 3009 inmates on death rows on April 30, 1995).

122. *Id.* (listing those states which do and do not have capital punishment).

123. *Id.*

124. *Id.*

125. Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1796 (1995) (codified in scattered sections of 42 U.S.C.).

I know this from first hand experience. When I lived in Washington, D.C., I was held up on the street. I will never forget that experience. I will never forget the morning I picked up *The Washington Post* and saw that the doctor, the cardiologist who had helped me through one of the most difficult times in my life, had been shot and killed by an intruder in his home.

I am very aware of the fear of crime. Our office is one of two buildings that are not abandoned in the part of downtown Atlanta where we are. Every night when I leave at the end of the day, I look down the street and there are people selling drugs a little further down the street, and on down after that, there are people selling their bodies. The walk from the front door to the car every night is always questionable in terms of whether you are going to make it.

Certainly our society and our government has to do something about violence in society and about the fear that people have about it. Where we part company perhaps, and where there may be some disagreement is, how we best deal with that problem. One area of disagreement is the role of punishment, where punishment comes into play and how punishment best accomplishes the purpose of protecting the community.

There is debate about the evolving standards of decency—or even whether there are evolving standards of decency—that mark the development of a maturing society. Are there some kinds of punishment that are beyond the pale: whipping, the stocks, capital punishment?

Alabama recently brought back the chain gang.¹²⁶ The new Commissioner of Corrections in Alabama spent \$17,000 to buy 300 pairs of chains.¹²⁷ You do not need to go to Singapore to find a chain gang. You can find one right there in Alabama.

I was in a debate with someone recently about the evolving standards of decency, and I said, well, now, boiling in oil, whipping, the stocks; do you think those are still appropriate punishments today? He thought about it for a minute, and said, well, boiling in oil, no; whipping and the stocks, yes.

That is something to think about. Are there some kinds of punishment that we do not have because of questions of decency, because of questions of expense, because of questions of effectiveness?

126. See Rick Bragg, *Chain Gangs to Return to Roads of Alabama*, N.Y. TIMES, Mar. 26, 1995, at 9 (describing Alabama's reinstatement of chain gangs).

127. *Id.*

Robert Morgenthau, the District Attorney in Manhattan, has raised questions about the effectiveness of capital punishment.

I recently was called by a Scandinavian journalist who said, how long do you think it will be until the United States abolishes the death penalty? I said that is really not something I have been thinking much about lately, given the way the country is going right now. He said, but all the western countries have done away with the death penalty. Surely it is only a matter of time.

It reminded me that we are still a very young country and in some ways still a frontier society. We still have some distance to go in reaching our aspirations for the kind of society we want this to be.

But we are going to have the death penalty into the twenty-first century. There is no question about that. We are going to have much greater use of the death penalty than we have had before.

So I would like to leave those questions to one side and talk about what kind of death penalty we are going to have, and what kind of process we are going to have because for people who are lawyers, as many of you are, or will be, these questions are of paramount importance.

Whether we are for or against the death penalty, we can agree on the importance of the integrity of the process. Ms. McCloskey said this morning, in our panel, she said we are not just for vengeance, we are for justice. Justice is something that everyone has an interest in.

I want to talk about four principal ingredients of justice in our court system that are in jeopardy today, in part because of the crime debate, and the development of the use of the death penalty as a political litmus test for the crime issue.

One, we all agree that our legal system depends upon a judge who is fair and impartial, a judge who follows the law and the Constitution of the United States in presiding over a case.

Second, we agree that the prosecution of a case, any case but particularly a case involving the loss of human life, must be based upon the law and a responsible exercise of discretion, and not on politics, race and other factors, such as that.

Third, we can agree that for the adversary system to work, the person accused of a crime must be represented by competent counsel who has the resources and the ability to make the trial a reliable adversary testing process.

Finally, we should agree that it is absolutely essential with regard to the death penalty that we eliminate the role of race in influencing who is executed. We must realize that we are, to some extent, still captives of a history where the death penalty and lynching have been

used against people of color in this country. It was not that long ago that lynchings were replaced by the perfunctory death penalty trial to accomplish the same purpose but with the pretense of some process.¹²⁸

All of us should agree that where those ingredients are not present, regardless of how one feels about the death penalty in the abstract, we should not carry out a death sentence.

Crime has become one of the most dominant political issues in this country, particularly after the fall of communism. It used to be a politician could not be soft on communism, but now one cannot be soft on crime.

Richard Nixon, in accepting the Republican nomination in 1968, promised a new attorney general, which set the agenda for the use of crime in the political climate in our country.¹²⁹

Lee Atwater, in 1988, said that Republicans should embrace the crime issue because most Democrats—this was 1988 and not that long ago—most Democrats are against the death penalty.¹³⁰ He helped with the Willie Horton advertisements to elect President Bush in his campaign for president.

Not nearly as noticed, but perhaps the saddest of all was when Bill Clinton went back to Arkansas to preside over the execution of Ricky Rector, a brain damaged man who killed a police officer and then put the gun to his own head and shot out the front part of his brain. Rector was tried by an all-white jury and sentenced to death.¹³¹

Even the Arkansas Supreme Court said this was a case that suggested itself for executive clemency.¹³² Read Marshal Frady's

128. See generally DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* 115 (rev. ed. 1979); GEORGE C. WRIGHT, *RACIAL VIOLENCE IN KENTUCKY, 1865-1940: LYNCHINGS, MOB RULE, AND "LEGAL LYNCHINGS"* (1990); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 *CORNELL L. REV.* 1, 79 (1990); John F. Galliher et al., *Criminology: Abolition and Reinstatement of Capital Punishment During the Progressive Era and Early 20th Century*, 83 *J. CRIM. L.* 538, 560-76 (1992). See also Alan Brudner, *Retributivism and the Death Penalty*, 30 *U. TORONTO L.J.* 337 (1980) (discussing procedural implications of utilitarian and retributive arguments).

129. See Michael Tonry, *Public Prosecution and Hydro-engineering*, 75 *MINN. L. REV.* 971, 980 (1983) (discussing Nixon administration's making crime re-election campaign issue); Larry W. Yackle, *The Reagan Administration's Habeas Corpus Proposals*, 68 *IOWA L. REV.* 609, 614 (1983) (discussing Nixon administration's attempt to curb protection of constitutional rights in federal system).

130. See James Ridgeway, *Race, Poverty, and Politics: Essential Ingredients for a Death Penalty Conviction*, *VILLAGE VOICE*, Oct. 11, 1994, at 23 (quoting Lee Atwater as claiming most Democratic candidates are opposed to death penalty).

131. See Panel Discussion, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 *FORDHAM URB. L.J.* 239, 240 (1994) (discussing Bill Clinton's political considerations in attending execution in Arkansas after becoming U.S. President).

132. See *Rector v. State*, 638 S.W.2d 672, 673 (Ark. 1982).

article about Ricky Rector's execution.¹³³ The logs at the prison show that in the days and hours leading to his execution, Rector was barking at the moon, howling like a dog, laughing inappropriately, and claiming he was going to vote for Clinton in the election.¹³⁴

Ricky Rector had a habit of always putting aside his dessert until later in the evening, and then, before he went to bed, he would eat it. After they executed Ricky Rector, they went to his cell and found that he had put his pecan pie aside. He had so little appreciation for what death meant that he thought he was going to come back after the execution and finish his pie.

Recently in New York, candidates for both attorney general and governor got their biggest applause lines by promising to send Thomas Grasso back to Oklahoma where he could be executed.¹³⁵

The use of crime by people in both parties to get elected has resulted in a non-debate. In Texas, candidates argue about who is most for the death penalty. In Georgia, who is most for the death penalty. There is no one on the other side. How this is spilling over into the judiciary and into our legal system? Is it corrupting our courts?

A. Pressures on Elected Judges in Capital Cases

A few years ago, the Governor of California pledged that unless two members of the California Supreme Court changed their votes in death penalty cases, he would campaign to take them off the court.¹³⁶ And he successfully did so.¹³⁷

Two years ago, Justice James Robertson was voted off the Mississippi Supreme Court because the attorney general and the prosecutors in

133. See Marshall Frady, *Death in Arkansas*, NEW YORKER, Feb. 22, 1993, at 105, 132 (discussing Bill Clinton's use of execution of Ricky Rector to advance his campaign for President).

134. See George E. Jordan, *Lawyer: Execution a Disgrace*, NEWSDAY, May 14, 1992, at 19 (describing Rector as incoherent).

135. *Pataki on the Record: Excerpts from a Talk of Campaign Issues*, N.Y. TIMES, Oct. 10, 1994, at B4. Upon assuming office, Governor George Pataki carried out his promise and sent Grasso back to Oklahoma where he was executed on March 20, 1995. John Kifner, *Inmate is Executed in Oklahoma, Ending N.Y. Death Penalty Fight*, N.Y. TIMES, Mar. 20, 1995, at A1.

136. Steve Wiegand, *Governor's Warning to 2 Justices*, S.F. CHRON., Mar. 14, 1986, at 1. Governor George Deukmejian had already announced his opposition to Chief Justice Rose Bird because of her votes in capital cases. Leo C. Wolinsky, *Support for Two Justices Tied to Death Penalty Votes, Governor Says*, L.A. TIMES, Mar. 14, 1986, at 3.

137. See James R. Acker & Elizabeth R. Walsh, *Challenging the Death Penalty Under State Constitutions*, 42 VAND. L. REV. 1299, 1330 (1989) (discussing California voters' ouster of three Supreme Court justices who opposed death penalty); Frank Clifford, *Voters Repudiate 3 of Court's Liberal Justices*, L.A. TIMES, Nov. 5, 1986, pt. 1, at 1 (describing defeat of three justices after campaign commercials insisted "that all three justices needed to lose if the death penalty is to be enforced").

that state campaigned against him because of his votes in death penalty cases.¹³⁸

Last year, death penalty was a big issue in many judicial elections. Stephen Mansfield ran for the Texas Court of Criminal Appeals on a platform of greater use of the death penalty, more application of the harmless error doctrine, and sanctions against lawyers who raise frivolous issues in death penalty cases.¹³⁹

Even though it was shown, right before the election, that he had lied about how long he had been in Texas—he had only been there two years; he claimed he had been there a lot longer—that he had lied about his criminal law experience—he had little, he claimed it was extensive—that he had actually been fined criminally for practicing law without a license in Florida,¹⁴⁰ he nevertheless was elected with fifty-four percent of the vote, to the Texas Court of Criminal Appeals,¹⁴¹ and he now sits on that court.

Norman Landford, a Republican judge in Houston, Texas, suffered the same consequence after he granted relief one time in a death penalty case. Johnny Holmes, the district attorney there, who has sent more people to death row than most states have, ran one of his assistants against the judge who defeated him in the Republican primary.¹⁴²

In Alabama, a judge ran with advertisements in the paper there that said, "Mike Mansfield, some say he's too tough on criminals." And then there was a picture of the judge, and below it, it said in all capitals, "AND HE IS."

138. David W. Case, *In Search of an Independent Judiciary: Alternatives to Judicial Elections in Mississippi*, 13 MISS. C. L. REV. 1, 15-20 (1992) (describing how Robertson was defeated by "law and order candidate" who had support of Mississippi Prosecutor's Association). Robertson was the second justice to be voted off the Mississippi Supreme Court in two years for being "soft on crime." Tammie Cessna Langford, *McCrae Unseats Blass*, SUN HERALD (Biloxi, Miss.), June 3, 1990, at A1; Andy Kanengler, *McCrae Overwhelms Justice Joel Blass*, CLARION-LEDGER (Jackson, Miss.), June 6, 1990, at 4A.

139. Janet Elliott & Richard Connelly, *Mansfield: The Stealth Candidate; His Past Isn't What It Seems*, TEX. LAW., Oct. 3, 1994, at 1, 32 (describing Mansfield's campaign promises).

140. *Id.* (reporting that Mansfield claimed to be born in Texas, but was born in Massachusetts); Jane Elliott, *Unqualified Success: Mansfield's Mandate; Vote Makes a Case for Merit Selection*, TEX. LAW., Nov. 14, 1994, at 1 (reporting that Mansfield was unable to verify campaign claims regarding number of criminal cases he had handled); *Q & A with Stephen Mansfield; The Greatest Challenge of My Life*, TEX. LAW., Nov. 21, 1994, at 8 (relating Mansfield's apology and response for statements he made); John Williams, *Election '94: GOP Claims Majority in State Supreme Court*, HOUSTON CHRON., Nov. 10, 1994, at A29 (reporting that Mansfield had been fined for practicing law without license in Florida).

141. Elliott, *Unqualified Success*, *supra* note 140, at 1 (reporting that Mansfield beat Judge Charles F. Campbell, former prosecutor, who had served 12 years on court).

142. Mark Ballard, *Gunning for a Judge; Houston's Lanford Blames DA's Office for His Downfall*, TEX. LAW., Apr. 13, 1992, at 1 (reporting Lanford's assertion that prosecutors stalled cases in his courtroom in order to provide ammunition for judge's opponent).

The Supreme Court has said the role of a judge is to hold the balance nice, clear and true, between the prosecution and the defense.¹⁴³ And yet here is a person who has been elected on a platform of being too tough on one class of people who come before him.

In Alabama, judges routinely override jury sentences of life imprisonment and impose the death penalty, but almost never override death verdicts and impose life imprisonment.¹⁴⁴ The same is true in Florida and other states that allow for override.¹⁴⁵

As Justice Stevens pointed out in his dissent in *Harris v. Alabama*, it appears that those judges are responding not to what goes on in the courtroom in the cases before them, but to what is going to happen in the ballot box in the next election.¹⁴⁶

A lot of my cases are heard in Butts County, Georgia, which is a small, rural community in Georgia that has one major industry, a huge prison which houses death row. In that community, almost everyone is associated with prison in one way or another—they either work there or their family does. They elect two superior court judges who hear most of the cases involving people under death sentence.

The two judges that are in office now have never once granted relief in a death penalty case. And that's only half the story. They never will. The constituency that elects them does not elect them to enforce the Bill of Rights in death penalty cases. Of the cases that they have heard that have been reviewed by the federal courts, federal courts have found violations of the Constitution of the United States in three fourths of them and sent the cases back for either a sentencing or for new trials.

The fact that judges may lose their jobs if they follow the law raises serious questions about the impartiality of the judiciary in those states where judges are elected. It is time to abandon the legal fiction that

143. See *Offutt v. United States*, 348 U.S. 11, 17 (1954) (reversing finding of criminal contempt because trial judge failed to represent "impersonal authority of law"); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (stating that defendant's constitutional rights are violated when judge has personal interest in deciding case against defendant).

144. See, e.g., *Harris v. Alabama*, 115 S. Ct. 1031, 1037, 1040 (1995) (Stevens, J., dissenting) (stating that only Alabama grants its trial judges "unbridled discretion" to impose death penalty despite determination made by jury and noting that Alabama's elected judges have overridden jury sentences of life without parole and imposed the death penalty forty-seven times, but have rejected only five jury recommendations of death).

145. *Id.* at 1040 n.8 (Stevens, J., dissenting).

146. *Id.* at 1039 (Stevens, J., dissenting) (noting that judges in electoral system must constantly agree with death penalty).

all judges are impartial and acknowledge the political reality that too often that is not the case.¹⁴⁷

B. *The Exercise of Discretion by Prosecutors*

For many people who become judges, the main route to a judgeship is through the prosecutor's office. The jurisdiction that sends the most people to death row in Georgia is Columbus, Georgia, Muscogee County. Two of the four superior court judges there are former prosecutors who made their name and got their exposure in the community by trying high profile death penalty cases, and then got elected to the bench. Right now, the current prosecutor has announced that he is going to seek the bench when a vacancy comes up.

Trying death cases has helped these prosecutors get in front of the community. They call press conferences and announce they are going for the death penalty. Cameras in the court means that they are on television all during the trial, calling and arguing for the death penalty.

What is remarkable is that they benefit politically even when a death penalty case gets reversed because of prosecutorial misconduct. What did the prosecutor do? He called a press conference, talked about how the federal judges were hysterical, emotional, and personally opposed to the death penalty, and announced that he would seek the death penalty again.

What the local citizens got on television that night was a brief report that a federal court had reversed the death penalty and then some more great exposure for the prosecutor who was the person responsible for the reversal. Nobody knew that. All the citizens knew was here was a guy denouncing the federal courts and saying, we are going to see the death penalty in the next trial.

Race and class unfortunately often come into play in decisions by prosecutors. In another case in Columbus, Georgia, involving the death of the daughter of a contractor, the prosecutor, Bill Smith, called him up and said, do you want the death penalty, and the contractor said, yes, I do, for the person that killed my daughter.¹⁴⁸

The prosecutor responded, that's all I need to know. It was not a very long discussion, it was not very thoughtful, but that was all he

147. For further discussion of the political pressures on elected judges in capital cases, see Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 BOSTON U. L. REV. 759 (1995).

148. *Id.* (citing Clinton Claybrook, *Slain Girl's Father Top Campaign Contributor*, COLUMBUS LEDGER-ENQUIRER, Aug. 7, 1988, at B1).

needed to know, and he got the death penalty in that case. And in the next election, the contractor contributed \$5000 to his campaign when Smith ran for judge. That was by far the largest contribution that anybody contributed to that campaign.

A few years ago, we went to people in the African-American community in Columbus to see if Bill Smith had ever called any of them to ask them what they wanted. And not only did we find that never had an African-American family whose loved one was killed been called and asked whether they wanted the death penalty, we found they had not even been told when the case was plea bargained out.

I will never forget that at one of the breaks during the hearing on racial discrimination, one of the government witnesses came up to me—it was a young black man, Morris Comer, Mr. Comer, who was testifying against our client at the trial. He tugged on my shirt and he said, Mr. Bright, the guy who killed my sister is already out on the streets again, and nobody called us. Nobody even told us when they plea bargained the case out.

C. *The Lack of Adequate Representation for the Poor*

On the other side of the street, defending capital case is not nearly so attractive, and it does not have the same political benefits as prosecuting. In fact, in Columbus, one of the victims rights groups ran an advertisement against a defense lawyer who was running for mayor, not for prosecutor, and urged people to vote against him because he had defended criminal cases.

Not only is it not politically attractive, it often is not very financially attractive. In Alabama today, which has one of the largest death rows, particularly for its population, there is a statutory limit of \$2000 for out-of-court time spent on a death penalty case.¹⁴⁹

If a lawyer spends 500 hours preparing for a death case, which I think is not nearly enough—the cases we have, normally one lawyer will spend at least a thousand hours—but if one spends half that much time, 500 hours, that lawyer is going to get paid four dollars an hour.

149. See Stephen B. Bright, *The Politics of Crime and the Death Penalty: Not "Soft on Crime," But Hard on the Bill of Rights*, 39 ST. LOUIS U. L.J. 479, 494 n.57 (1995) [hereinafter Bright, *Politics of Crime*] (citing ALA. CODE § 15-12-21(d) (Supp. 1994)).

Although the statute limits payment for time spent out of court to \$1,000, an opinion of the Alabama Attorney General has concluded that the sentencing phase of a capital case is to be considered a separate case, allowing a maximum payment of \$2,000 for out-of-court time at a rate of \$20 per hour.
Id. (citing Op. Ala. Att'y Gen. No. 91-00206 (Mar. 21, 1991)).

Call the law firms here in Washington and tell them you want anything, the simplest kind of thing, a will, an uncontested divorce, a title search, and tell them you're willing to pay four dollars an hour, and see what you get.

It is time for all of us to acknowledge that the reality is you get what you pay for. One example is provided by a case in Houston, where the one lawyer appointed to defend a capital case was sleeping at times during the trial. A judge in Houston, Texas, a judge who had taken an oath to uphold the Constitution and the laws of the United States, said the Constitution guarantees a lawyer but it does not guarantee the lawyer must be awake during trial.¹⁵⁰

Now we are not talking about some case that got thrown out on ineffective assistance of counsel. We are talking about a person who may be executed. The testimony in one case was that the prosecutor, aware that this lawyer was sleeping from time to time, would go over and hit the defense counsel table while presenting his case, to wake the lawyer up.¹⁵¹

There was a front page story about this lawyer in *The Wall Street Journal* not too long ago, Joe Cannon.¹⁵² He has been appointed to a number of death penalty cases in Houston. It makes you wonder, what do the judges in Houston mean to accomplish by continuing to appoint a lawyer who, in several death penalty cases, has nodded off.

Judy Haney was represented by a lawyer who one morning came to court so drunk that the judge in Talladega County, Alabama, had to send the lawyer to jail, told the jury that he was recessing the trial for the day, and the next day produced both Ms. Haney and her lawyer from the jail; the trial resumed, and she got the death penalty.¹⁵³

After I described that case one time, someone said, well, she had another lawyer, the drunk lawyer was not the only lawyer. She had

150. See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1843 n.53 (1994) [hereinafter Bright, *Counsel for the Poor*] (citing John Makeig, *Asleep on the Job; Slaying Trial Boring, Lawyer Said*, HOUS. CHRON., Aug. 14, 1992, at A35) (discussing lawyer sleeping during part of capital case).

151. See *Ex parte* Burdine, 901 S.W.2d 456, 457 (Tex. Crim. App. 1995) (Maloney, J., dissenting) (noting testimony of jurors and court clerk that defense attorney slept during trial); cf. Deborah Tedford, *Killer Granted Stay in Dozing Lawyer Case*, HOUS. CHRON., Apr. 11, 1995, at 14 (noting that Texas Court of Criminal Appeals refused to grant Burdine new trial despite fact that Burdine's counsel slept through parts of trial and U.S. district court judge subsequently granted Burdine stay of execution).

152. See Paul M. Barrett, *On the Defense: Lawyer's Fast Work on Death Cases Raises Doubts About System*, WALL ST. J., Sept. 7, 1994, at A1 (noting that death penalty has been imposed on 10 men who were represented by Cannon and that "he boasts of hurrying through trials").

153. Haney v. Alabama, 603 So. 2d 368 (Ala. Crim. App. 1991) (stating that Haney was convicted of capital murder by Talladega County jury and sentenced to death); *aff'd sub nom. Ex Parte Haney*, 603 So. 2d 412, 413 (Ala. 1992), *cert. denied*, 113 S. Ct. 1297 (1993).

another lawyer. And that is true, she did. I saw, in the Alabama Bar Reports, that her other lawyer was disciplined for missing the statute of limitations on two workmen's compensation cases.¹⁵⁴ So she had two lawyers, one who was drunk during the trial and one who is not competent to handle a workman's compensation case.

This is not a technicality. Judy Haney had been abused for fifteen years by the man whose death she caused. That does not make it okay, but it is something a court should take into account with regard to punishment. But because her lawyers were drunk and uninvolved, the jury that sentenced her to death and the judge who approved the jury's recommendation never knew the full extent of the abuse. In fact, the prosecutor argued it had never taken place, when in fact there were medical records right there in town of her and her daughter's broken bones and injuries that they had suffered at the hands of this abusive husband.¹⁵⁵

This morning, one of the panelists on the first panel, talked about the day in the United States' attorney's office when the Westlaw was down and they could not do some legal research for a whole day.

There have been a number of people, including Billy Birt, who were represented in Georgia by a lawyer who was asked recently, when he was on the witness stand, to name all of the capital cases or all of the criminal cases from any court—the Georgia Supreme Court, the United States Supreme Court, any court—with which he was familiar.¹⁵⁶ He thought about it for a minute, and he said, well, there's the *Miranda* case, I know there's the *Miranda* case. Yes. So far, so good. Then he thought a little more and he said, and then there's the *Dred Scott* case.

Those were the only two "criminal" cases this lawyer could name, *Miranda* and *Dred Scott*.

The result for Billy Birt was pretty substantial.¹⁵⁷ He was tried in Jefferson County, Georgia, where the population is fifty-two percent African American.¹⁵⁸ The jury commissioners there had always

154. See Bright, *Politics of Crime*, *supra* note 149, at 493 n.55 (citing *Disciplinary Report*, ALA. LAW., Nov. 1993, at 401).

155. See Richard Lacayo, *You Don't Always Get Perry Mason: Judy Haney*, TIME, June 1, 1992, at 38, 38 (noting that defense attorney was unable to locate medical records until after defendant was sentenced).

156. See Bright, *Counsel for the Poor*, *supra* note 150, at 1839 n.32 (citing Transcript of Hearing of April 25-27, 1988, at 231, *State v. Birt* (Super. Ct. Jefferson County, Ga. 1988) (No. 2360)).

157. *Birt v. Georgia*, 225 S.E.2d 248, 250 (Ga.), *cert. denied*, 429 U.S. 1029 (1976) (stating that Birt was found guilty of one count of burglary, two counts of armed robbery by use of offensive weapons, and two counts of murder).

158. *Birt v. Montgomery*, 725 F.2d 587, 598 n.25 (11th Cir.) (stating jury pool statistics), *cert. denied*, 469 U.S. 874 (1984).

under-represented, and almost excluded African Americans from participation. It was patently unconstitutional, but nobody ever challenged them.

Billy Birt's lawyer, as you might imagine, if all the law he knew was *Miranda* and *Dred Scott*, was not aware of the Supreme Court cases that hold that a fifty percent under-representation of African Americans on the jury violates the Sixth and Fourteenth Amendments.¹⁵⁹

Billy Birt was no fool. He came to court and he said, I want a new lawyer. My lawyer has not been to see me, he's not prepared, he doesn't care about me. And the judge said, we're paying the lawyer, not you.¹⁶⁰ The judge denied the motion to replace counsel.

The case went to trial, and when the case got to the United States Court of Appeals for the Eleventh Circuit, it held that the jury claim was waived because the lawyer never raised it, and it also held that the lawyer was not ineffective for the representation that he provided.¹⁶¹ The Sixth Amendment to the United States Constitution guarantees you no more than a lawyer who knows *Miranda* and *Dred Scott*.

The death penalty was upheld in a case out of Pennsylvania,¹⁶² where the lawyer tried the case under the impression that the trial was governed by a death penalty statute that had been declared unconstitutional three years before because it unconstitutionally limited the evidence that could be put on at the penalty phase.¹⁶³

Now those of you here at law school, let me just tell you, when you get out of law school, you ought to check to see if the statute your client is being tried under is the right one. That is fundamental. And if you have a law degree, you should be able to do that.

The federal district court in Pennsylvania agreed and held that was ineffective assistance of counsel.¹⁶⁴ The Court of Appeals reversed and upheld the death sentence.¹⁶⁵

159. See Bright, *Counsel for the Poor*, *supra* note 150, at 1839 n.30 (citing U.S. CONST. amends. VI, XIV; *Whitus v. Georgia*, 385 U.S. 545 (1967); *Strauder v. West Virginia*, 100 U.S. 303 (1879)).

160. Bright, *Counsel for the Poor*, *supra* note 150, at 592 n.10 (quoting Birt's testimony at state habeas proceeding).

161. *Birt*, 725 F.2d at 601.

162. See Bright, *Counsel for the Poor*, *supra* note 150, at 1842-43 n.49 (noting that court reversed finding that defendant had ineffective representation) (citing *Frey v. Fulcomer*, 974 F.2d 348, 359 (3d Cir. 1992)).

163. See *Commonwealth v. Moody*, 382 A.2d 442, 447 (Pa. 1977) (holding statute unconstitutional because it prevents jury from sufficiently considering mitigating circumstances), *cert. denied*, 438 U.S. 914 (1978).

164. See *Frey v. Fulcomer*, No. 89-4248 1991 WL 53662, at *6 (E.D. Pa. Mar. 28, 1991), *vacated in part*, 974 F.2d 348 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1368 (1993).

165. See *Frey v. Fulcomer*, 974 F.2d 348, 369 (3d Cir. 1992) (upholding death sentence), *cert. denied*, 113 S. Ct. 1368 (1993).

There are a lot of other examples.¹⁶⁶ Increasingly the right to counsel is seen as one of those unfunded mandates that the states are not required to fulfill.

And the result of that is that juries are not getting the information that is necessary to do their jobs. Gary Nelson spent eleven years on Georgia's death row, convicted on the basis of expert testimony about a hair found on the victim's body that supposedly matched that of Gary Nelson.¹⁶⁷

Unlike the O.J. Simpson case or some of the others we see, he had no expert witness. His lawyer was never able to check that out. And when later, a law firm in Atlanta took the case pro bono and did have it analyzed, it turned out the hair was not a head hair or pubic hair, which are subject to microscopic analysis; it was a chest hair, and in fact it was of no forensic value whatsoever. Gary Nelson was released after eleven years on death row.

Now some have argued that Nelson's case is a great example of the system working. I must say, I am troubled if people really think that spending eleven years on death row for a crime one did not commit is an example of the system working. The trial should be the main event. It should be that a person accused of a capital crime, who is on trial for his life, should have the expert assistance.

Someone said this morning, well, once you know the person stuffed the panties down the person's throat and she gagged on it, then that is all we need to know. But you need to know more because you might not have the right person. There may be other issues there about the role that the person played. Often that information is not before the juries and the adversary system cannot work.

Often when these cases are appealed and there are fundamental violations of the Bill of Rights that have not been preserved by lawyers such as the one who represented Billy Birt, courts refuse to examine the issues and executions take place.

The first person executed in Georgia after *Furman* was John Eldon Smith, who had been sentenced to death by a jury from which women had been completely excluded,¹⁶⁸ as was his co-defendant. The co-defendant's lawyer raised the issue. Of course it was denied by the

166. See Bright, *Counsel for the Poor*, *supra* note 150, at 1837-66 (describing examples where defendant facing death penalty received ineffective assistance of counsel).

167. David Lundy, *Bondurant's Costly Death Appeal*, FULTON COUNTY DAILY REP., Aug. 18, 1989, at 6.

168. *Machetti v. Linahan*, 679 F.2d 236, 241 (11th Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983); see Bright, *Counsel for the Poor*, *supra* note 150, at 1839 n.34 (noting that Georgia's "opt-out" provision, which allowed women to decline to serve on juries, caused under-representation of women and was unconstitutional).

elected state judge.¹⁶⁹ He had no choice in the matter if he wanted to remain on the bench. John Eldon Smith's lawyer was not aware of *Taylor v. Louisiana*¹⁷⁰ that had been decided by the United States Supreme Court, which said that discrimination against women in jury selection violates the Constitution.¹⁷¹

Both co-defendants were sentenced to death.¹⁷² When the cases got to federal court, the co-defendant was granted a new trial, was tried before a jury that fairly represented the community, and a life sentence was imposed.¹⁷³

When John Eldon Smith's case got to federal court, the court held that because his lawyers had not preserved the issue, it was waived, was forfeited, and he was executed.¹⁷⁴ If you switched the lawyers in these two cases, it would have switched the outcome. The co-defendant would be dead today, and Smith would be alive. That is the difference that a lawyer makes in these cases.

I'm not terribly optimistic that this situation is going to change. Robert Kennedy, when he was Attorney General, said a poor person accused of a crime has no lobby, and that is certainly true today. I do not think it was true then because Robert Kennedy was actually a very effective voice for the poor and the disadvantaged and people of color in our society. He championed the Criminal Justice Act¹⁷⁵ being passed by the Congress.

When *Gideon v. Wainwright*¹⁷⁶ was before the United States Supreme Court in the sixties, and Florida was arguing that a person like Clarence Earl Gideon had no right to counsel in a criminal case, and asked other states to join them in supporting that, Walter Mondale and others who were the Attorneys General of twenty-two states decided to come in on Gideon's side, and argue that poor people are entitled to counsel because the system cannot work if the accused are

169. See *Smith v. Kemp*, 715 F.2d 1459, 1469 (11th Cir. 1983) (stating that co-defendant's lawyer raised issue of jury composition at first habeas corpus proceeding and, while failing to obtain state relief, succeeded in first federal habeas corpus appeal).

170. 419 U.S. 522 (1975).

171. *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975).

172. *Smith v. Kemp*, 715 F.2d 1459, 1476 (Hatchett, J., concurring in part and dissenting in part) (describing both cases).

173. *Id.* (Hatchett, J., concurring in part and dissenting in part).

174. See *Smith*, 715 F.2d at 1469-72, 1476 (Hatchett, J., concurring in part and dissenting in part).

175. Criminal Justice Act of 1964, Pub. L. No. 88-455, 78 Stat. 552 (1964) (codified as amended at 18 U.S.C. § 3006A (1994)).

176. 372 U.S. 335 (1963).

not represented by counsel.¹⁷⁷ The only two states that supported Florida were North Carolina and, of course, Alabama.¹⁷⁸

Today, we do not have this kind of leadership. Even the most minimal efforts to improve the quality of representation in cases are opposed by the Attorneys General Association and the District Attorneys Association. Recently Dan Lungren, the Attorney General of California, opposed what was a totally inadequate proposal that required two lawyers be appointed to defend a death penalty case because in a lot of cases in California, they do not provide two lawyers, which seems remarkable to me. Even down South, we provide people with two lawyers.

The Attorneys General of the United States, both Republicans and Democrats, have opposed efforts to improve quality of counsel in these cases.

There is never going to be adequate funding and there is certainly never going to be a sufficient number of lawyers to respond to the need, although I hope some of you will when you leave this law school. But at the very least, public defender offices could be established.

Most of the states where I practice have no public defender office at all. Local lawyers are appointed by the judges, totally at the whim of the judge. There is no group of lawyers, like on the prosecution's side, who specialize in the defense of criminal cases who stay in an office for some period of time, who learn the skills, who go to conferences, who do the things you need to do to be an effective advocate.

If we are not going to spend much money as a society on these cases, we at least have to do better than just simply appointing young, inexperienced, and often uncaring lawyers and paying them \$2000 or \$3000, which is the system in many, many states, particularly down in the South where most people are being sentenced to death.

D. Indifference to Racial Discrimination

Let me just finally say something about race. One case that shows the convergence of counsel and race issues in these cases is a case of a man named Wilburn Dobbs that Georgia plans to execute. Dobbs was sentenced to death after a trial where he was called by his first

177. *Gideon v. Wainwright*, 372 U.S. 335, 335-36 (1963) (listing 22 states and commonwealths supporting indigent defendant's right to counsel in criminal trial and joining in brief as *amicus curiae*).

178. *Id.* (listing Alabama and North Carolina as supporting Florida on *amicus curiae* brief).

name by the prosecutor and he was called "colored" and "colored boy" by the judge and the defense attorney.¹⁷⁹

He was represented by a lawyer who said that right up until the day of trial, he did not know he was going to be the lawyer in the case and he did not know the state was going for the death penalty.¹⁸⁰

The judge nevertheless denied his continuance. The lawyer admitted later in testimony some pretty pronounced racial biases—that he believes black people make good basketball players but not good teachers.¹⁸¹ That if he ever calls a state agency and an African American answers the phone, he just hangs up. That he uses the slur "nigger" from time-to-time.¹⁸² This lawyer put on no evidence at the penalty phase, and for a closing argument, he read Justice Brennan's concurring opinion in the case of *Furman v. Georgia*.¹⁸³

It was not the best opinion to read because of course, at that time, Justice Brennan was saying the death penalty was unconstitutional and could not be carried out.¹⁸⁴ If a prosecutor gave that argument that the death penalty would not really be carried out, it would be reversed under the Supreme Court's decision in *Caldwell v. Mississippi*.¹⁸⁵

But nonetheless, that is what he did, and the federal district court recently ruled that such representation was not ineffective assistance of counsel,¹⁸⁶ and, beyond that, that the lawyer's racism was irrelevant because the lawyer did not sentence Mr. Dobbs.¹⁸⁷

This case shows two things: how indifferent the courts are to poor quality of representation and how indifferent they are to the influence of racial prejudice in these cases.

To represent a person in a case, one has to know that client and has to investigate his life and background, and has to know his family and the people he works with and all that. And if that lawyer believes

179. *Dobbs v. Zant*, 720 F. Supp. 1566, 1578 (N.D. Ga. 1989), *aff'd*, 963 F.2d 1519 (11th Cir. 1991), *remanded*, 113 S. Ct. 835 (1993).

180. *Id.* at 1577.

181. *See id.* (discussing district court's summary of Dobb's trial attorney's racial views).

182. *Id.*

183. 408 U.S. 238 (1972); *see Dobbs v. Zant*, 113 S. Ct. 835, 837-38 (1993) (Scalia, J., concurring) (agreeing with lower courts that reading excerpts from Brennan's dissent in *Furman* in closing argument did not constitute ineffective assistance of counsel).

184. *See Furman v. Georgia*, 408 U.S. 238, 305 (1972) (Brennan, J., concurring) (contending that death penalty constitutes "cruel and unusual punishment" and that states may not impose it as form of punishment).

185. 472 U.S. 320 (1985).

186. *Dobbs v. Zant*, No. 4:80-CV-247-HLM (N.D. Ga., Order of July 29, 1994).

187. *Id.*; *see also Dobbs v. Zant*, 720 F. Supp. 1566, 1578 (N.D. Ga. 1989), *aff'd*, 963 F.2d 1519 (11th Cir. 1991), *remanded*, 113 S. Ct. 835 (1993).

those people are inferior, if he does not believe those people are really worthy of saving, then he is not going to do a very adequate job.

We tolerate race discrimination in the criminal justice system that would not be tolerated in any other area of American life today.

The District Attorney in Jackson, Mississippi, the largest city in Mississippi, Ed Peters, has said both publicly in the newspaper¹⁸⁸ and under oath in a deposition,¹⁸⁹ that when he picks a jury, his policy is to get rid of as many black people as possible.

What other public official, what school, what housing authority, what employer, could have a policy of getting rid of people based on their race? And yet in the case of Leo Edwards, an African American tried by an all-white jury, both the district court¹⁹⁰ and the Fifth Circuit¹⁹¹ upheld that and Leo Edwards was executed.

Recently, our office handled a case in Chambers County, Alabama. At the time we were there, they still kept the marriage license books engraved "White" and "Colored." The prosecutor had used twenty-six jury strikes to exclude twenty-six African Americans from Albert Jefferson's case.¹⁹² Jefferson was a mentally retarded African American charged with a crime against a white person.

That was bad enough, but when we started going through some records at the courthouse, we found that the prosecutor had divided the prospective jurors up into four lists. One list marked "strong" contained approximately twenty-five people. Another list was marked "medium;" I guess those were the people he did not think would be as good jurors for the state. One list was marked "weak," and then a

188. See *Edwards v. Scroggy*, 849 F.2d 204, 207 (5th Cir. 1988) (stating that July 1983, newspaper article quoted Peters as saying that he tried to "get African Americans off of jury panels"), *cert. denied*, 489 U.S. 1059 (1989).

189. See *id.* (noting that when Peters was deposed he stated that "he had a philosophy of striking the black juror when presented with a choice between a white and black juror and all other factors were equal" because "blacks were more sympathetic to the defense than white jurors are").

190. See *Edwards v. Thigpen*, 682 F. Supp. 1374, 1379-80, 1387 (S.D. Miss. 1987) (vacating stay of execution), *aff'd sub nom. Edwards v. Scroggy*, 849 F.2d 204 (5th Cir. 1988), *cert. denied*, 489 U.S. 1059 (1989).

191. See *Edwards v. Scroggy*, 849 F.2d 204, 206 (5th Cir. 1988) (applying standard from *Swain v. Alabama*, 380 U.S. 202 (1965), and noting that subsequent standard from governing state preemptory challenges in *Batson v. Kentucky*, 476 U.S. 79 (1986), is not applicable to this case), *cert. denied*, 489 U.S. 1059 (1989).

192. See Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509, 520 & n.45 (1994) (citing Transcript of Post Conviction Rec. at 39-56, *State v. Jefferson*, No. CC-8-87, Cir. Ct., Chambers County, Ala., Jan. 25, 1989, *rev'd on other grounds*, 645 So. 2d 313 (Ala. Crim. App. 1994)).

fourth list was marked "black."¹⁹³ He had listed all of the African Americans on that last list.

Again, what other person in public life could divide people up on the basis of race and exclude all the people of one race, and get away with it? Well, you can in Chambers County, Alabama. The court held no race discrimination because the prosecutor had a race-neutral reason for all twenty-six strikes.¹⁹⁴

Alabama now has scheduled two people for execution, two more African Americans. Of the ten people executed in Alabama, seven have been black.

The saddest and worst record in the area of race and the death penalty unfortunately is the federal government. Of the first thirty-seven federal prosecutions under the Anti-Drug Abuse Act,¹⁹⁵ all but four were against members of racial minorities.¹⁹⁶

Janet Reno recently approved the death penalty for a case in Washington over the objection of the local United States Attorney,¹⁹⁷ a case where it is extremely hard to find any federal interest in the case.

Of the first ten cases that Janet Reno approved for the death penalty as Attorney General of the United States, all were against African Americans.¹⁹⁸

The Anti-Drug Abuse Act that was passed in 1988, was supposedly for "drug kingpins" who were involved in homicides. Where are these drug kingpins?

Where might you think? Detroit? New York? Some parts of California? If you look at how that Act has been used, for some reason, they all seem to be in the Eastern District of Virginia, and in fact, most seem to be in Norfolk.

Despite that sad record by our federal government, Congress last year, when it passed the Crime Bill, refused to adopt the Racial Justice

193. *Id.*

194. *Alabama v. Jefferson*, No. CC-81-77, Cir. Ct., Chambers County, Ala., (Order of Oct. 2, 1992), *rev'd on other grounds*, 645 So.2d 313 (Ala. Cr. App. 1994).

195. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001, 102 Stat. 4181, 4387 (codified at 21 U.S.C. § 848(e) (1994)).

196. See Bright, *Politics of Crime*, *supra* note 149, at 481 nn.6 & 8 (citing STAFF REPORT BY THE HOUSE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS, RACIAL DISPARITIES IN FEDERAL DEATH PENALTY PROSECUTIONS 1984-94, 103d Cong., 2d Sess. 2 (1994); Kenneth J. Cooper, *Racial Disparity Seen in U.S. Death Penalty*, WASH. POST, Mar. 16, 1994, at A5).

197. *Locy*, *supra* note 3, at A1 (reporting that Reno persuaded U.S. Attorney for District of Columbia, who had originally recommended that death penalty not be sought, to seek death penalty against Donzell McCauley for murder of Officer Jason E. White).

198. See Joseph P. Cosco, *Federal Government Gearing Up for Executions; A Death Row Will House Felons*, VIRGINIAN-PILOT (Norfolk), Jan. 28, 1994, at A1 (stating that all of death penalty prosecutions to which Attorney General Reno consented were against African Americans).

Act,¹⁹⁹ to allow courts to at least start dealing with those kind of disparities and try to see if there are race-neutral reasons behind them. I must say, in all sadness, I was not terribly surprised.

Back in the 1930s and the 40s, when people were being lynched in this country, there were repeated efforts to pass an anti-lynching statute, it was always opposed.²⁰⁰ At that time, the federal government was more interested in pursuing moonshiners than it was in preventing the lynching of people.²⁰¹ Unfortunately, things have not changed that much.

E. Challenges for the Twenty-First Century

These things go to questions of the integrity of the system. What are we going to do about it?

For those of you who are law students, you face tremendous temptations. You can make a fortune practicing law doing some fairly trivial things that are not very stress producing. You have to think about where you are going to put your energies, and are you going to do that, or are you going to respond to some of the more desperate needs in our society.

Elie Wiesel, when he accepted the Nobel Peace Prize, said our lives are not our own; they belong to those who need us desperately.²⁰²

I would suggest to those of you who are going into the legal profession, that there are many desperate needs, but one area where the needs are most desperate is poor people facing the death penalty.

There are many people like Judy Haney and many people like the others that I have described, who, with all of society, the prosecutors,

199. The House passed the Violent Crime Control and Law Enforcement Act of 1994, H.R. 4092, 103d Cong., 2d Sess., with the Racial Justice Act, H.R. 4017, inserted as title IV. *See* 140 CONG. REC. H2608 (daily ed. Apr. 21, 1994) (recording passage of H.R. 4092 with Racially Discriminatory Capital Sentencing provision intact). H.R. 4092 was then inserted into the Amendments to Omnibus Crime Control and Safe Streets Act of 1968, H.R. 3355, 103d Cong., 1st Sess. (1993). 140 CONG. REC. H2609 (daily ed. Apr. 21, 1994). The Senate then adopted a nonbinding resolution instructing the conferees to demand that title IX be dropped from the final bill. 140 CONG. REC. S5526 (daily ed. May 11, 1994); *see also* 140 CONG. REC. S6018-S6104, S6106-08 (daily ed. May 19, 1994) (relating full text of H.R. 3355 and Senate's dissatisfaction with title IX). The provision was ultimately omitted by the conference committee. H.R. CONF. REP. NO. 711, 103d Cong., 2d Sess. 388, *reprinted in* 1994 U.S.C.C.A.N. 1839, 1856. The Act became law without the provision. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (approved Sept. 13, 1994) (to be codified at 42 U.S.C. § 13701).

200. W. FITZHUGH BRUNDAGE, *LYNCHINGS IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930*, at 238-44 (1993).

201. For further discussion of the influence of race on the imposition of the death penalty and the failure of legislatures and courts to deal with the problem, see Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in the Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433 (1995).

202. Elie Wiesel, *This Honor Belongs to All the Survivors*, N.Y. TIMES, Dec. 11, 1986, at A12.

the power of government against them, and the public hue and cry for execution, do not have even one person to stand up and argue for their humanity and why they should be preserved.

Beyond that, I think all of us must realize that there should be some limits on our system. We have here today the pleasure of hearing from some of the most responsible prosecutors in the country; people who have exercised discretion in ways that are consistent with the intent of these laws.

But they are not the only people who prosecute. Particularly in systems where people are elected, where people are advancing their political careers, the court system often is abused. Society has entrusted important functions, like the prosecution of cases, to people, some of whom are wonderful people but some of whom are not really the people who should be entrusted with that kind of responsibility.

In addition, we have to realize that the Bill of Rights is not a collection of technicalities. There must be some effort by responsible people to refrain from demagoguery on the crime issue. We have to get away from this notion that to avoid being soft on crime, you must be hard on the Bill of Rights. We have to realize that the passions of the moment and politics often come into play in these cases because they are so one-sided.

I go to jurisdictions all over the South where people won't drink out of the same Coke machine with me. And the thing I hear from lawyers more than anything else when I say we must move to recuse this judge because he is racist, or we must move to recuse this prosecutor, or we must file a motion challenging the under-representation of black people on the jury is, "I've got to live here."

For example, in Columbus, Georgia, there was under-representation of African Americans in the juries for years. The local so-called public defender, who handled 500 cases at a time—he was "public" but I am not sure he was a defender—had a policy against filing challenges to under-representation of black people on the juries because, as he put it, he had to live there.

Lawyers and courts must recognize and struggle with the role of race in these cases because otherwise we will never eliminate the influence of racial prejudice. The goal of the courts now is just to sweep it under the rug, pretend it is not there, act like it is not going on, when everybody knows what is happening.

I recall a hearing in Cowetta County, Georgia, in James Ford's case. The prosecutor had used most of his jury strikes to get all the African-American people off the jury. The case had been remanded for the

prosecutor to give his reasons for the jury strikes. The prosecutor took the witness stand, and an assistant prosecutor was examining him, and the assistant prosecutor would ask him each time why he struck the person. For each juror, the prosecutor had some reason, such as one juror worked at a videotape store, and if you watch videotapes, you're more likely to give a life sentence. Those kinds of reasons were given for striking people.

Each time, after giving one of the reasons; the assistant prosecutor would say, well, now, did race have anything to do with it? And the prosecutor, under oath, would reply oh, no, race had nothing to do with it.

I was struck by it. I thought, he knows he's lying. I mean, you don't strike nine out of ten black people out of coincidence. He knows he's lying. The judge who was presiding had been a prosecutor himself. That's how he got to be a judge; he had struck all the black people from the jury when he was a prosecutor. He had taught this prosecutor how to do it. He knew the prosecutor was lying. He knew how the game was played, he had played it himself most of his career.

We know he's lying. Then I thought about the people out in the courtroom, whether they are white or black, everybody in that courtroom knew that the prosecutor was lying.²⁰³ I thought this is not a court of justice. This is a court of vengeance. We are here not for justice, but for a different agenda. That is the thing we have to remember, that so long as we have courts of vengeance, we will never have courts of justice.

V. CONTEMPORARY SOCIETY AND THE DEATH PENALTY

MR. WOOTTON: I want to say, at the outset, that I agreed to moderate this in spite of the fact that the Safe Streets Alliance does not have a position on the death penalty.

There are two issues we don't have a position on, the death penalty and gun control, because they are so divisive and there are so many

203. The prosecutor's reasons did not withstand scrutiny by the Georgia Supreme Court on appeal and James Ford's conviction and sentence were set aside. *Ford v. State*, 423 S.E.2d 245 (Ga. 1992). More often, however, reasons given by prosecutors, no matter how fanciful, for striking African-American jurors are upheld by trial and appellate courts. See generally Kenneth B. Nunn, *Rights Held Hostage: Race Ideology and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63 (1993); Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky*, 27 U. MICH. J.L. REF. 229 (1993).

people on both sides that we found it useful not to alienate people who have a position on either side.

But at the same time, I'm very honored to be here, and to be the moderator for this discussion. And to open the discussion, I would like to ask each of the panelists to share briefly where they're coming from, which means maybe why they think they're here and talking about this issue, and what their position is, if they have one, on the death penalty.

Mr. Shilling?

MR. SHILLING: Thank you.

I represent the Stephanie Roper Committee, and the first thing I want to share with you is that our organization does not formally have a position either on the death penalty or gun control for obvious reasons.

We feel that the victims' rights movement and the legislation that we work for transcends what often is as best described as a very emotional and controversial issue.

We also find, if you looked inside of our organization and looked at the real chemistry, you would find that we're broken into thirds about those type of positions.

There's approximately one third of our organization that feels very strongly for the death penalty.

There's another third at least, and in which I fall into that has serious reservations about the death penalty as we know it today. The way it is administered, the way it's attempted to be administered, and the costs. A lot of my concern is the cost and whether it even makes logical sense in the form that we view it today.

Then there's a third portion in our group that have real strong religious feelings for the most part, that they don't believe in the death penalty.

So for lots of reasons, our organization does not choose to formally buy into the emotional concerns surrounding it.

However, as an individual, which is part of the reason why I'm here, is to give you some insight, to say to you that the death penalty, the way it currently is, that typically you'll find that it costs almost a million dollars per appeal for a death row inmate,²⁰⁴ and most of these appeals are obviously guaranteed in the process.

204. See Charles L. Lindner, *Cost of Death: A Billion Dollars and Counting*, L.A. TIMES, Aug. 29, 1993, at M1 (noting that courtroom costs, prosecution and defense teams, appellate review, and habeas corpus writs total approximately \$3.5 to \$4.5 million for each defendant sentenced to death).

It's an on-going process that takes many, many years. I don't think it's fair additionally, to a certain degree, for the victim's family. Victims have to go through the emotional upswings and down swings the way the current death penalty system is. As far as the inmate, if there is going to be finality to the person who is on death row, it's not very fair either. The tremendous emotional playing with one's mind as to will this in fact be the month that I will be put to death.

You can also get into all side discussions about the manner of administering the actual act, whether it be lethal injections or gas, and I think there's some valid arguments there. I recall a little bit of the discussion that the panel had before us, and there are some emotional concerns that one needs to consider when deciding on a manner of execution, so that it is not cruel or unusual.

But there are side issues for victims, and for myself. I think the main thing is to say that if it's going to cost a million per appeal, and this money is going to fall back on the state, very few inmates, if any, that I can recall, who are appealing death penalty sentences in the past have been doing it from their own private funds.²⁰⁵ Hence, these appeals are by and large done by and at the expense of the state. So we get into a mathematical or business-like equation about it, and I think from the legislation that we've worked on in Maryland and some other states, I think life without the chance of parole, for lots of reasons, under the current way that we try to administer the death penalty, seems to be a very good and reasonable choice and approach. Hence, there's a lot of cost savings, and those savings can go to education, go to more prisons, go to more community policing, and could even go to a lot of other rehabilitation programs.

Therefore, the reality of it is that you can incarcerate possibly ten or fifteen additional people in the prisons without the chance of parole, just from the interest alone of the one million to one-and-a-half million dollars costs the state will bear out through trying to publicly defend someone who has a mandatory appeal for the death sentence.

MR. WOOTTON: Mr. Morin?

MR. MORIN: I've been involved in defending capital cases and doing capital appeals for about fifteen years now, and I've never publicly stated my position on the death penalty. And I'm not sure it's a useful statement because what it tends to do is divide people,

205. See Pamela Manson, *Matter of Life or Death: Capital Punishment Costly Despite Public Perception, It's Cheaper to Keep Killers in Prison*, ARIZ. REPUBLIC, Aug. 23, 1993, at A1 (stating that while defendant may use own money for trial, almost all those found guilty cannot afford appellate process).

and you get into discussions about whether somebody's more moral or has more morality than someone else.

My interest is in the process, assuming we are going to have a death penalty, there are some fundamental issues we haven't addressed yet.

So my position on the death penalty is I've recognized that reasonable people can disagree about it, and I don't say much more other than that on the ultimate question about the policy of having the death penalty.

My interest is more, if you make that decision, then you have to address some fundamental issues that infect the process we now have.

MR. WOOTTON: Thanks.

Mr. Von Drehle?

MR. VON DREHLE: My approach to the death penalty is as a journalist, not as an advocate or an activist. I began reporting on capital cases as a general assignments reporter at *The Miami Herald* in Florida about seven years ago.

By telling the story of a particular case, I became interested in how the system works more generally. Gradually my investigations of that case led me to trying to write the first book that would tell, in a narrative way, the story of the death penalty in modern America, how it's experienced by everyone intimately involved with it.

Obviously, the inmates themselves, but also the victims of crimes, the prosecutors, the defense attorneys, the judges, the politicians, and so I've told this story in my book over the course of about a twenty to twenty-five year period in the State of Florida.²⁰⁶

I used Florida as an example of facts that are true about the whole country. What I determined was whether people support or oppose the death penalty personally is no longer an important distinction in their conclusions about the death penalty, that among people who live with it and work with it and understand it intimately, no one likes it.

There are now 3000 people on death row in America.²⁰⁷ This year, there will be something on the order of thirty to forty executions probably.²⁰⁸ That is about one percent. This ratio, one percent of

206. See generally DAVID VON DREHLE, *AMONG THE LOWEST OF THE DEAD: THE CULTURE OF DEATH ROW* (1995).

207. See John A. Barnes, *National Issue Capital Punishment Gridlock*, INVESTOR'S BUS. DAILY, Apr. 10, 1995, at A1 (noting that since states resumed use of capital punishment, more than 5000 death sentences have been imposed, approximately 2000 of which "have been thrown out completely," and that 272 inmates have been executed).

208. See Sean Whaley, *Death Row Population on the Rise*, LAS VEGAS REV.-J., Sept. 11, 1995, at 1B (stating that thus far, 38 executions have taken place in 1995).

the people on death row being executed, has been a pretty constant number for over ten years now.²⁰⁹

It does not appear to be changing, either getting much faster, or slower, as a percentage of the death row population.

Nor is it getting less expensive, in terms of the public money that Mr. Shillings referred to, and he's right about; and the time, which has become almost comical in a really macabre way. There are now inmates on Florida's death row who have been there for twenty years waiting for their sentences to be either carried out or reduced.²¹⁰

There are scores of inmates across the country who've been on death row more than fifteen years²¹¹ and hundreds across the country who've been on death row more than ten years.²¹² That's no longer unusual, it's the norm.

So it's expensive, it's slow. There seems to be no reason, at the end of the day, why the one percent who are executed have been selected out of the vast pool on death row. It seems to reach a kind of unpredictable and sputtering wheel-of-fortune kind of result.

So that no matter what the intention might be of sending a message about crime, of expressing a public rage over the very serious problem of violent crime, the truth is that, as former Supreme Court Justice Lewis Powell, a great supporter of the death penalty, told his biographer recently, the death penalty, as it exists, makes a mockery of the law in America by threatening and imposing punishments that, in most cases, will never be carried out.²¹³

209. See *National Digest Wire Reports*, FORT WORTH STAR-TELEGRAM, Dec. 9, 1994, at 4 (noting that in 1993, 37 of 2716 inmates on death row were executed and that in 1992, number of executions was 31); David Von Drehle, *A Slow Death - After 21 Years in Prison, Doug McCray Has Become a Living Symbol of Florida's Costly and Chaotic Death Row*, SUN-SENTINEL FT. LAUDERDALE, July 9, 1995, at 8 (noting that in 1994, 31 inmates out of more than 3000 were executed).

210. See VON DREHLE, *supra* note 206, at 8 (noting that Florida convict, Thomas Knight, has spent 20 years on death row); *Death Row Inmates Linger for Decades But One Murderer May Set a Record This Month, Being Executed 22 Years After the Crime*, ORLANDO SENTINEL, June 11, 1995, at B1 (referring to Joseph Spaziano); see also Carlos Sanchez, *House Approves Bill to Refine Death Row Appeals, Cut Delays*, FORT WORTH STAR-TELEGRAM, May 19, 1995, at 34 (stating that in Texas, several convicts have been on death row for almost 20 years).

211. See Linda Kleindienst, *Inmates' Death Row Time May Be Halved*, ORLANDO SENTINEL, Apr. 27, 1995, at B5 (noting that in Florida, 31 inmates have remained on death row for longer than 15 years).

212. See Barnes, *supra* note 207, at A1 (stating that 10- to 12-year wait on death row is becoming norm); Aaron Epstein, *High Court Refuses to Hear Inmate Plea That Death Row Cruel*, HOUS. CHRON., Mar. 28, 1995, at 8 (discussing length of time inmates serve on death row); Linda Kleindienst, *House OKs Bill to Reduce Length of Death Row Appeals*, SUN-SENTINEL FT. LAUDERDALE, Apr. 27, 1995, at 16A (stating that average death row inmate in Florida does not get electric chair until 9.7 years after initial sentencing).

213. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 451 (1994) (reporting statement made by Justice Powell in 1990 interview that if Justice Powell were member of state legislature he would not vote for capital punishment because it "reflects discredit on the law to have a major component of the law that is simply not enforced"); VON

MR. WOOTTON: Thank you.

Mr. Sonner?

MR. SONNER: Yes. One of the disadvantages of going last is that many of the points that you had intended to make have already been covered, but let me underline some of them.

I was a little concerned, when I was selected to be on this panel, that you might be expecting a prosecutor to come in who is pro-death penalty and would therefore serve as a counterbalance in the adversary system for death penalty litigation. I may not be able to fill that role.

I've been a prosecutor for almost all of my legal career. As you can see, it's been quite awhile, and I did prosecute some death penalty cases personally in earlier days.

Today, as the elected prosecutor in Montgomery County, Maryland, I have the responsibility to make the certifications for death penalty prosecution, to use the discretion of the prosecutor to make a determination as to whether or not a particular defendant will be subjected to a trial in which the death penalty will be threatened.

In the last election, which was just about a year ago, I ran against somebody who was for the death penalty, while I took the position which I take consistently, that I am opposed to the death penalty. Had that been the only issue in the election in Montgomery County, a highly educated, well-off county, I would have lost the election.

Last year was different from any other year in which I have ever run for office. The public now is clearly in favor of the death penalty. Every forum that I went to, if I tried to defend my position against the death penalty, it was even more difficult than defending plea bargaining, which if you know anything about that, know it is impossible.

Death penalty prosecutors are engaged in a largely symbolic function. Few people are being executed, so there is a certain amount of fraud involved as we go to victims of crime and tell them that we're going forward with the death penalty, with a death penalty proceeding. The truth is we are going through a process that is not likely to result in a death sentence being carried out. If the past is any indication at all of the future, few of the jury verdicts for death will ever be imposed. I think that, in and of itself, is a reason to be opposed to the death penalty.

DREHLE, *supra* note 206, at 412 (noting Powell told biographer that today he would vote differently in *McCleskey v. Kemp* decision that upheld imposition of death penalty from claim of racial bias).

I heard the discussion earlier on the role of the victims in making a determination of the death penalty. I do give the victims' families a veto right. I will not go forward with one where they really do wish to have closure. I will not subject them to what we know is going to be protracted litigation, the public expense, a drawn-out process, and the subjecting of the case to closer scrutiny that could cause reversal and another trial.

The defense attorneys, who will be excellent defense attorneys in my jurisdiction, will be raising every possible issue that they can, and hoping that the judges will rule against them so that they can preserve those points for appeal.

So it is a process that, before we decide to go forward and ask for a death sentence, we had better understand what we're doing. First, it is largely symbolic and then second, we are going to be subjecting the victim's family to a very long and drawn out, painful process and the risk of reversal.

I am amazed, quite frankly, at how many people, when you do explain the process to them and how long it will be and what it will subject them to, the possibility of having to go through a second trial after a reversal, how many people recognize how difficult it is and want to avoid it.

Let me say just one last thing in closing. You made reference earlier to Justice Powell. I heard a speech that he made some ten, eleven years ago, and after he, of course, had been in the seven-to-two majority that upheld the death penalty. He said that if we couldn't come to grips with a better system of habeas corpus in death penalty cases, then we really ought to reexamine why we, as the only western industrialized nation using capital punishment, continue the practice.²¹⁴

I think that if those Justices on the Supreme Court in 1976 had been able to go forward like Charles Dickens' *Christmas Carol* and look at the way that the process has worked in the twenty years and the erratic way in which it's being administered in this country, they would have reversed the holding of the majority.

214. See David Mazie, *Death Penalty Remains Alive Around World, Arousing Strong Passions; Punishment: In 1992 1,708 Prisoners Were Executed in 35 Countries, Four-Fifths of Them in China and Iran, According to Amnesty International*, L.A. TIMES, Jan. 16, 1994, at 2 (noting that, with exception of Turkey, United States is only member of NATO that routinely puts inmates to death); see also Bruce Finley, *Pressure On to Cut Death Row Appeals*, DENVER POST, Sept. 11, 1995, at A1 (noting examples of other non-western countries that execute prisoners more often than United States, including: China, Iran, Nigeria, and Saudi Arabia); Dale Turner, *Death Penalty Isn't Way to Deter Crime or Deal Punishment*, SEATTLE TIMES, Apr. 23, 1994, at D5 (pointing out that although Western European countries do not employ death penalty, these countries have lower murder rates than United States).

Clearly, Justice Blackmun changed his opinion.²¹⁵ And I think others who were on the bench at the time would have changed their opinions. Our experience tells us today that we should reexamine what we are doing.

MR. WOOTTON: Because there seem to be no ardent advocates of the death penalty on the panel, I'm going to ask the panel if they would engage in some speculation, and address why it is that the public seems to be ardent advocates of the death penalty.

Then I would like maybe to follow on by considering some of the process issues and obviously at the federal level, the habeas corpus issue is central.

I would like to pose to each member maybe three alternatives for why the public feels so strongly about this. I start with a general distrust of the criminal justice system and a serious skepticism that life without parole means life without parole, at a time when some people who've been on death row have had their sentences commuted at least. As a result there is no finality to the possibility that this person who in some cases seems to be a predator, is removed from society, that's one.

Another possibility is a sense that it is justice, in certain cases, to have the death penalty imposed, the severity of the crime, the maliciousness of the individual who committed it deserves the death penalty.

I have to say that we established the National Center for the Analysis of Violent Crime to track serial killers down at the FBI Academy.²¹⁶ I went down there frequently, briefed frequently, saw a lot of crime scenes, and it was easy to conclude that the person or persons who committed those crimes probably deserved the death penalty. So that's maybe option two.

The third option is, is the public expressing a general statement about fear? Are they somehow trying to see the death penalty as a way to respond to an increased concern about crime?

Now those aren't the only things that you might address, but it seems to me that the public is demanding this, the politicians are responding, and whether they're responding in good faith or not,

215. See *Callins v. Collins*, 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting) ("Rather than continue to coddle the Court's delusion that the desired level of fairness had been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed."); see also *supra* notes 16-18 and accompanying text.

216. See Mary Thornton, *FBI Opens Sophisticated Crime-Analysis Center*, WASH. POST, July 11, 1984, at A17 (noting that center will use "sophisticated behavioral science techniques and a complex computer system" in its pursuit of serial killers).

they are responding and throwing the burden back to the courts to handle it. I think everybody here is saying the courts are not handling it very well.

Maybe we could start again with you, Mr. Shilling?

MR. SHILLING: I think that a good way of tracking your questions and looking at the innate intelligence of today's society, what they're grasping at, what they're having difficulty with and what statements they're making is quite similar and parallel to the various statewide efforts to establish a Constitutional Amendment for Victims' Rights in which there's approximately twenty-four states in the United States that have passed legislation on state constitutions, allowing for victims of crime to be heard, to be seen, to be recognized, to be informed of their rights.²¹⁷ Whereas, out of this grassroots campaign over the last ten years or so, a tremendous amount of information is clearly coming out to the public in a manner and in a descriptive way that it's surprising a lot of people. Our society is concerned and now fearful.

I think our society, for whatever reasons, had not previously chosen to ignore the frightening crime statistics but when they heard a judge or an authoritative figure say that a person was going away in prison for life, they took that at face value.

I think it's maybe a growing-up process. I think that a lot of us, especially many of us who are in our forties and fifties and older, took for granted certain things in life, that when someone, an authoritative figure, i.e., a judge, told you something, in pronouncing a sentence, you could believe that, and you took it at face value, and then you considered some other thought of the day.

What we're finding out and have found out, ten, twelve years ago, is that we had to get involved, that life in prison didn't mean life in prison. It meant, in most states, that after twenty-five percent of your term being served, you were eligible for parole. Now the reality of that is not very many people served only twenty-five percent but quite a few served only forty percent of their time, even though they may have been a repeat offender. They were back out on the street.

Along with that statistical swell of information and knowledge that came with it, there was a reaction lag time by the public, all of which seems to be catching up to us now. Therefore, with eight, ten, twelve

217. See Wade Lambert, *Victims' Rights Receive A Fresh Focus*, WALL ST. J., Feb. 27, 1995, at B10 (noting that in some states, victims claiming that right to speedy trial applies to victims as well as defendants); Andrea F. Siegel, *Crime Victims, Families Demand a Voice, Proposed Amendment Would Give Them a Say in Court*, BALTIMORE SUN, Nov. 5, 1993, at B1 (noting that in 1982, California was first state to enact crime victims' amendment).

years of this data as common knowledge and we now discover that there is the reality that of the top seventy-five counties producing crime in the United States of America, the recidivism rate is sixty-four percent.²¹⁸

Sixty-four percent of the people who are violent offenders in prison today will come out and commit their next very violent offense.²¹⁹

The statistics also show that when a person comes out of prison after "hard time,"²²⁰ they are more likely to make their next crime more violent. In fact, there are quite a few people who will kill to avoid future identification.

This swell of information is concerning a lot of people, and it's taken a long time to become public. You could look at the wild card, if you want, someone like Ross Perot, the threat of the third party, whether you believe in that, or support that concept or not, I think it's brought a lot of attention, snapped the attention, and turned the heads of a lot of politicians who are Democrats and Republicans alike. Hence, politicians in fear of a third party, are forced to take seriously and to listen much closer to what their constituents are saying, and whether they were saying it from a very technical and organized and intelligent statistical way, or even if they are saying it in broader emotional terms, that we really do fear for our lives.

We are concerned, and we want something done to protect the American people. When someone tells them they're going to do something, they expect something to happen. So with this death penalty and getting caught up with this particular issue, they don't understand the delay of ten, twelve, fifteen, or seventeen years. They don't understand the cost.

They want something done because now they're informed and they want it done now.

218. Cf. G. Robert Blakey, *The Need, Not for Revised Constitutional Theory or New Congressional Statutes, But the Exercise of Responsible Prosecutive Discretion*, 46 HASTINGS L.J. 1175, 1211-16 (1995) (discussing recidivism and prosecutorial discretion); Meredith Felisesopher, "The Best of All Possible Worlds." *Balancing Victims' and Defendants' Rights in the Child Sexual Abuse Case*, 63 FORDHAM L. REV. 633, 638 (discussing recidivism rates in child abuse cases); Christopher Slobogin, *The ABA Criminal Justice Mental Health Standards: The Guilty but Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494, 503 (1985) (discussing recidivism rates among mentally ill).

219. See Franklyn W. Dunford, *The Measurement of Recidivism in Cases of Spousal Abuse*, 83 J. CRIM. L. & CRIMINOLOGY 120, 128 (1992) (discussing recidivism rates for various offenses).

220. See Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149, 1217 (1990) (discussing prisoners on first convictions doing "hard time"); J. Robert E. Hanlon, *Hard Time Lightly Given: The Standard of Persuasion at Sentencing*, 54 BROOK. L. REV. 465, 498-99 (1988) (discussing hard time sentencing); James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 UCLA L. REV. 217, 220 (1982) (discussing predictions of recidivism).

So now, all of a sudden, you're seeing the heat and the pressure on the legislature by the general public. Concerns, by the way, that some of us, because we were victims unfortunately, got in tune with it, and became involved with it early on.

Additionally, there are so many victims out there now that we're seeing the entire United States of America saying enough is enough. We want something done. We want it done now.

MR. WOOTTON: Mr. Morin?

MR. MORIN: I remember having a conversation with a person I was litigating against in Mississippi one time who was clearly for the death penalty. He was pained by the process he was going through. He said one of the things you have to recognize is that people are for the death penalty and not of monolithic thought. People are for the death penalty for different reasons.

I'm not sure you can give a complete answer. I think there is, there was a general concern several years ago about life without parole or life not meaning life. I think a lot of states have redressed that problem.

I think the opponents of capital punishment, it's incumbent upon them to offer life without parole as an alternative to the death penalty. And that is more and more coming about. More and more states are adopting life without parole, and that clearly is a problem or was a motivation for some people to support the death penalty.

Other people have religious reasons, other people out of fear and frustration. For some people, I think it was a view, it is the highest form of response that society can have, and anything less than that is discounting what happened.

I think there are a myriad of reasons why people are for the death penalty, and I'm not sure you can put out just one as to why there's such support. I think it's a combination of things.

MR. WOOTTON: Mr. Von Drehle?

MR. VON DREHLE: The Gallup poll has done annual polls on the question of the death penalty going back into the fifties, and you see a decline in public support for capital punishment down into the low forties, about forty-two percent in support. I think that was the '67 or '68 poll, and then you see it start spiking right back up.²²¹

221. See Scott G. Parker & David P. Hubbard, *The Evidence for Death*, 78 CAL. L. REV. 973, 1014 (1990) (discussing approximately 40% national support for death penalty in mid-1960s); Kathryn K. Russell, *A Critical View from the Inside: An Application of Critical Legal Studies to Criminal Law*, 85 J. CRIM. L. & CRIMINOLOGY 222, 235 (1994) (discussing public support for death penalty in Gallup poll).

It's not possible to imagine that that is not a response to a huge spike beginning in about 1960 in the violent crime rate in America.²²²

The increase in support for capital punishment, which now runs up about seventy-five to eighty percent nationwide²²³ and in certain regions up over ninety percent,²²⁴ I mean, it's more popular than apple pie in many places. You can't get ninety percent to agree on anything.

It has to be, in large measure, a response to a violent crime problem that the government seems not to be dealing with. So these questions about trust in the government and these questions about fear of violent crime I think are at the heart of the public devotion.

On the other hand, not all seventy-five, eighty, ninety percent of people are rock solid in favor of it. So we get into a situation where there's real question in my mind how much of this mood is the public driving the politicians and how much of it is the politicians feeding a public desperate for solutions.

You can't find politicians anymore, with few exceptions—Mr. Sonner—who will stand up to the electorate and say, well, I know the death penalty sounds good but it just doesn't work very well in practice, and people have been trying to fix it for twenty-five years without any success, let's try x, y, or z.

Instead what you find across the country are people running for office who don't have any good answers to a very serious problem of violence in America, and so they offer the death penalty as a kind of fig leaf to the voters. It's a way of saying, I'm on your side, I know who the good guys are, I know who the bad guys are, and you won't find me with any sympathy for the bad guys.

Now I think it's important for politicians to side with the good guys in our society, but what they are offering the public, and the public is welcoming because they want to hear something, it turns out to be a paper tiger.

So it seems to me inevitable that at some point, the public is going to get really upset about being sold, in election after election, something that they open up the box and there's nothing there.

222. See John Q. LaFond & Mary L. Durham, *Cognitive Dissonance: Have Insanity Defense and Civil Commitment Reforms Made a Difference?*, 39 VILL. L. REV. 71, 81 (1994) (discussing public reaction to increase in crime rate in 1960s).

223. See Panel Discussion, *supra* note 131, at 281 (reporting 80% support of death penalty among Americans).

224. See Mark Curriden, *The Death Belt: The South Leads United States in Executions*, S.D. UNION TRIB., May 1, 1994, at A1 (citing poll by *The Atlantic Constitution* that showed that nearly all of those living in South support death penalty).

MR. SONNER: I was just musing here. When I first started prosecution, back in 1966 when the death penalty was at its lowest, I was trying cases day in and day out where we were asking for the death penalty, primarily because the law then provided for a different sentence for the judge if the jury came back without a recommendation against capital punishment.²²⁵

So if you really wanted life imprisonment, and to bind the judge to it, you asked for the death penalty.

I really never thought that any of those defendants that I was prosecuting would actually get the death penalty.

But I think if you make an analysis of the seventy-five to ninety percent of people who are in favor of the death penalty, I think some of them want to keep it there for symbolic reasons or want to reserve it for the person who poisons a crowd in a subway or the Speck's or the Bundy's and what-have-you.

The problem is we've created a statute in Maryland that, with a wide net, catches almost all felony murders. I haven't looked too closely at the New York statute, but as I understand it, if the only aggravating factor is felony murder, then felony murder's not qualified.²²⁶

That's not the way the law reads in the State of Maryland.²²⁷ The fact that a murder is committed in the course of certain kinds of felonies is enough for it to qualify for capital punishment for the person who actually pulls the trigger.²²⁸

I sometimes wish we could be like Israel, which does not have capital punishment, but they don't have prohibitions against ex post facto laws. If they ever have such a horrible set of circumstances or crimes, they can enact a capital punishment statute, impose it, and then repeal it.²²⁹

You look back also in history to the 1920s, there are a number of states that reinstated the death penalty after having gone for years

225. See *Spaziano v. Florida*, 468 U.S. 447, 449 (1984) (affirming state judge's power to impose death penalty despite jury sentence of life without parole).

226. See Act of Mar. 7, 1995, ch. 1, §§ 7, 20, 1995 N.Y. Laws 1 (delineating aggravating circumstances needed to impose death penalty).

227. See Louis A. Ambrose et al., *Developments in Maryland Law*, 51 MD. L. REV. 612, 623 (1992) (discussing Maryland law with respect to imposition of death penalty).

228. *Id.* at 612-13.

229. See Andrew D. Wolfberg, *Israel v. Ivan (John) Demjanjuk; Wachmann Demjanjuk Allowed to Go Free*, 17 LOY. L.A. INT'L & COMP. L.J. 445, 451-52 (1995) (discussing Israel's limited reinstatement of death penalty for imposition on Nazi war criminals).

without it, and it was in response to what they perceived was a crime wave.²³⁰

Right now, I think the public's perception, as we've heard it today several times, is that violent crime is on the increase, and that we have to use capital punishment to protect ourselves.

If you look at where they're asking for it in New York, the DAs from the upper part of the state, where they have low crime rates, say they're going to impose it, but the five DAs from down in New York City are going to be very parsimonious in how they impose it. Yet the danger in New York City, in certain sections of the city, is so much greater than it is in upstate New York.

The same thing is true about us as a nation. I mean we in the suburbs in the middle class and above are really relatively safe. We're safer than we've been in times past.

But in the inner city, where people are living among the drug wars, that's where the danger is. But those are not the murders that we're going to be prosecuting as capital crimes.

So it's amazing to me, as I observe this crime debate, and then attempt to apply it to the death penalty. I mean, we're not having a rational debate in this country about crime to begin with. We should start there.

We can't really expect to have a rational debate about the death penalty when it is a part of an irrational debate on crime.

MR. WOOTTON: I'm just going to give a quick commercial for the Safe Streets Alliance position on truth in sentencing. It is supported by ninety-four percent of the American people.²³¹ My position has been that people who oppose mandatory minimums and the death penalty ought to support truth in sentencing because it is likely to increase the confidence and decrease the pressure for mandatory minimums and the death penalty.

But I want to end our questions, before we open it up, with everyone addressing fairly quickly, if that's possible the issue that is the elephant in the living room of the debate and that is habeas corpus reform, and some of the issues that are attendant to that debate, including effectiveness of counsel and the tradeoffs between finality and due process.

So I think this time we'd start on the right because —

MR. SONNER: Well, I am on the right on that issue.

230. See Gallihier et al., *supra* note 128, at 540 (discussing trend of reinstatement of death penalty during 1920s).

231. See *Hearing on Welfare's Effect on Youth Violence Before the Subcomm. on Youth Violence of the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995).

(Laughter.)

MR. SONNER: To me, it is an example of the damage that the death penalty does to the fabric of the practice of law, as we go over and over these cases forever, and you don't reach any kind of finality, and then often a reversal eventually comes down.

It does seem to me, and this is where I line up with Justice Powell's recommendation and against Professor Robinson's position²³² and that of the American Bar Association. I think that we have to come to some finality, some omnibus way of disposing of all appellate issues without having convictions tested over and over again with habeas corpus and post-convictions hearings that often end up trying the defense lawyers.

It's hard enough to get lawyers to represent capital cases without then having them subjected to post-conviction proceedings where their tactics and their decisions are subjected to second guessing reviews.

I'm not an appellate lawyer. I used to be a trial lawyer and now I'm a politician lawyer, I guess. But my friends, who are appellate lawyers for the state, just tell me that the situation that they have with the constant attack upon capital cases with the writs of habeas corpus is exhausting their resources and creating a bad set of law.

MR. VON DREHLE: Well, in response to that, and people ask me a lot about habeas reform and other kinds of appellate reforms,⁴ and I'd just like to share three stories I came across in my book, all very quick.

The first one has to do with federal habeas corpus reform. I tell the story of a very famous serial killer named Ted Bundy who killed twenty-five or thirty-five young women from coast to coast before he was finally sentenced to die in Florida in 1979.²³³

Ted Bundy was universally hated and was one of these people for whom everyone who supports the death penalty believes deserves that penalty. There was no question whether, if we're going to have the penalty, he deserved it. He found no sympathetic courts. In fact, courts went out of their way, on several occasions, to create loopholes to law that they had made so that his case could continue toward execution while problems with it were cleared up in other cases.

232. See PAUL H. ROBINSON, AN EMPIRICAL STUDY OF FEDERAL HABEAS CORPUS REVIEW OF STATE COURT JUDGMENTS (1979) (reviewing historical development of federal habeas corpus jurisdiction); see also Larry W. Yackle, *Form and Function in the Administration of Justice: The Bill of Rights and Federal Habeas Corpus*, 23 U. MICH. J.L. REF. 685, 710 (1990) (discussing Robinson's 1979 study).

233. See VON DREHLE, *supra* note 206, at 305 (stating that number of women murdered by Ted Bundy is unknown but could be two to three dozen and up to as many as 50).

Hypnosis, for example, was banned from the Florida courts, using the Bundy case,²³⁴ but they said that there was harmless error in Bundy's case individually, so one exception was made for him.

Every court he went to, his case was moved to the head of the line. Lawyers on both sides came to call it the Bundy express. He leap-frogged fifty people on Florida's death row who had been there longer than him. He got one bite at the apple.

If the toughest habeas corpus reforms proposed in Congress had been in effect and law the day he was sentenced, he would not have been executed one minute sooner.

It took nine years and five million dollars to execute Ted Bundy.²³⁵ So when people ask me about habeas reform, I say I'm skeptical.

Post-conviction relief. I tell the story of a Florida inmate named James Curtis "Doug" McCrae. When a person is sentenced to die in Florida, they receive, as they do in every state, an automatic appeal to the state supreme court.²³⁶

Doug McCrae was sentenced to die in 1974 and got an automatic appeal to the state supreme court.²³⁷ For the next seventeen years, the state supreme court and the trial court bounced his case back and forth, trying to determine whether Doug McCrae should live or die.²³⁸

The state supreme court, first level of appeal, changed its mind seven times before finally reducing his sentence to life in prison in 1991.²³⁹

That's a case that was on death row for seventeen years without ever entering post-conviction.

The third story I'd like to share was a conversation I had with a woman who is the chief prosecutor of capital appeals for the State of Florida. It is her job to try and get the 350 inmates on Florida's

234. See *Bundy v. State*, 471 So. 2d 9, 18-19 (Fla. 1985) (ruling that post-hypnosis testimony is inadmissible and, in evaluating error on appeal for admission of such evidence, court need only determine whether sufficient evidence, excluding tainted testimony, existed to uphold conviction).

235. See VON DREHLE, *supra* note 206, at 401 (discussing length of time and money spent before Bundy was executed).

236. See FLA. STAT. ch. 921.141(4) (1993) (stating that sentence of death is subject to automatic review); VON DREHLE, *supra* note 206, at 413 (discussing Florida's appeal procedure for inmates under death sentence).

237. *McCrae v. Florida*, 395 So. 2d 1145, 1147-50 (Fla. 1981); VON DREHLE, *supra* note 206, at 413-18.

238. See *McCrae v. Florida*, 582 So. 2d at 614 (discussing history of case); VON DREHLE, *supra* note 206, at 413-18 (discussing history of McCrae's case).

239. See VON DREHLE, *supra* note 206, at 413-18 (discussing ultimate disposition of McCrae's case).

death row into the electric chair. That's all she does day in and day out.

She knows the system as well as anyone, she knows and supports every imaginable reform. I finally asked her, well when is this system finally going to start working. You've got 350 people on death row. You're executing three or four a year, one percent. It's been like this year after year after year. How do you fix it?

She said, I'd say the system is operating at peak efficiency right now. In other words, you can't support the death penalty any more than she does. You can't support reform any more than she does. You can't be any more knowledgeable about the appellate system than she is. But a person in her situation does not expect serious changes from reform.

So it's important to understand what's real and what's hype in the discussion of habeas and post-conviction reform.

MR. WOOTTON: Thank you. Mr. Morin?

MR. MORIN: I think those of us involved in the day to day litigation, both prosecution and defense, understand the frustration from the outside, looking at these cases, of the amount of time.

When you're in the case, it doesn't feel like a long period of time when you're working on them. I know we have some stories of lengthy periods of an appeal. I have my own story that really struck home.

I represented a young man named Kirk Bloodsworth in Maryland, who was convicted and sentenced to death.²⁴⁰ Got a new trial and was convicted again.²⁴¹ Young man, twenty-three years old, never been arrested before in his life, convicted for the brutal rape and murder of a nine-year-old girl.²⁴²

Twenty-four jurors were convinced beyond a reasonable doubt that he was guilty.²⁴³ Two trial judges were convinced.²⁴⁴ Three appeals judges were convinced.²⁴⁵

240. See *Bloodsworth v. State*, 512 A.2d 1056, 1057 (Md. 1986) (discussing Bloodsworth's trial in Circuit Court for Baltimore County on first appeal).

241. See *Bloodsworth v. State*, 543 A.2d 382, 387-98 (Md. Ct. Spec. App.) (discussing Bloodsworth's second trial and conviction on second appeal), *cert. denied*, 548 A.2d 128 (Md. 1988).

242. See *id.* at 384-85 (discussing Bloodsworth's alleged rape and murder of nine-year-old Dawn Hamilton).

243. *Bloodsworth*, 543 A.2d at 384 & n.1; *Bloodsworth*, 512 A.2d at 1057.

244. See *Bloodsworth*, 543 A.2d at 382 (listing names of two trial judges, J. William Henkel and James T. Smith).

245. See *id.* at 384 (providing names of three Court of Special Appeals judges affirming trial court's decision).

We started working on the case a couple of years ago, and nine years after he was arrested, nine years of appeals, we found a little spot of DNA on the girl's clothing. And we had it tested and it wasn't Mr. Bloodsworth's DNA.²⁴⁶ Here's a twenty-three year old man, the only thing he was saying for nine years was, I didn't do it. Nobody believed him, none of the jurors, none of the judges, none of the appellate judges, just him.

Overnight, every one of those people changed their mind and said, well, okay, now he is innocent, let's get him released. He got a full and complete pardon, and several hundred thousand dollars from the State of Maryland.²⁴⁷

Now he didn't change one word of what he was saying for nine years. He said the same thing from the minute he was arrested to the minute he was released. Only the people who were listening to him changed their minds.

The people who are in this system on a day-to-day basis understand the value of time in these cases. Mr. Bloodsworth would have been executed.

So let's not fool ourselves and think if we compress the time, we are not going to be executing innocent people. It's not a question of increasing the probability it's going to happen. That's just a matter of when, and when we discover their innocence.

Last year, we had four people released from death row, all of whom were innocent.²⁴⁸

Now, are we to believe that we miraculously, through all our appeals, happen to find the only four innocent people on death row, so now we can breathe a sigh of relief?

Again, Mr. Bloodsworth went from someone who was viewed as a prisoner who's just claiming he's innocent. You know you all do that,

246. See Glenn Small, *Schaefer Exonerates Man Once Sentenced to Die*, BALT. SUN, Dec. 23, 1993, at 1B (relating Governor William Schaefer's pardon of Bloodsworth after DNA test results indicated that Bloodsworth could not have been perpetrator); Paul W. Valentine, *Man Cleared by DNA Gets Pardon; Md. Waterman Spent Nine Years in Prison*, WASH. POST, Dec. 23, 1993, at A8 (reporting pardon of Bloodsworth).

247. See Steve Goldstein, *DNA Test Frees Man from Life in Prison; Thousands of Cases Could Be Reopened by Genetic Evidence*, SEATTLE TIMES, July 24, 1994, at A2 (reporting that Bloodsworth received \$300,000 compensation, roughly \$92 for each day of eight years, eleven months, and nineteen days he spent in prison).

248. See Randall Coyne, *Death Row Population Not the Most Vicious Criminals*, TULSA WORLD, Dec. 17, 1994, at N29 (editorial) (stating that four innocent people were released in 1993); Rev. Dorsey R. Stebbins, *Issue 1 Increases Risk of Putting Innocent People to Death*, CIN. POST, Oct. 14, 1994, at 12A (editorial) (stating that four innocent men who were released from death row in 1993 gave testimony before U.S. House Judiciary Committee's Subcommittee on Civil and Constitutional Rights).

they all do that. Overnight, he was transformed into an innocent person.

Are we to believe that we happened to find the only wrongfully convicted person of a capital case in Maryland?

I think that's a real issue that we have to start dealing with. We are discovering, through this process, that despite all the protections we supposedly afford, innocent people are being convicted and sentenced to death. We have to keep that in mind, and that gets lost a lot.

So for anybody who wants to compress the time, I think you have a right to do it, as long as you sit down and have a conversation with Mr. Bloodsworth and his family about why you wanted to shorten the period of time he had to work on his case.

MR. WOOTTON: Mr. Shilling?

MR. SHILLING: That's a very compelling story, very compassionate, very important. It's very important to consider and to hear that.

But equally so, in trying to put balance into the criminal justice system, it's very important to understand that we don't have maybe today the luxury of time that we may have enjoyed in the sixties or hopefully can enjoy some day in the future.

The crime rate in this country, and at the rate we're going, is so impactive that it compels us, I believe, to take a more conservative approach, and I think it's okay to use the word conservative from time to time, especially since we have the conservative leadership here in Congress in the majority.

I think we need to hear, and we need to be respectful of incidences, as you just heard. But the needs of the many often will outweigh the needs of the few or the one.

It does not mean that we can be disrespectful of due process or the rights of others. It just means that at some point in time it goes beyond diminishing return. Let me give an example of what I mean about diminishing return.

My father-in-law was branch chief of EPA in pesticides, he's an economist. I never thought that he had a tough job. One day I guess about three or four years ago, I went in and saw what he did.

His job is demanding, and I think the scenario is quite the same as our topic today.

His job, as an economist in pesticides, is to equate cost versus benefits. And when you really press him and people in his position, he'll tell you that we're dealing with lives, we're dealing with pesticides, we're dealing with new legislation and how it will affect farmers,

and where is the cost line, and at what point in time do we have to at least be concerned about the costs, versus the value of human life.

I would proffer to you today that that argument is as realistic in his world as it is in our discussion here with crime and the state that our country is in. We simply don't have the luxury of time the way we used to.

Some people refer to crime as the nation's biggest concern, and rightly so. People put crime at a level of what we heard many people during the Watergate days talking about which was our national security. Citizens believe that crime is our single biggest national security issue, and it really is. It's at staggering levels but I think that we have to be respectful of situations like Mr. Morin shared with us. Thank God this gentleman was released, the system worked. But nine or ten years versus seventeen or twenty, I think that it then goes beyond being reasonable. I think that if an inmate's going to be able to establish their innocence, it's most likely, and in all probability, will occur within the first ten years of incarceration.

That doesn't mean there won't be a few people who unfortunately will go to their death being innocent. As a society, you know, we don't always get easy questions. We don't have a book that tells us how to play everything out perfectly. We will make mistakes. I think the needs of the many outweigh the needs of the few.

MR. WOOTTON: Well, thanks very much.

VI. RACE AND THE DEATH PENALTY

DEAN RASKIN: Let me just say a word about our topic for this panel discussion. In 1987, the Supreme Court rejected an equal protection challenge by a capital prisoner to his death sentence. The challenge asserted that racial factors had contaminated the death penalty regime in the State of Georgia. Defendant McCleskey in *McCleskey v. Kemp*²⁴⁹ had been found guilty of murder, and his habeas corpus attorney presented a remarkable study by Professor Baldus.²⁵⁰ The raw numbers of that study showed that defendants in Georgia who were charged with killing whites got the death penalty eleven percent of the time; defendants charged with killing African Americans got the death penalty one percent of the time;²⁵¹ and

249. 481 U.S. 279 (1987).

250. *McCleskey v. Kemp*, 481 U.S. 279, 286-91 (1987) (discussing Baldus study). See generally David Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983) (discussing racial disparities in death penalty sentences); see also BALDUS ET AL., *supra* note 11 and accompanying text.

251. *McCleskey*, 481 U.S. at 286.

when Professor Baldus controlled for various factors, including the type of crime, the area of Georgia and so on, he found that defendants who killed whites were about four and a half times more likely to receive the death penalty than defendants who killed blacks.²⁵² The Supreme Court in *McCleskey v. Kemp*, however, found that there was no equal protection violation²⁵³ because, as you recall from *Washington v. Davis*²⁵⁴ and *Arlington Heights*,²⁵⁵ in order to prove an equal protection violation you need to show governmental purpose, and the Supreme Court said there was no showing of official purpose to discriminate here.²⁵⁶ The Court also rejected an Eighth Amendment cruel and unusual punishment claim on the ground that the system was not so irrational as to require that it be thrown out.²⁵⁷ In fact, the Court gave a ringing defense of discretion in the criminal justice process, saying that the Court didn't want to get involved in what was happening behind the closed doors of the jury room. As long as there was no report that there was open racial animus in the process, the Court was willing to tolerate such racial disparities in result.

The Court, with Justice Powell writing, said that two other considerations informed its decision. One was that if it found an equal protection violation in a case like this because of racial disparities, it would create a slippery slope and the Court would have to see whether defendants who had committed assaults, rapes, robberies, or other crimes against white victims rather than black victims were given more serious penalties, thereby opening the door to a whole series of claims about the impermissible use of race in the criminal justice process.²⁵⁸ The other concern, Justice Powell said, was that of institutional competence: that it wasn't up to the courts to go around

252. *Id.* at 287.

253. *Id.* at 292-95.

254. 426 U.S. 229, 239 (1976) (holding that for personnel test to be unconstitutional under equal protection standards, it must have racially discriminatory purpose, not just racially disproportionate impact).

255. 429 U.S. 252, 265-66 (1978) (holding that disproportionate impact may be evidence of discriminatory intent, but for action to be unconstitutional, proof must be shown that it was racially motivated).

256. *McCleskey*, 481 U.S. at 292-96 (holding that because there was no specific showing of discriminatory intent in sentencing McCleskey to death and because where McCleskey relied solely on Baldus study arguing that it compelled inference of purposeful discrimination, equal protection argument fails because study sample was small and many factors contributed to jury giving death penalty).

257. *Id.* at 299-300 (holding that procedures in McCleskey's case were not so irrational that Eighth Amendment required overturning his death sentence).

258. *Id.* at 315-16.

policing racial bias in the criminal justice process; it was up to the legislature, if anyone, to do it.²⁵⁹

A number of members of Congress in the last session took up this invitation and attempted to enact a Racial Justice Act as part of the crime bill.²⁶⁰ This measure ended up being knocked out as part of a series of political compromises to get the crime bill through. I'm hoping at least a couple of our panelists can discuss the attempt to get this bill through.

So, that's the background. The courts have said that they are not going to look into this matter. So, the question is should the legislature, either at the state level or Congress, do it?

To begin with, I would like to invite our representatives of the GAO to kick us off by telling what it was they found in their study released not long ago. Let's start with Laurie Ekstrand. Please welcome her.

DR. EKSTRAND: Thanks very much. It's very nice to be here. This study was part of a congressional mandate. The GAO often does work that is required by law. This study was mandated for us to do in the Anti-Drug Abuse Act of 1988.²⁶¹ We were specifically asked to determine if the race of either the victim or the defendant influenced the likelihood of the defendant's being sentenced to death.

In trying to figure out what to do to answer this question we first tried to see what had been done in the past. We found that there had been a great deal of empirical research done on this topic. We also found out that although there are some databases that have information about defendants and the death penalty process, those data are pretty skimpy and wouldn't be complete enough for us to use, and if we collected the data on our own we would have to go to case file after case file after case file and try to build a body of data.

So in deciding what to do we decided on an evaluation synthesis. This is a critical integration of empirical research and there is a structured, bona fide methodology to do this type of work.

The first step in this process was to identify all of the past empirical studies that deal with this area of disparity and death penalty sentencing.²⁶² For that we did an extensive literature search and we

259. *Id.* at 319.

260. *See* H.R. 4092, 103d Cong., 2d Sess., tit. IX (1994).

261. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4392 (1988) (codified at 21 U.S.C. § 848(e) (1994)) (amending 21 U.S.C. § 848 and requiring GAO report on influence of race in death penalty sentencing).

262. *See* UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO SENATE AND HOUSE COMMITTEES ON THE JUDICIARY, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 1-2 (1990) [hereinafter GAO REPORT] (describing methodology of study).

contacted all of the known researchers in this field to see if there was something they knew about that we might miss through ordinary sources. In the process, we screened over 200 citations and we reviewed more than 50 articles, dissertations, manuscripts and books, and we located 28 studies that were empirical and that met minimum quality standards.²⁶³ Once we had these studies, we divided up in teams of two social scientists to review each study, and we rated each study in terms of quality—using a high, medium, and low scale. We rated them in relation to study design, sampling, measurement, data collection, and analysis.²⁶⁴ In addition to that process, we also had a statistician assess the data in relation to the conclusions to determine if the conclusions really were valid in relation to the data and analysis which were used. In addition to all of this, we had a third social scientist review the findings of the two that initially reviewed the report, to make sure that they were consistent. Any assessments that weren't consistent we discussed, so that we could come to some agreement as to how we should rate these studies.

In grouping these studies, we found that almost half of the studies were in a medium to high category and the remainder were in the low category.²⁶⁵ There are basically three kinds of problems that could affect the quality of a study. The first one is called sample selection bias. I don't need to remind this audience that there are a variety of decision points in the process for a defendant to go through the entire process of indictment, conviction, and sentencing in a death penalty case. Studies that picked up the data later in the process may or may not have missed disparity in earlier parts of the process. If a study uses people at the conviction stage, there may or may not have been any disparity at the indictment stage. The most robust studies are the ones that followed people through the entire system, and there were some studies that met that criteria.

Another potential problem is termed omitted variables. This problem occurs when there are other variables that are not included in the modeling to find out what the relationships are with the death penalty's determination. Variables, which might have been left out of models, that might affect the results are socioeconomic level or perhaps the quality of counsel. Things like this are very difficult to measure in these kinds of studies. But the problem of omitted variables is only of concern if the omitted variable correlates with race

263. *Id.* at 2.

264. *Id.* at 2-3.

265. *Id.* at 3.

and the death penalty outcome—that is, it has to be related to both of those things—and second, it has to operate independently from all the other variables in the model. Since some of these studies had over a hundred variables, the likelihood that there is an omitted variable that meets both of these criteria is somewhat slim in those studies.

Finally, as you know, the actual death penalty sentence is relatively rare and in situations where there are small sample sizes there can be a great deal of instability in a finding. So, the stronger studies looked across a variety of states and years to have a sufficient number of cases to be able to produce an adequate analysis.²⁶⁶ Basically, then, we found some studies which covered all stages in the process and included large numbers of variables—in some cases, over a hundred, and had ample sample sizes. Harriet is going to tell you what our findings were.

DR. GANSON: Basically, our synthesis of the twenty-eight studies showed a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty. In over eighty percent of the studies, which was actually twenty-three out of the twenty-eight, race of victim was found to correlate with being charged with capital murder or receiving the death penalty.²⁶⁷ The finding was remarkably consistent across data sets, across time periods, across states, even in the use of analytic techniques. It was pervasive.

Although the race of victims influenced what is found in all stages of the judicial process, it was found to be of greater influence earlier on—for example, during the prosecutors' decisions whether to charge capital punishment or not. This was because the earlier stages were comprised of larger samples allowing for more rigorous analysis. Legally relevant variables such as aggravating circumstances were influential but they did not explain the racial disparities that researchers found. In the higher quality studies, researchers controlled for legally relevant variables such as prior criminal record or heinousness of the act, and still found that there was a higher likelihood of receiving the death penalty based on the race of the victim.²⁶⁸

The influence of the race of the defendant on sentencing or on sentencing outcomes was equivocal. Although more than half of the studies found that the race of the defendant influenced the likelihood of being charged with a capital crime or with receiving the death pen-

266. *Id.* at 5.

267. *Id.*

268. See *McClesky v. Kemp*, 481 U.S. 279, 287 n.5 (describing Baldus study statistic that defendants had higher likelihood of receiving death penalty if victim was white).

alty, the relationship between race and the outcome was somewhat complex. One of the things we found was that race seemed to interact with other variables, so you weren't sure of the extent to which it was the race of defendant alone that influenced the sentence. For example, one study found that in rural areas black defendants were more likely to receive death sentences, whereas in urban areas, whites were more likely to receive the death penalty.²⁶⁹ Finally, more than three fourths of the studies found that black defendants were more likely to receive the death penalty. However, the remaining studies found that whites were more likely to receive the death penalty.²⁷⁰ So in that sense, the influence of race of the defendant really was equivocal.

In summarizing, first of all we found that there were a sufficient number of studies and they were of sufficient quality to use an evaluation synthesis to assess a relationship between race and death penalty sentencing. Our results showed a strong race-of-victim influence.²⁷¹ The race of the offender influence is not as clear.²⁷² That concludes my comments.

DEAN RASKIN: Thank you, Harriet. Let me just ask you about one thing: Were you able to quantify the race-of-victim differential in the way that the defendant in *McCleskey v. Kemp* did when he came forward and said "because I killed a white person rather than a black I'm four times more likely to receive the death penalty"? Were you able to find such a number?

DR. GANSON: Yes, the high quality studies did quantify it in terms of the likelihood. It ranged all over. The higher the quality of the study, the lower the odds were, but they were still about four or five times as likely.

DEAN RASKIN: So, around the range of four?

DR. GANSON: They were strong enough so that you can say that there is definitely an influence of the race of the victim. It did vary based on the quality of the study.

DEAN RASKIN: I would like to call up next Ron Tabak, who has been a frequent litigator in death penalty cases. Please welcome Ronald Tabak.

MR. TABAK: Thank you very much. I'm happy to be here.

What I thought I would do is say a few things preliminarily and then talk about some cases that in my view underlie these statistics.

269. See *supra* notes 11, 250 and accompanying text (discussing Baldus study).

270. GAO REPORT, *supra* note 262, at 6.

271. GAO REPORT, *supra* note 262, at 6.

272. GAO REPORT, *supra* note 262, at 6.

One preliminary thought is to note that Justice Powell is reported in his recent biography by his former law clerk, University of Virginia Law School Professor Jeffries,²⁷³ as saying that he regrets his authorship of the *McCleskey* decision—which was a five-to-four decision—more than any other regret that he has about his entire tenure on the bench, and that if he had to do it over again he would have ruled the other way.²⁷⁴ That isn't going to bring Warren McCleskey back to life and isn't going to change the constitutional law; but since Justice Powell was invoked earlier, I thought I should mention that.

Also you were just told that the average good quality studies show that you are four times more likely to get the death penalty if your victim was white than if your victim was black. The proof that cigarette smoking causes lung cancer is less strong than this multiple of four.

Turning to some of the examples that lie behind the statistics, there was a hearing in a retrial of a case out of Columbus, Georgia, the William Brooks case,²⁷⁵ in which many family members of black murder victims testified that they had never been informed of any arrest occurring or, if somebody was arrested, of the trial date or the outcome, and some of them had actually been treated as suspects. Then, white murder victims' families testified that they were treated very solicitously by the district attorney and were asked their opinions.

This is not isolated to Columbus, Georgia. There are many situations where the prosecutors care more about the victim's family if the victim is white than if the victim is black.

Another case is one involving Albert Jefferson in Alabama.²⁷⁶ In that case, the prosecutor exercised his right to challenge peremptorily jurors by challenging twenty-four of the twenty-six black people who were qualified to be on the jury, and that was enough to end up with an all-white jury.²⁷⁷ It was later discovered that the prosecutor had a ranking system for these prospective jurors. He ranked them as

273. JEFFRIES, *supra* note 213.

274. See JEFFRIES, *supra* note 213, at 451-54 (discussing Justice Powell's reconsideration of *McCleskey* decision).

275. See DEATH PENALTY INFORMATION CENTER, CHATTAHOOCHEE JUDICIAL DISTRICT: BUCKLE OF THE DEATH BELT 10-12 (1991) (reporting that at evidentiary hearing in Brooks' retrial, family members of black murder victims reported neglect and abuse by law officials while family members of white murder victims were treated attentively by law officials).

276. See Stevenson & Friedman, *supra* note 192, at 520, 527 n.45 (1994) (discussing Jefferson's case being heard by all-white jury and citing to *Jefferson v. State*, No. CC-8-87, Cir. Ct., Chambers County, Ala., Jan. 25, 1989)).

277. See Stevenson & Friedman, *supra* note 192, at 520, 527 n.45 (citing Transcript of Post Conviction Record at 39-56, *Jefferson v. State*, No. CC-8-87 (Cir. Ct., Chambers County, Ala., Jan. 25, 1989)).

strong, medium, weak, and black.²⁷⁸ All of the black people were ranked black, and that is why he decided to challenge them.²⁷⁹ This was later the subject of litigation. The state court refused to grant relief on the basis of the proof that this had happened—although it did grant relief on another ground.

Another Alabama case, that of Walter McMillian which was featured on *60 Minutes*,²⁸⁰ took place in Monroeville, Alabama. McMillian was accused of having killed a white person.²⁸¹ Reportedly, one reason he was treated so harshly there is that he, a black person, had a romantic relationship with a white woman. He was put on death row a year before he was put on trial—somewhat of a pre-guessing of what the outcome would be.

In Alabama, even if the jury recommends a life sentence, the judge can override it.²⁸² The jury found McMillian guilty and recommended a life sentence.²⁸³ However, Judge Robert E. Lee Key overrode the jury and imposed the death sentence.²⁸⁴

Six years later, when Bryan Stevenson, Director of the Alabama Capital Resource Center, got involved in the case, he demonstrated that Mr. McMillian was not guilty. Indeed, there were many witnesses who were with McMillian at the time—but not at the place—of the crime.

In the case in Georgia of Wiley Dobbs, another African American who was convicted and sentenced to death for killing a white person, it was later brought out that his trial attorney had repeatedly referred to him as a “boy.”²⁸⁵ When the trial lawyer was asked, in the post-conviction proceeding, to give his attitudes about black people, he said that when he called a phone number and a black person answered the phone he would hang up because he couldn’t ever get

278. See *The Racial Justice Act: Hearings on H.R. 2466, Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 7 (1990) (statement of Bryan Stevenson, Executive Director of the Alabama Capital Representation Resource Center) (discussing use of ranking system by prosecutor in Alabama trial of Albert Jefferson); Stevenson & Friedman, *supra* note 192, at 523 (describing Jefferson’s case and use of ranking system).

279. See Stevenson & Friedman, *supra* note 192, at 523.

280. See *60 Minutes: Walter McMillian* (CBS television broadcast, Nov. 22, 1992).

281. *Id.*

282. ALA. CODE § 13A-5-46 (1994) (describing juror recommendation process in death penalty sentencing); see Brian K. Fair, *Using Parrots to Kill Mockingbirds: Yet Another Racial Prosecution and Wrongful Conviction in Macomb*, 45 ALA. L. REV. 403, 462-63 (1994) (describing that under Alabama code, 10 of 12 jurors must concur in recommending death penalty; however, all jury verdicts concerning sentencing are purely advisory and trial judge has ultimate decision and may override jury’s sentencing decision).

283. See Fair, *supra* note 282, at 463.

284. Fair, *supra* note 282, at 463.

285. See Panel Discussion, *The Death of Fairness? Counsel Competency and Due Process in Death Penalty Cases*, 31 HOUS. L. REV. 1105, 1128 (1994) (describing *Dobbs* case and attorney’s actions).

any information out of a black person; he said that if you hire a black person, you know he will steal from you; and he made a variety of other such remarks. At the trial, this defense counsel presented absolutely nothing about the defendant or his background in an effort to show why the defendant should not receive the death penalty—although counsel was entitled to present such evidence and there were positive things to be said about Dobbs. Instead, Dobbs' counsel argued to the jury that the death penalty was unconstitutional based on the *Furman v. Georgia*²⁸⁶ case—even though by then, the Supreme Court had held, in *Gregg v. Georgia*,²⁸⁷ that the death penalty was constitutional, and the jury wouldn't have been there if the death penalty had been held to be unconstitutional.²⁸⁸ The Eleventh Circuit held that Dobb's lawyer was not ineffective.²⁸⁹

Then we have my African-American client, Johnny Lee Gates, in another Georgia case out of Columbus.²⁹⁰ He had an all-white jury at a trial in which he was accused of having killed a white woman. Gates' post-conviction counsel asked Gates' trial lawyer how Gates ended up with an all-white jury in a community that was thirty percent black and had a history of unconstitutional racial discrimination—discrimination that Gates' trial lawyer had not challenged. First of all, it turned out that the trial lawyer didn't really know anything about the law relating to challenging unconstitutional jury composition. He also said that he and the other local defense lawyers got together and decided that they would never challenge racial discrimination in jury composition because if they won on such a claim that would result in juries being angry at them and their clients, so that they would be worse off than if they did nothing. We showed in habeas proceedings that the amount of discrimination was of a sufficient level to have violated the Constitution. The Eleventh Circuit said we had done so.²⁹¹ Normally, the State would have been called upon to rebut the proof, but not in this case. The Eleventh Circuit held that the issue had been waived because the trial

286. 408 U.S. 238 (1972) (per curiam).

287. 428 U.S. 153 (1976).

288. *Gregg v. Georgia*, 428 U.S. 153, 195-99 (1976).

289. *Dobbs v. Zant*, 963 F.2d 1403, 1407 (11th Cir. 1992) (stating that trial judge's and defense lawyer's references to Dobbs as "colored boy" did not affect jurors sentencing determination).

290. See Ronald J. Tabak, *Is Racism Irrelevant? Or Should the Fairness in Death Sentencing Act Be Enacted to Substantially Diminish Racial Discrimination in Capital Sentencing*, 18 N.Y.U. REV. L. & SOC. CHANGE 777, 783 (1991) (discussing *Gates* case, *Georgia v. Gates*, Crim. No. 28225 (Aug. 30, 1977)).

291. *Gates v. Zant*, 863 F.2d 1492, 1498 (11th Cir.) (agreeing that evidence stated prima facie case of jury discrimination), cert. denied, 493 U.S. 945 (1989).

lawyer had not objected.²⁹² So Mr. Gates' conviction and death sentence were upheld.

You may have seen on *Dateline NBC* a few months ago or read about the William Hance case,²⁹³ also out of Columbus, Georgia. In that case, they did manage to get one black person, a woman, on the jury in yet another trial of a black man accused of murdering a white person. The sole African-American juror was holding out for a life sentence during the jury deliberations. Unbeknownst to the jurors, if one person held out for a life sentence, that would result in a life sentence under Georgia law, and not a hung jury. But the jurors didn't know that, and the foreman falsely told the judge that the jurors had unanimously decided on the death sentence. When the jurors were subsequently polled in open court, the sole African-American juror did not state that she had not in fact voted for the death sentence. Years later, when that juror read that Hance was on the verge of being executed, she came forward and gave affidavits about what had happened. Then, a white juror who had been on the same jury not only confirmed that the African-American juror had never voted for the death sentence; she also revealed that during the jury deliberations, racist remarks had been made both about the defendant and about the black juror. However, it was held that this evidence was presented too late, that the issue had been defaulted, and that the courts would not consider it. William Hance was executed. *Dateline NBC* showed the African-American juror's reaction when she learned about the execution. She will never forgive herself.²⁹⁴

These are some of the cases that underlie the statistics. None of the people I have mentioned have gotten relief except for Walter McMillian, who managed to be found innocent eventually. I think that these cases are important to bear in mind when you consider the subject we are discussing tonight. Thank you.

DEAN RASKIN: Thank you, Ron. Please welcome now Paul Kamenar, Executive Legal Director of the Washington Legal Foundation.

MR. KAMENAR: Thank you very much for having me here this evening. As Professor Raskin said, the Washington Legal Foundation is a nonprofit public interest law and policy center based here in

292. *Id.* at 1498-99 (holding that because trial lawyer did not object to jury composition, issue was waived, and that Gates did have effective assistance of counsel).

293. See Panel Discussion, *supra* note 285, at 1190 (describing William Hance case, and dilemma and situation of African-American juror).

294. See Panel Discussion, *supra* note 285, at 1190 (describing African-American woman's remorse).

Washington, DC. We do get involved in a number of issues involving government reform, civil justice and criminal reform, limited government, the free enterprise system and so forth. Since we're talking about statistics, I would probably estimate that perhaps less than ten percent of the work we do is involved in criminal issues and a very small percent of that is involved in death penalty issues, although we did file an *amicus* brief in the *McCleskey* case and have also done so in a few other death penalty cases. Another case that we were involved in that's not a death penalty case but involves the use of racial statistics was the recent *Podberesky v. Kirwan*²⁹⁵ case, where we successfully challenged the University of Maryland's blacks-only scholarship program.²⁹⁶ We represented an Hispanic student who was not allowed to qualify for that scholarship program because he was not black. The Fourth Circuit unanimously ruled in our favor.²⁹⁷ Tomorrow, the University of Maryland is filing a petition for rehearing *en banc*, and everybody thinks it's going to go to the Supreme Court.²⁹⁸ The Washington Legal Foundation does support the death penalty, as do eighty percent of the American people and a majority of the minority population in this country, and they support it because they are disproportionately victims of violent crime and murder. We support it for principally two reasons: retribution and deterrence.

Our position is that there is really no convincing evidence, you just heard some anecdotal evidence, of racial bias in the criminal justice system in general and the death penalty in particular. You would think that if there is some discrimination afoot in the death penalty administration, it would manifest itself in the criminal justice system as a whole. So, let's briefly take a look at that. I recommend for everyone's reading the lead story in the fall 1994 issue of *The Public Interest*,²⁹⁹ which discusses the question of black crime. It is by John DiIulio, Jr., with commentaries by Glen Loury, Paul Robinson, Richard Gill, Patrick Klangin, and James Q. Wilson. It really is a great piece to read.

295. 38 F.3d 147 (4th Cir. 1994), *amended and reh'g en banc denied*, 46 F.3d 5 (4th Cir.), *cert. denied*, 115 S. Ct. 2001 (1995).

296. *Podberesky v. Kirwan*, 38 F.3d 147, 160-61 (4th Cir. 1994), *amended and sugg. for reh'g en banc denied*, 46 F.3d 5 (4th Cir.), *cert. denied*, 115 S. Ct. 2001 (1995).

297. *Id.*

298. The Supreme Court denied certiorari for *Podberesky* on May 22, 1995. *Podberesky v. Kirwan*, 115 S. Ct. 2001 (1995).

299. See John DiIulio, Jr. *The Question of Black Crime*, PUB. INTEREST, Fall 1994, at 3 (discussing racial implications of crime statistics and suggesting that there is no significant statistical difference in prosecution and sentencing between whites and blacks).

I'll refer to a study in there by Pat Langin, who works for the Bureau of Justice Statistics. A recent study looked at the seventy-five most populous counties in America where there is a high concentration of blacks or where blacks are more likely to come in contact with the criminal justice system, and here's what his survey found. First of all, they were looking at whether blacks were prosecuted more vigorously than whites; second, they examined whether they were convicted more often than whites; and third, they studied whether blacks were sentenced more harshly than whites. As for prosecution, sixty-six percent of the black defendants were subsequently prosecuted; the rest of the cases were dismissed or *nolle prossed*. Yet, that is slightly less, not more, than the sixty-nine percent of whites who were prosecuted. Looked at another way, at a stage where felony court charges were filed, black defendants comprised fifty-three percent of all defendants but they comprise fifty-one percent of those actually prosecuted. As for the adjudication stage, among blacks prosecuted in urban America's courts during the study period, seventy-five percent were subsequently convicted of a felony offense. Once again, this figure is slightly less, not more, than the seventy-eight percent of whites. And despite the small difference, blacks comprised fifty-one percent of those prosecuted and also fifty-one percent of those convicted of a felony. Looking at the sentencing, the results were mixed. On the one hand, the average state prison sentence received by blacks convicted of a felony was five and a half years—that is, one month longer than what whites received: a small difference, not of statistical significance. The Justice Department survey thus provides no evidence that in places where blacks have most of their contacts with the justice system, the system treats them more harshly than whites.

Now let's look at the death penalty as a subclass of that criminal justice system. Again, Bureau of Justice statistics show that out of 1000 whites who are arrested for homicide, 16 would get the death penalty, whereas out of 1000 blacks who are arrested for homicide, 12 would get the death penalty.³⁰⁰ You are more likely if you are white and commit murder to get the death penalty than if you are black and commit murder.

You've got to keep in mind that blacks are twelve to thirteen percent of the population.³⁰¹ They commit fifty-four percent of the homicides but only get forty percent of the death penalties that are

300. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1984, NCJ-98299, at 7-9, tbls. 11, A-1, A-2 (Aug. 1985).

301. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, USA STATISTICS IN BRIEF 4 (1995) (stating total black population was 12.5% of total U.S. population in 1994).

measured out.³⁰² So, we see that there's really no hard evidence showing that the race of the defendant has any statistical significance in the way they are treated in the criminal justice system at the arrest stage, at the prosecution stage and the sentencing stage, and even the GAO report says that it's equivocal with respect to that.

So, those who oppose the death penalty then say, "Let's not look at the race of the defendant. Let's look at the race of the victim." This is a theory that quite frankly has some strange implications, both as a practical matter and as a jurisprudential matter. It presupposes that there's one jury that goes around and sits on all these cases in order to keep that variable locked in, that it's so sophisticated at discrimination that it sees the black defendant there and doesn't impose the death penalty because of the race of the victim—who is not even in the courtroom. It seems to me that racism would manifest itself with the black defendant there, but, again, we just discovered that there's really no evidence to that argument. It also is a strange jurisprudence where a John Spenklink, who was white and was the Florida killer who in 1973 killed a white person and got the death penalty, can then scream racism, because if only he had killed a black person he would not have gotten the death penalty.³⁰³ It's that kind of argument that the Court, I think, had trouble with in the *McCleskey* case.

I'm sure the GAO tried to do a good job here in looking at all these varied studies, but it just seems impossible to control all the numerous variables that are involved in these kinds of cases. I want to mention another study which is not in the GAO report; it came out after their study, by the Rand Corporation. Stephen Klein looked at the death penalty in California and concluded that there was no discrimination there. Of 215 white murderers, thirty-two percent were sentenced to death, whereas of 281 nonwhite murderers, twenty-seven percent were sentenced to death. Then, when he looked at the factor of the race of the victim, he found that if you look at just the raw data, white victim cases were likely to result in death sentences more often than nonwhite victim cases.³⁰⁴ However, that relationship disappeared once he controlled for the gravity of the crime, the number of victims in a particular case, whether the victims were vulnerable, whether the killing took place to avoid arrest, whether a

302. See DiIulio, *supra* note 299.

303. *Spenkelink v. Wainwright*, 578 F.2d 582, 612-16 (5th Cir. 1978) (rejecting contention that judges "value black lives less than they do white lives, and thus are more likely to seek, recommend, impose, and affirm the imposition of the death penalty when a defendant murders a white victim"), *cert. denied*, *Spenkelink v. Wainwright*, 440 U.S. 976 (1979).

304. See STEPHEN P. KLEIN ET AL., *RACIAL EQUITY IN SENTENCING* 11-12 (1988).

sex crime was involved, or whether torture was involved. He said that at this point, the statistical evidence just evaporated and it is really an impossible task to try to control for all these variables and to try to come to a conclusion, because each particular murder has its own unique characteristics.

You can't compare apples with oranges and just simply look at the race of the victim and pretend that you are controlling for all of these variables. Professor Joseph Katz of the University of Georgia, who was the statistician for the State in the *McCleskey* case, took the same data base that Baldus had³⁰⁵ and by adding more or less of the variables, one could basically game the system. Depending upon where you stop the spinning wheel of variables, you can show that there was less of a correlation based on the race of the victim or no correlation at all.

So, we can be talking around and around with these numbers and our eyes can glaze over about the race of the victim. It just seems to me that rather than feeling sorry for the criminal who everybody admits committed a murder, our resources can better be spent by trying to see why blacks are eight times more than their percentage of the population to be the victims of murder and violent crime.

The Racial Justice Act³⁰⁶ is an attempt to try to solve this problem, but when you look at that, I think it would do more harm than good and have a perverse result. It would almost be like a quota system, where you would have to be putting to death more blacks who killed other blacks in order to have an equal system there for comparison's sake.

I think what these statistics are leaving out is the fact that when there is a black on black crime, the court and the jury find more mitigating circumstances. To twist the fact that they don't impose the death penalty there, out of leniency or mercy, and to say that there's racism afoot because that black defendant didn't get the death penalty when he killed a fellow black person, just seems not to make much sense. I think statistics really don't bear out the position that the other side is trying to argue. Thank you.

DEAN RASKIN: Thank you, Paul. We have been joined now by Diann Rust-Tierney who is the Director of ACLU Capital Punishment Project and Vice Chair of the National Coalition to Abolish the Death Penalty. Please welcome her.

305. See *supra* notes 11, 250 and accompanying text (discussing Baldus study).

306. See, e.g., H.R. REP. NO. 103-458, 103d Cong., 2d Sess. 12 (1994).

MS. RUST-TIERNEY: Good evening. I want to talk a little bit this evening about the remedy for race discrimination in capital sentencing. Paul has led us to that discussion by talking about the Racial Justice Act.

But before I do that, however, I want to add to what you have already heard about racism. Racism, as we know from other aspects of a society, is a very complex issue. There is no reason to believe that those same complexities that we see in other constitutions in our society don't carry over here. So, when we talk about why you have disproportionate numbers of people on death row who kill white victims from a statistical point of view, you heard from Ron that there are lots of things that go into the decision to prosecute; and there are lots of pressures that go into these decisions that come from public outrage, which has a lot to do with the public's identifying with the victim. The jury need not necessarily know the race of the victim to have the outcome that we are so concerned about if the prosecutor is getting pressure from the community because the community is outraged when there's been a white victim.

As we reflect on some of the feelings that came out of the Union, South Carolina case,³⁰⁷ we realize that people were too ready to believe that the perpetrator was black. We're writing not on a blank slate.

We have had to apply remedies in other contexts, such as in housing and employment, to deal with complex issues. There, we sort out, for example, whether the reason why a person did not get a job was because the person was not qualified or because the individual who did the hiring didn't feel comfortable with a person of a different race or gender. When the person who does the hiring doesn't feel comfortable, why doesn't that person feel comfortable? We sort out the same kinds of complex issues to determine whether there is impermissible discrimination in other areas. Just as we've done it in employment and housing, we very badly need to do that in the context of the death penalty, and in general with regard to the criminal justice system.

There's a lot of evidence that is contrary to what Paul has suggested, that the criminal justice system does not operate equitably. One example is a study that was done by the United States Sentencing Commission. There were sentencing guidelines introduced in the

307. *State v. Smith*, Nos. 94-GS-44-906 & 94-GS-44-907 (Ct. Gen. Sess., Union County, S.C. 1995); see also Howard Kurtz, *When Media Skepticism Is Left Behind*, WASH. POST, Nov. 5, 1994, at A11 (discussing public and media's initial belief in Susan Smith's, a white woman, accusation that black man kidnapped her children).

federal system to deal with inequities and arbitrariness in sentencing generally.³⁰⁸ The idea was that if you commit a crime and we can define that crime, you should serve the same amount of prison time that the next person does. So, the whole idea of that sentencing scheme was to make sure that there was some uniformity. But the United States Sentencing Commission—which is not an arm of the American Civil Liberties Union, by the way—found that even where there was supposed to be no discretion in sentencing prosecutors exercised discretion in favor of white defendants; and even in a system where you could supposedly define the crime precisely, African-American defendants were receiving longer sentences for the same crimes.³⁰⁹

So, it's against that backdrop that we look at the problem of race discrimination and the death penalty, and the possible remedies. In 1987, after the Supreme Court decision in *McCleskey v. Kemp*, which made it impossible to prove discrimination not only in capital cases but also in sentencing generally, there was an attempt in Congress to provide a federal statutory right to be free from discrimination in capital cases. That statute was called the Racial Justice Act.³¹⁰ It tried to track what we have done in other contexts of civil rights law. It would not have said that you couldn't ever have the death penalty—although that would have been one solution. Rather, it would have said that when you do seek to impose the death penalty, if the defendant can show a pattern such that, for example, a person who kills a white victim is four more times likely, under otherwise similar circumstances, to get the death penalty than a person who kills a black person, that would be enough (in the initial drafts of the provision) to authorize a court to place the burden of explaining the disparity on the state.

Keep in mind that some of the evidence of a pattern of bias here is stronger than the evidence that we've relied on in other contexts. You may have heard that you are about 1.7 times more likely to have a heart disease if you smoke. Think about how much more likely you are to be sentenced to death if your victim is white than if your victim is black.

308. See Sentencing Reform Act of 1984, 28 U.S.C. §§ 3551-3559 (1994) (delineating guidelines by which judges should carry out sentencing by looking at factors such as seriousness of crime and past crimes).

309. U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, at F-4 (1991).

310. See H.R. 4092, 103d Cong., 2d Sess., tit. IX (1994).

Let me just say a word about something Paul raised: why, in his view, doesn't it make sense to deal with the race of the victim? It makes absolute sense to deal with the race of the victim because the single most important issue is whether the death sentence in a particular case is the result of focusing on factors that are specific to that defendant and to that crime. I think we would all agree that a crime isn't worse because the victim is white or the victim is black. So, anywhere we think that there's evidence that consideration has crept into the determination, we want to cull that out. That is why it does make a difference if you can show a pattern such as we've seen.

The Racial Justice Act would follow the same kind of pattern that we've seen in employment discrimination cases. Just as in such cases you can show that an employer has never hired a person of color or has never promoted a woman to a particular position, the Racial Justice Act would allow a defendant to show that the State has never imposed the death penalty in a particular type of case where the victim is black. That's the kind of evidence that doesn't prove automatically that there's discrimination, but gives a court a reason to look at the situation.

DEAN RASKIN: Can you explain what the remedy would be in the event that the defendant could demonstrate such a showing?

MS. RUST-TIERNEY: In the event that the defendant could show that race influenced a particular death sentence, he or she could not be executed. The state would then be free to go back and try to resentence the defendant under procedures that do not cause that kind of risk of discrimination, or the state might decide that it would sentence this defendant to the same punishment to which we sentence most people who commit murder—a very lengthy prison sentence.³¹¹ Under the Racial Justice Act, a defendant could not challenge the conviction and murderers could not be set free.³¹² It would say that there's something wrong with this person's death sentence because of strong evidence that the thing that's wrong is race. That doesn't really go outside what we've been used to dealing with in other civil rights contexts.

There were a number of changes made in this legislation to address concerns that the Racial Justice Act would be too burdensome on the state. I said earlier that in the initial drafts, there was a burden placed on the state to disprove discrimination once a pattern of the kind that we have talked about was shown. In an effort to pass the

311. See, e.g., H.R. REP. NO. 103-458, 103d Cong., 2d Sess. 12 (1994).

312. *Id.* at 4.

legislation and to deal with the political realities, the proponents of the Racial Justice Act—both people who oppose the death penalty and people who support it—cut it back significantly to the point that in the last days of Congress, when this issue was very much in the national debate, we were only talking about allowing a defendant to present this kind of evidence of a pattern of discrimination and to have the court decide whether, on balance, given all the considerations the court really thought that discrimination was taking place. That raised the risk of a defendant's putting on the most sophisticated evidence, of the kind that we had seen in the *McCleskey* case where 2000 cases were looked at and numerous variables were controlled, only to have a court look at that and say that on balance it did not think there had been discrimination. But we thought it was so important that there be some remedy and some opportunity to at least get this information before a court that we were willing to go that far.

Unfortunately, the opponents of the Racial Justice Act were so steadfast in opposing this remedy that even that was not enough. As we look at prospects for addressing this issue in the future, I think it is going to be extremely difficult. We are in the process now of assessing where we are in Congress with the changes that are going to be taking place. Those changes don't go well necessarily for advancing this particular aspect of civil rights.

What people need to do when they think of this legislation, and when they hear this information, is to realize that this is part of a continuing struggle for civil rights. It is not an accident that we have this kind of gross disparity in the application of the death penalty—or the gross disparity in the way our sentencing in criminal justice operates generally. We have not focused the same kind of attention on racial disparities in other contexts in the criminal justice system. We have left that by and large with the courts, which have been exceedingly deferential to states on these sentencing issues and have not done the same kind of job they have done in education and housing.

So, the Racial Justice Act did not come into being in the last Congress.³¹³ It may not come into being in the next Congress. But I think this issue will continue to be with us. We will continue to press forward, as long as states continue to use the death penalty as

313. See Helen Dewar, "Racial Justice" Language Divides Congress, WASH. POST, May 12, 1994, at A6 (discussing Senate vote opposing Racial Justice Act as part of President Clinton's 1994 crime bill).

they have thus far done. As long as we don't have a Racial Justice Act, there will be permission for the states to use the death penalty as they have been doing. There will be a push for the Racial Justice Act legislation, and I think we will finally see it become law—or we will see the end of the death penalty.

DEAN RASKIN: Thank you. Those were interesting and provocative presentations. I'm now going to pose a series of questions to the panel, and we will reserve the last half hour for questions from people in the audience.

Listening to everyone speak, it is clear that we have a conflict about what we want to promote in the criminal justice system. I want to try to isolate these different issues for the sake of clarity in our discussion.

Paul, let me start with you. You began by saying that you oppose the Racial Justice Act and the defendant's claim in *McCleskey* on the grounds—I hope that I'm quoting you properly—"that there's no convincing evidence of racial bias in the system." Your empirical premise is that racial bias has not been shown. But let's assume it can be shown that those who kill whites are ten times more likely to be sent to their deaths than those who kill African Americans. At that point, would you support something like the proposed Racial Justice Act?

MR. KAMENAR: That question presupposes that all the other variables were taken into account. For example, in the *McCleskey* case, McCleskey murdered a white person, and the fact of the matter was that that person happened to be a police officer, and eighty-five percent of the police that are murdered are white.³¹⁴ Therefore, there are other factors counted in there. So, again, it just seems difficult even to try to make some sense out of that.

DEAN RASKIN: Now, Mr. Kamenar, I'm a law professor, and I tell people not to fight the hypothetical. You're fighting the hypothetical.

MR. KAMENAR: I wouldn't oppose some kind of a measure to allow the defendant to challenge this sentence. The Supreme Court said if you've got the evidence to show that there is racism in your situation, the death penalty should not be imposed, I agree, but the question is how do you go about proving that. The way that Ms. Rust-Tierney laid it out, you have to have the prosecutor basically prove the negative, saying, "Well, no, out of all these variables the race of the victim wasn't the one that caused the defendant to get the death

314. See Robert S. Stein, *In an Effort to Control and Prevent Violence*, INVESTOR'S BUS. DAILY, Apr. 25, 1994, at 1 (citing criminal justice professor).

penalty." I think the burden should be on the person challenging it rather than allowing defendants to raise a generic prima facie challenge like you do in employment discrimination cases. After all, in that context you have essentially one employer. You do not argue, "Well, look, there's racism in my case because there are fifty other employers who didn't hire enough blacks, etc.; therefore, my employer must be discriminating against me." It's going to be harder to compare apples with apples in this kind of a case.

So, I think, sure, there should be some kind of a way in the system to do that. I think there is already. You have other protections in the system. *Batson v. Kentucky*³¹⁵ eliminates the striking of jurors because of their race and so forth.³¹⁶ But I just don't see how the system they want to propose could work. I think it would shut down the death penalty system by putting the burden on the government.

DEAN RASKIN: I do want to come back to the fact question you're focusing on but let me flip the question I just posed over to Mr. Tabak and to Ms. Rust-Tierney. Let's say that the statistics, in fact, come out the other way; that there is no racial bias with regard to the race of the victim or the race of the defendant. I assume that at that point neither of you would support the death penalty as a general matter. Is that a fair assumption?

MS. RUST-TIERNEY: There are other problems with the death penalty, such as that it doesn't work. The rest of the world isn't using it anymore because it doesn't work. There are other problems as well. Racism in the application of the death penalty makes capital punishment in the United States particularly offensive. I think if you mention that a majority of the African-American community supports the death penalty, that is true, but the support is much softer and much less than in the white community generally. One of the things that is most troubling is the racism. So, taking away the racism doesn't solve all of my problems with the death penalty, but keeping it there is unconscionable.

I would just say one other point. If there were no race discrimination here, if Paul were right that there isn't such a problem, it couldn't hurt to have the Racial Justice Act, because nobody would be able to prove a claim of discrimination and nobody's death sentence would be vacated. In fact, that's what we would see in some places. If in fact in California, as Mr. Kamenar points out the Rand study

315. 476 U.S. 79 (1986).

316. *Batson v. Kentucky*, 476 U.S. 79, 89-92 (holding that Equal Protection Clause forbids striking potential jurors solely on basis of race).

said, there is no discrimination, at least in regard to the Racial Justice Act. They could go forth with as many death sentences as they want and carry them out. So, you have to be clear that we have to have a basic commitment to stamping out discrimination.

DEAN RASKIN: Do you believe that the history of the death penalty in the United States is inextricably bound up with race, so that even if you could purge racial factors from the administration of the death penalty in a particular state today the social meaning of the death penalty is tied to racism? Or if you want to think about that one, let's go to Mr. Tabak and you can answer my original question.

MR. TABAK: Let me answer the original one and let Ms. Rust-Tierney handle that one. First, because I'm sitting behind a card here that has the ABA on it I want to point out before I give my own thoughts that the ABA has no position on the death penalty but it does have a position in favor of the Racial Justice Act and I was present when the ABA adopted that policy;³¹⁷ in fact I wrote the resolution. The fact is that many supporters of the death penalty supported that ABA resolution, and many supporters of the death penalty supported the Racial Justice Act in Congress. So while my individual answer to that question is yes, I would oppose the death penalty anyway, there are many other people in the ABA and in Congress who would say no, not only would they not oppose the death penalty anyway but even though it is racist, they don't oppose the death penalty. But they do advocate passage of the Racial Justice Act.

DEAN RASKIN: They'll support it even more once it's cured of any racial impurities.

MR. TABAK: I would hope that in my state, New York, that now that we have a Governor-elect who is pledged to sign a death penalty bill into law, that those people, particularly in the Democratic party who have been voting thoughtlessly for the death penalty bill without ever reading the bill will now look at what it says and look at what it doesn't say—including its lack of a racial justice provision—before they vote on it, since Governor-elect Pataki would actually sign it into law if they do pass it. The ultimately-adopted New York death penalty statute does contain a provision similar to the Racial Justice Act. It remains to be seen how effectively it will be implemented.

MS. RUST-TIERNEY: You have to look at the death penalty in the context of American history and particularly the criminal justice

317. See Robert D. Raven, *A Message from the President, Death Penalty Cases: Ensuring Fairness While Reducing Delay*, 74 A.B.A. J., Oct. 1988, at 8 (discussing ABA Resolution passed in Toronto, Canada, on August 9, 1988, encouraging legislation to forbid racial discrimination in death penalty cases).

system—I refer people, in this connection, to Judge Leon Higginbotham's book, *In the Matter of Color: Race and the American Legal Process*.³¹⁸ Many of the patterns we see in sentencing, such as race of victim discrimination and race of defendant discrimination, are carryovers from (a) laws that explicitly said that if you murdered your slavemaster the punishment was death but if the slavemaster murdered you, the punishment might be nothing, or if the slavemaster killed somebody else's slave, the penalty might be to pay the other owner the value of the slave, and³¹⁹ (b) codes that said that the rape of a white woman carried a death sentence whereas the rape of an African-American woman carried maybe a fine, at the discretion of the court.³²⁰

We not only have a legal history. We also have had lynching going on in the South which went unpunished. So, you have a legal history and a criminal justice history that makes the death penalty a very tough symbol for some. We need something like the Racial Justice Act to address that perception.

MR. TABAK: I would like to add one thing. I think it's no accident that we remain virtually the only western country that is actually implementing the death penalty. European countries, Canada, Mexico, and numerous other countries have gotten rid of it.³²¹ The Union of South Africa, under its new government, has had a moratorium and may eliminate it.³²² I believe that two reasons why we have had the death penalty in this country are (1) we have a higher murder and crime rate, in part because we have no real control of guns, and also for other reasons; and (2) the racial tensions that we have had in this country, which historically have underlied support for the death penalty.

Racism is not admitted overtly anymore the way it once was. That's why to rely, as the Supreme Court would have us do, on people coming forward and admitting, "Yes, I intentionally discriminated," is unrealistic. People are not as honest about their racism as they used to be, but racism still exists.

318. A. LEON HIGGINBOTHAM, *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS* (1978).

319. See, e.g., *McClesky v. Kemp*, 481 U.S. 279, 302 (1987); HIGGINBOTHAM, *supra* note 318, at 187.

320. See, e.g., *McClesky*, 481 U.S. at 302; HIGGINBOTHAM, *supra* note 318, at 282.

321. See AMNESTY INTERNATIONAL, *UNITED STATES OF AMERICA: THE DEATH PENALTY 73-87, 189-91* (1987) (discussing use of capital punishment in United States).

322. On June 6, 1995, South Africa's Supreme Court unanimously held the death penalty unconstitutional. Thus, the moratorium, which began in 1992, turned into complete abolition. See Howard W. French, *South Africa's Supreme Court Abolishes Death Penalty*, N.Y. TIMES, June 7, 1995, at A3.

Mr. Kamenar said we would have to look behind all the juries. Yet, as our GAO experts explained, discrimination takes place more in prosecutors' decisions on whether to seek the death penalty than in jury rooms. When you look at who these prosecutors are and who they look to to get them elected, you can understand why they care a lot more when, under otherwise totally similar circumstances, a white person is murdered than when a black person is murdered. That is a very troubling aspect of our criminal justice system.

MR. KAMENAR: I do not dispute, of course, and nobody can, the racism that was involved fifty, one hundred years ago in the system that was applied. But I dispute that it has somehow spilled over to a jury that is empaneled today. That may be the perception. I think that with all the safeguards we have today—and, again, no system is perfect—the evidence, I think, does not bear out that racism is a factor in the criminal justice system as a whole or in the death penalty in particular. I think there should be safeguards, to be sure. There are plenty of them there, and in death penalty cases you have super due process provided. No system is perfect.

The Republicans did have an alternative to the Racial Justice Act that I thought was a good one.³²³ It would allow for challenges about race used in the system, but at the same time it would not bring the system to a halt and make the prosecutor prove a negative. Indeed, as I said earlier, doing the latter would have the perverse effect of having even more blacks be sentenced to death in order to keep the quota numbers up high.

It had a really bizarre provision, where you would compare the percentages of those being executed to the classes of races. California would have four classes. You would have blacks, whites, Hispanics, and Asian Americans, so that each one of those groups would have to be represented twenty-five percent in terms of those executed. Well that's just nonsense. Blacks commit fifty-four percent of the murders, so to say that we need to execute more Asian Americans so that they get their twenty-five percent quota, just didn't make much sense at all.

DEAN RASKIN: Let's come back to that question, which is finally the policy question of what to do. But first, I thought we could ask Ms. Ganson to address the two studies that Paul relied upon. I've got them down as the Katz study and the Klein study, which appeared to deny the general findings of the GAO report. Were these studies that you looked at in the GAO report?

323. See *Accused Facing Death May Give Racial Data in Trial, House Says*, BOSTON GLOBE, Apr. 21, 1994, at 9 (discussing amendments to Act proposed by Rep. McCollum).

DR. GANSON: Actually, the Klein study was included in the GAO report.³²⁴ As part of our evaluation synthesis, we determined whether the researcher's conclusion was supported by the data. We're real big on data and facts at the GAO, so we like to make sure that not only what we say is correct but also we don't accept what researchers say at face value. We look beyond that and behind that. In the Klein analysis, his conclusion and his tabular presentation were inconsistent. When our statistician looked at it, what he said was that the data that Klein presented in the tables did not support a conclusion of no effect and, in fact, when he reports the results of the largest analysis in the table, the race of the victim is shown to have an effect that is statistically significantly at the .014 level. This finding doesn't support a conclusion of no effect. So, that was how we dealt with the Klein study. I might also add that this was not the only study where we found that the conclusions were not supported by the data.

Klein's study came to the conclusion that the race of the victim had no effect, but when, rather than just looking at the words we also looked at the data that he presented in the tables, we saw that the data that he presented said that race of the victim was significant at the .014 level—which means it was highly unlikely that it was true due to chance.

I want to comment also on the Katz study. We did look at the Katz study in relation to Professor Baldus' study.³²⁵ Paul mentioned in the history presentation that these two studies seem to be inconsistent and when Katz added more variables to the model and reanalyzed the data the race effect washed out. Well, basically, the Katz study used a statistical method called ordinary least squares, which is much more intolerant of having multiple variables in a model than the model that Baldus had used. Baldus used a statistic called logit analysis. It's a more robust statistic to differentiate differences in variables, especially when there are large numbers of variables in a model. So, we did, basically, in our assessment find the Baldus study to be quite robust in terms of its findings.

DEAN RASKIN: Let me ask one final question before we open it up to the audience. It's the policy question. Isn't there something to Mr. Kamenar's point that all that's really being asked for in the Racial Justice Act is for more death penalties rather than less death penalties? In other words, aren't you really saying that someone's rights are being violated when the murderers of black victims or other

324. See GAO REPORT, *supra* note 262, at 11 (citing to Klein study).

325. See *supra* notes 11, 250 and accompanying text (discussing Baldus study).

minority victims get off easy and those people should be sent to the chair as well?

MS. RUST-TIERNEY: I think that is a possibility, but it's not a certainty. One of the things we have to sort out is whether the system is overreacting to crimes against certain white victims or whether it is underreacting to certain crimes against African-American victims or against other people of color, and we haven't sorted that out. Remember that the majority of murderers are punished by prison sentences and not by death sentences, so it's only in the extraordinary handful of cases that we seek this extraordinary punishment. There's a question about whether or not we are overprosecuting white victim cases and really prosecute those to the hilt or whether or not we are undervaluing black victim cases.

I don't know for sure if we can say we will automatically see more death sentences if the Racial Justice Act is passed. We may see a system in which the states would really focus on the worst cases—the cases where “you know it when you see it” if it is a death-worthy case.

The vast majority of the cases in which there is evidence of bias are the mid-range cases. Those are the cases, such as murder in the course of a robbery, where it is hard to distinguish the cases where the death penalty is secured from other cases in which defendants who committed similar crimes are serving life sentences or other sentences. That's where there's the most discretion. That's where it's hardest to sort out the death-worthiness. So, we might see a more judicious use of the death penalty. We may see an increase in some African-American death sentences, but a better outcome and I think a likely outcome is a more judicious use of this punishment.

DEAN RASKIN: Let's go to the audience.

AUDIENCE: You made the statement about a juror who is a racist and looks at the defendant and at the victim, and I think it represents a basic kind of misconception about racism in general—the conception that someone has to have some malicious intent to be racist. Looking at employment discrimination cases, a lot of the cases arise because you have a white supervisor who for whatever reason mixes more with the white employees than with the black employees, and the white supervisor therefore gives the white employees promotions. It's not someone saying, “I'm not going to give the black people here promotions.” It comes back to what Bill Bradley said after the race riots in L.A.: if you are white and you haven't got a friend who's black, or vice versa, then you're part of the problem. It's not malicious racism. When a jury goes in there, a juror is not saying, “This is a black victim; therefore I'm not going to give the death penalty.”

You are judging the person differently. You are possibly more sympathetic to the white victim than to the black victim.

DEAN RASKIN: You are raising the whole question of unconscious racism. Very good.

Let's do this so we can get more of the audience in. Why don't we take several questions and then a series of responses.

AUDIENCE: If we have to have a death penalty and we can see that there is racism in the process, would the Racial Justice Act proposed last year be the perfect solution or is there another solution besides the death penalty that is not politically possible or just hasn't been raised yet?

We seem to be having a battle of the statistics and numbers, and I don't claim to be an expert but there was an admission that the death penalty is a very small portion of murder prosecutions, and one thing I do know is that whenever your population, and you kind of mentioned it, is very small there are wide fluctuations and most people that base decisions on these statistics when the population is small say OK, it might tell me trends but it never gives me an answer. In what numbers are we actually talking about with respect to size: 500,000, 10,000? I'm just trying to get an idea of the actual numbers of cases you've studied because it didn't come out here.

DEAN RASKIN: Let me just add a little twist to that question, which is whether in the Racial Justice Act we would be comparing the population of minorities given the death penalty to the general population of minorities or to the populations of minorities arrested for murder or prosecuted for murder? What exactly is the baseline comparison?

Why don't we take one more question and then we can have some answers up here. Yes, sir.

AUDIENCE: Is there any way to keep the death penalty and take racism out of the process?

DEAN RASKIN: Ron, why don't we start with you?

MR. TABAK: I'll try to at least answer that one and to deal a little bit with the last one.

What I was saying about the lack of gun control and the availability of guns is that in my view these are not accidentally related to our having a higher homicide rate than in Western European countries and Canada, which do not have the widespread availability of guns that we have. I was suggesting that if our murder rate were much lower, then the clamor for the death penalty would also be much lower. The claim made in political campaigns that, "My position on

dealing with crime is to have the death penalty” as if that would do something about crime, is a fraud on the public.

As to whether there are other ways of dealing with racism in the death penalty, there is something I found ironic after I testified before Congress in support of the Racial Justice Act on behalf of the ABA. I pointed out that if the Racial Justice Act were passed, it need not lead to the end of the death penalty, as its opponents claimed, because there were various other things that might then occur; for example, (a) the states might provide decent quality defense lawyers in capital cases who would be more likely to exercise the right (under the *Batson* case that Mr. Kamenar mentioned) to object to discrimination by prosecutors in jury selection and who would be more likely than Mr. Gates’ lawyer to object to racial discrimination in these cases; and (b) the states or Congress could get rid of the doctrine of procedural default, whereby you can literally get executed because your lawyer did not object—which is not what I would call “super due process” but rather super *lack* of process. But then what happened was that Senator Paul Dixon of Illinois stated on the Senate floor that he had read my testimony and that he had concluded that all the ideas that I had for ways of dealing with racism were wonderful and that, therefore, we didn’t need the Racial Justice Act—which he then voted against. My reaction to that was the same as if in the 1950s or 1960s somebody had told me, “We don’t need to pass a federal civil rights law because the states could do a lot of things that could end racial discrimination.” Both are completely illogical. The fact of the matter is there *are* a variety of other things that could be done besides passing the Racial Justice Act but nobody is going to do any of those other things unless you have the Racial Justice Act.

MS. RUST-TIERNEY: Just to add a footnote, in supporting the Racial Justice Act, we were dealing within the parameters of what Congress can do under its authority under section five of the Fourteenth Amendment. One of the outcomes we would hope for if the Racial Justice Act were passed is that the states would take that seriously and look at their sentencing schemes and do things like Mr. Tabak has suggested, such as giving some guidelines to prosecutors about which cases ought to be death-eligible cases, so that prosecutors are not subject to the whims and frenzies of the communities, which can be influenced by bias.

The other thing I would underscore is that because of the political way the death penalty is dealt with, politicians run around and advocate the death penalty for everything; so, death statutes are written broadly, to cover as many crimes as possible; and that’s

precisely what leads to the kinds of disparity that we see. That is what we saw in the passage of this year of the major expansion of the federal death penalty, where there were sixty variations on the theme, and as a result, we're going to see evidence of bias.

A state could, without the Racial Justice Act, say, "We only want the death penalty for the worst crimes, and we're going to really try to define what are the worst crimes, such as where there are multiple victims, and not how many crimes we can come up with." A state could really try and do that job.

In direct answer to your question, the Racial Justice Act, as passed by the House of Representatives in 1994, was probably the best version that it would have passed. I prefer a stronger version that would place more of a burden on the state, since it has the most information about why it selected a case for capital prosecution.

MR. KAMENAR: Just a few fast statistics here. The vast majority of murderers who receive the death penalty are involved in intra-racial offenses—whites killing whites, blacks killing blacks. Most analysts agree that a high percentage of the homicides are intra-racial.³²⁶ In the smaller number of cases in which blacks kill whites, the circumstances of the crimes seem to be substantially different. The number of cases in which whites kill blacks is usually too small to be factored into a lot of these analyses because of the small sampling pool that you talked about.

DEAN RASKIN: Did you have an answer to one of the questions?

DR. GANSON: We just want to comment that sample size is one of the things that we looked at specifically when we reviewed the studies. There were in fact some low quality studies where we thought the sample size was insufficient for their conclusions to be strong, but there were also studies that went across multiple states in multiple years where we felt the sample size was in fact sufficient.

MR. TABAK: One way to try to deal with unconscious racism by prosecutors and jurors is to have some different people involved in the process. As of a recent year, and this may still be the case, every district attorney in Georgia was white. Until recently, very few judges in Georgia were nonwhite. Even on the staffs of many Georgia district attorneys, there are very few people who might have a different reaction to these cases. So, one thing that could help deal with the prosecutor's decisionmaking process would be to involve more

326. MICHAEL KRONEWORTH, CAPITAL PUNISHMENT 188 (1991) (stating that 77% of homicides are intraracial); U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 17 tbl. 2.8 (1993) (showing that "94 percent of the black murder victims were slain by black offenders, and 84 percent of the white murder victims were killed by white offenders").

people from more diverse backgrounds in the decisionmaking rather than doing it the way most prosecutors do it now—making the decisions themselves and reacting to their perceptions of public opinion and which voting blocks in their community are most likely to be outraged by a particular murder. It would also help if prosecutors had to be more worried that if they were discriminating in jury selection, judges would not accept explanations like “[t]he reason why I rejected that juror is that the juror reminds me of the defendant,” where the defendant is black and the juror is black, or “I thought that prospective juror looked a bit slow to me.” If white prosecutors keep giving such explanations and white judges keep accepting those explanations, and then, if we raise the issue in federal court a presumption of correctness is given to those state court determinations and we can’t get relief, this discrimination will continue going on. So, we need to get some more sense of reality into the process, as well as more diversity.

DEAN RASKIN: Any final questions?

AUDIENCE: What type of training programs are available to sensitize attorneys to the factors of race?

MR. TABAK: The ABA has a post-conviction death penalty representation project which attempts to find lawyers to represent people on death row in post-conviction proceedings. It does not itself try to train them, although it supplies training materials. Certain other bar associations, like the Association of the Bar of the City of New York, have training programs for such lawyers. The ABA has advocated standards for trial counsel that have been widely ignored and not adopted, because the people who oppose them claim that a state couldn’t meet those standards and have a death penalty. I’ll let others comment on what that means about the death penalty.

As for resource centers I’d say two things. One is that there needs to be more resource centers for trial court representation. There have not been any resource centers for trial lawyers until very recently, and they only exist in a very few places. Yet, that is where the original problems occur. Even if we could get all the post-conviction lawyers we wanted, if the trial and direct appeal lawyers have waived all the issues, our clients will get executed even if their constitutional rights have been egregiously violated in what is not harmless error. Second, it is important to realize that one very likely part of any crime bill that comes out of the new Congress that has just been elected would be an effort to eliminate the existing death penalty resource centers that deal with post-conviction representation. There have been a lot of political attacks made on these resource centers. Their

opponents are going to argue, "Why are we wasting taxpayers money on these resource centers?" In fact, the resource centers, now known as Post-conviction Capital Defender Organizations, were defunded by the new Congress, and many of them had closed by the end of 1995. I would not be surprised if Mr. Kamenar's group were to urge the abolition of resource centers. I think there is a real danger that the representation of death row inmates will become even worse under the new Congress, under the guise of so-called "reform" of habeas corpus. Such habeas "reform" is also likely to, in effect, abolish what little is left of habeas corpus.

DEAN RASKIN: Dr. Ganson, were you going to respond?

DR. GANSON: Some of the studies we looked at involved only one state. Some studies involved all states that have the death penalty. And others involved only states in a certain region. Basically, across all of the types of studies, we found a fairly robust finding of a race of victim effect. So, it did not seem to be related to a certain region of the country or a certain specific state.

DEAN RASKIN: I want to invite each of the panelists to make a closing remark.

MS. RUST-TIERNEY: I think this issue is going to be with us as long as we have the death penalty. We have a history in the United States that we can't ignore, and we have a criminal justice system that was used in a biased manner.

MR. KAMENAR: I wasn't aware that we were funding these resource centers, but thanks for telling me. Just kidding.

I think the evidence is fairly clear that when you look at the race of the defendant, the statistics are not there. I think when you get into the very complex situation of the race of the victim and try to control for all of these variables, you are never going to come to any hard conclusions about a cause and effect relationship. Even in *McCleskey*, he killed a white officer. That's a highly aggravated situation. He would have gotten the death penalty for that crime whether he was white, black, green, or yellow.

In our point of view, it seems that the death penalty is being imposed because of what the murderer did: taking an innocent human life. I'm all in favor of abolishing the death penalty and you can do it tomorrow by simply not committing any more murders.

MR. TABAK: I think the position of those people who have opposed the Racial Justice Act can be summed up as follows: "Don't confuse me with the facts." You just heard Paul talk again about police officers, even though he's been repeatedly told tonight that the

Baldus study did take that into account. The fact of the matter is that not everybody who kills a police officer is given the death penalty.

When we were discussing the Racial Justice Act with people on Capitol Hill, we would be met with these same sorts of arguments. We responded by saying, "If everything you say is true, then nobody would ever get relief under the Racial Justice Act." They remained opposed to it anyway. We offered to make it explicit that the Racial Justice Act would work in the way we said it would work, so that you couldn't get relief except if the facts were as we said they would have to be. But the opponents of the Racial Justice Act still wouldn't agree to include it.

The reason they wouldn't do so is that they like this as a political issue. The people who want to cast votes against the Racial Justice Act want to be able to continue claiming that the people who favor the Racial Justice Act are really soft on crime even if they vote for the death penalty. That is what we are now seeing in today's politics. I would urge you to do whatever you can to try and have a legal system and a political system which cares something about facts, rather than what we have now.

DEAN RASKIN: OK, do you have any closing factual remarks?

DR. GANSON: The GAO is extremely careful about what it says in its reports.

DEAN RASKIN: Is that a fact or an opinion?

DR. GANSON: It's a fact. We live this day to day, yet this report's title is "Death Penalty Sentencing: Research Indicates Patterns of Racial Disparity." Another thing, also. The GAO has no position on the death penalty, nor does it have a position on the Racial Justice Act.

VII. APPENDIX: SPEAKERS AND PANELISTS

STEPHEN B. BRIGHT is the Director, Southern Center for Human Rights, Atlanta, Georgia; J. Skelly Wright Fellow, Yale Law School. B.A. 1971, J.D. 1974, University of Kentucky. He has represented persons facing the death penalty at trials, on appeals, and in post-conviction proceedings since 1979.

EDWARD CHIKOFSKY teaches courses on Capital Punishment and Post-Conviction Remedies at Fordham University and as an Adjunct Professor at the Washington College of Law, The American University. Since 1982, Professor Chikofsky has litigated death penalty cases in state and federal courts nationwide, including the Supreme Court, and has also written numerous articles on the subject.

LAURIE EKSTRAND is the Associate Director, Administration of Justice Issues at the United States General Accounting Office. Prior to her appointment to this position, she was the Chief Social Scientist for GAO's General Government Division. Before joining GAO in 1981, Dr. Ekstrand was a consultant at Westat, Inc. in Rockville, Maryland. Dr. Ekstrand received her B.A. in political science from the University of Maryland. She earned her M.S. and Ph.D at Florida State University with specialties in social science research methods, public policy, and statistics.

HARRIET C. GANSON is an Assistant Director of Tax Policy and Administration in the General Government Division of the U.S. General Accounting Office. Prior to her work with the GAO, she served as a senior project manager with a research and evaluation consulting firm. She also taught courses in Sociology at George Mason University and Ohio State University. She received a B.S. from Miami University, an M.S. in Family and Child Development from Ohio State University, and an M.A. and Ph.D in Sociology from Ohio State University.

PAUL D. KAMENAR is the Executive Legal Director of the Washington Legal Foundation (WLF), a non-profit public interest law and policy center with over 100,000 members and supporters nationwide. WLF advocates free enterprise principles and criminal justice reform, including support of the death penalty. Mr. Kamenar has argued for the death penalty in numerous cases and has also testified before Congress in support of the death penalty. He received his B.A. from

Rutgers College in 1970, and his J.D. from Georgetown Law Center in 1975.

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