Buffalo Law Review

Volume 43 | Number 2 Article 2

10-1-1995

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BUFFALO LAW REVIEW

Volume 43 Fall 1995 Number 2

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INTRODUCTION

In the United States, it is widely believed that those accused of capital crimes[1] benefit from extensive procedural and substan-

1. Because the vast majority of those charged with and convicted of capital crimes are male, this Article uses the masculine pronoun to refer to death row inmates and defendants in capital cases. As of April 20, 1994, 2,804 of the 2,848 inmates on America's death rows (98.45%) were male. NAACP LEGAL DEFENSE & EDUCATIONAL FUND, DEATH ROW U.S.A. 1

tive protections, a sort of "super due process" through which every precaution is taken to assure that the death penalty is administered fairly and reliably. Many feel that those protections are, if anything, too extensive, and that the criminal justice system errs on the side of mercy for murderers, frustrating the public will by unduly delaying executions.[2] This popular perception is fueled by the media attention given to aberrational cases, such as those involving O.J. Simpson and the Menendez brothers, where the defendants have ample personal resources to finance an aggressive defense.[3] Moreover, this perception is endorsed by the rhetoric of the system itself—especially in the Supreme Court's numerous capital punishment opinions issued in the last two decades.[4]

(Spring 1994) [hereinafter DEATH ROW USA].

2. *See, e.g.*, Coleman v. Balkcom, 451 U.S. 949, 958 (1981) (Rehnquist, J., dissenting from denial of certiorari) (stating that time-consuming habeas review of death cases makes "a mockery of our criminal justice system"); *see also* American Bar Ass'n Task Force on Death Penalty Habeas Corpus (Ira P. Robbins, rep.), *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 159 (1990) [hereinafter ABA Task Force] (quoting Idaho Supreme Court Justice Robert Huntley as saying that "the single greatest problem the American system of justice faces with the public is the unseemly and unexplained amount of time it takes to process a capital punishment case"); Daniel E. Lungren & Mark L. Krotoski, *Public Policy Lessons from the Robert Alton Harris Case*, 40 UCLA L. REV. 295 (1992) (discussing growing concern that capital cases are litigated for too many years); Linda Greenhouse, *Justice Powell Assails Delays in Carrying Out Executions*, N.Y. TIMES, May 10, 1983, at A16 (In speech, Justice Powell criticized delays in processing death cases, stating that "[t]he primary fault lies with our permissive system, that both Congress and the courts tolerate."); Linda Greenhouse, *Rehnquist Urges Curb on Appeals of Death Penalty*, N.Y. TIMES, May 16, 1990, at A1 (Chief Justice Rehnquist, in urging greater legislative limitations on federal habeas corpus review of capital cases, stated that "a lag of seven to eight years between sentence and execution in the average death penalty case represented a 'serious malfunction in our legal system.' ").

The popular belief that it takes too long to carry out death sentences has motivated several recent legislative proposals intended to streamline the processing of capital punishment cases so that the time that elapses between the conviction of murderers and their execution is significantly reduced. *See, e.g.*, Naftali Bendavid, *What Ever Happened to Habeas Reform?*, LEGAL TIMES, May 16, 1994, at 1; *An Attack on the Bill of Rights*, SACRAMENTO BEE, November 7, 1993, at F3.

3. *See, e.g.*, Barbara Babcock, *Equal Justice—And a Defendant With the Money to Exercise Every Right*, L.A. TIMES, July 10, 1994, at A26 (contrasting defense of O.J. Simpson murder case with more typical cases); Alan Abrahamson, *Simpson Legal Fees Could Run Into Millions*, L.A. TIMES, July 9, 1994, at A10; Alan Abrahamson, *To Retry, or Not to Retry, Is the Question*, L.A. TIMES, January 27, 1994, at B1 (reporting that cost of first trial of Erik and Lyle Menendez, which ended in hung jury, exhausted Menendez estate valued at $14 million).

4. *See* Ronald J. Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 14 N.Y.U. REV. L. & SOC. CHANGE 797, 798 (1986) [hereinafter Tabak, *Death of Fairness*]. Tabak, who has represented several death row inmates in post-conviction proceedings, notes that the widely-held belief that the American legal system "guarantees the fair imposition of the death penalty" is "[a] popular miscon-

Among those who have witnessed the day-to-day operation of the death penalty system, however, a different perspective predominates. The process of selecting those offenders who will be put to death by the states[5] has been described by one prosecutor as "random, chance, [a] throw of dice;"[6] other observers refer to the system as "a sham,"[7] "scandalous," "shameful," and "deplorable."[8] While elaborate procedures and rules peculiar to capital punishment have been developed to ensure that only those defendants "most deserving of death" are singled out for execution,[9] in practice those who have been sentenced to death, as a class, are largely indistinguishable from convicted murderers who have been spared the ultimate punishment.[10] As applied, these procedures have done too little to remove the influence of prejudice and caprice in the life and death decisions made by prosecutors, judges, and juries in capital cases.[11]

Many attribute this failure to the pervasive influence of racism. Numerous empirical studies have linked sentencing patterns in death penalty cases with the racial characteristics of the defendant and the victim.[12] Others point to the distorting effects of polit-

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ception," and places much of the blame for this misconception on the United States Supreme Court. *Id.*

5. So far, the death penalty has been almost exclusively a punishment sought by state officials in state court. As of April 20, 1994, only 13 of the 2,848 inmates awaiting execution in the United States were charged and convicted in the United States military courts or federal courts. DEATH ROW USA, *supra* note 1, at 1, 42. It remains to be seen whether this changes in light of recent legislative proposals that would dramatically expand the number of federal crimes punishable by death. *See, e.g.*, Carolyn Skorneck, *House Votes Death Penalty for 70 Crimes*, LEGAL INTELLIGENCER, April 15, 1994, at 1. *See also* 21 U.S.C. § 848(e) (1994).

6. *See* Jason DeParle, *Special Report: A Matter of Life or Death*, NEW ORLEANS TIMES-PICAYUNE, 2, 6 (1985).

7. *See* Esther F. Lardent & Douglas M. Cohen, *The Last Best Hope: Representing Death Row Inmates*, 23 LOY. L.A. L. REV. 213, 213 (1989).

8. ABA Task Force, *supra* note 2, at 69.

9. Scott E. Sundby, *The* Lockett *Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1176 (1991).

10. *See, e.g.*, DAVID C. BALDUS, ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 3 (1990) ("The problem is that a very large proportion of each year's death sentences are imposed against defendants whose cases are not among the most aggravated and therefore the most blameworthy cases."); 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, 1840 (1994) [hereinafter Bright, *Counsel for the Poor*].

11. Numerous studies have demonstrated that an unacceptable degree of arbitrariness continues to infect results obtained in capital cases. *See infra* notes 64, 395, and 396.

12. *See infra* notes 24 and 64 and accompanying text. These studies show that the killer of a white person is far more likely to receive a death sentence than the killer of an African-American. Between 1976 and April 20, 1994, 232 persons have been executed by the states. Of those, 80 were black defendants who murdered white victims, while one was a

ics on a death penalty system that is administered at the local level by popularly-elected prosecutors and judges.[13] The fear of voter backlash from an electorate that overwhelmingly supports the death penalty colors the way in which discretion is exercised by the central decision-makers in the capital punishment system.[14] Still others, such as former Justice Harry Blackmun, have concluded that the problem is more fundamental: efforts to accommodate basic constitutional values such as consistency, reliability, and fairness in the context of capital punishment have spawned constitutional rules that cannot be reconciled with one another and cannot achieve their intended ends.[15] This view maintains that even if the lingering influences of racism and politics could be wrenched from the system tomorrow, the system would still yield unacceptably arbitrary results.[16]

Although I share Justice Blackmun's doubts about the death penalty, this Article assumes that the procedural and substantive protections that have been erected by the Supreme Court in an effort to minimize arbitrariness in capital sentencing, if fully implemented, could yield rational, consistent and fair sentences in capital cases. The problem is that these procedures and rules are rarely implemented. Without discounting in any way the deleterious effects of racism and the politicization of capital punishment, this Article contends that the primary obstacle to the full implementation of these rules is the chronic and severe underfunding of indigent defense services by state and local governments throughout the United States.[17]

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white defendant who murdered a black victim (the only white person executed for the murder of an African-American in this country since 1932, when such records were first kept, through April 20, 1994). DEATH ROW USA, *supra* note 1, at 5; Jack Greenberg, *Death Row, U.S.A.*, N.Y. TIMES, June 2, 1993, at A19. In addition, 33 of the 37 defendants who have been charged with capital crimes by the federal government between 1990 and June 1994 were either African-American or Mexican-American. *See* Harvey Berkman, *No Racial Bias Found in Federal Death Suits*, NAT'L L.J., June 13, 1994, at A12.

13. *See infra* notes 321-23 and accompanying text.

14. *See generally* David R. Dow, *When Law Bows to Politics: Explaining* Payne v. Tennessee, 26 U.C. DAVIS L. REV. 157 (1992) [hereinafter Dow, *When Law Bows to Politics*]; Glenn L. Pierce & Michael L. Radelet, *The Role and Consequences of the Death Penalty in American Politics*, 18 N.Y.U. REV. L. & SOC. CHANGE 711 (1990-91); Paul Reidinger, *The Politics of Judging*, 73 A.B.A. J., April 1987, at 52.

15. Callins v. Collins, 114 S. Ct. 1127, 1129-34 (1994) (Blackmun, J., dissenting from denial of certiorari).

16. *See id.*

17. Of course, racism, the politicization of the death penalty, and the refusal of the states to provide adequate resources for the defense of capital defendants are closely related phenomena. Resource deprivation is one consequence of the overwhelming popular demand for the execution of murderers in the United States and the political powerlessness of capital defendants; it is also one of the reasons that defense counsel in individual cases fail to

The vast majority of those who are tried for capital offenses are too poor to pay for their own defense. According to some estimates, approximately ninety percent of those charged with capital murder are indigent when arrested,[18] and virtually all are indigent by the time their cases reach the appellate courts.[19] These defendants are entirely dependent on others for the resources necessary to develop and present a defense at trial and to pursue an appeal. While the ultimate constitutional responsibility for providing indigent defense services in capital cases rests with the state,[20] state governments have rarely regarded this constitutional responsibility as one that carries with it significant financial obligations. Most states have shifted the economic cost of defending the poor in criminal cases to individual lawyers asked to represent criminal defendants for woefully inadequate compensation or to severely underfunded public defender offices.[21] This policy has had a disastrous impact on the quality of defense services provided in capital cases.[22]

To appreciate the magnitude of the financial burden the states

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detect and minimize the influence of racial attitudes on sentencing decisions. On the other hand, latent racial prejudices may underlie at least some of the political support for the death penalty and the reluctance to provide those representing indigent defendants with the resources necessary to provide a meaningful defense.

18. *See* Vivian Berger, *The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 245, 249 (1991) [hereinafter Berger, *The Chiropractor as Brain Surgeon*]; *see also* Jack Greenberg & Jack Himmelstein, *Varieties of Attack on the Death Penalty*, 15 CRIME & DELINQ. 112, 114 (1969) (noting that nearly 100% of those executed from 1930 until 1967 were indigent); Michael G. Millman, *Financing the Right to Counsel in Capital Cases*, 19 LOY. L.A. L. REV. 383, 384 (1985) (reporting that in California less than 2% of death row inmates were represented by retained counsel); William P. Redick, *The Crisis in Representation of Tennessee Capital Cases*, TENN. B.J., March/April 1993, at 22, 23 (estimating that more than 75% of all capital defendants in Tennessee are indigent at the trial stage); Ronald J. Tabak & J. Mark Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOY. L.A. L. REV. 59, 70 (1989) (reporting that approximately 90% of those on death row in 1985 had appointed counsel when convicted) (citing John Conyers, Jr., *The Death Penalty Lottery*, N.Y. Times, July 1, 1985, at A15).

19. *See* Redick, *supra* note 18, at 23.

20. Over sixty years ago, in the infamous "Scottsboro boys" case, the United States Supreme Court held that an indigent defendant charged with a capital offense was entitled to the assistance of court-appointed counsel. Powell v. Alabama, 287 U.S. 45, 68-69 (1932). The *Powell* Court found the right to counsel in death cases to be a right guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Id.* at 71. In the last three decades, however, starting with Gideon v. Wainwright, 372 U.S. 335 (1963), the Court has looked to the Sixth Amendment as the source of that right. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

21. *See infra* part II.

22. *See infra* part III.

have imposed on the criminal defense bar, the revolution in capital punishment jurisprudence that began in the 1960s must be taken into account. In that decade, the Supreme Court was confronted repeatedly with compelling evidence that death sentences were meted out capriciously[23] and that the death penalty was administered in a racially discriminatory manner.[24] The legal assault on capital punishment culminated in 1972 with *Furman v. Georgia*,[25] where the Supreme Court found that all existing death penalty statutes in the United States violated the Eighth Amendment's prohibition against cruel and unusual punishments.[26] In the aftermath of the *Furman* decision, thirty-five states enacted new capital punishment statutes.[27] Four years after *Furman*, in *Gregg v. Georgia*[28] and four companion cases,[29] the Supreme Court passed on the constitutionality of five of these statutory schemes, upholding three and invalidating two.[30] In doing so, the Court embarked

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23. *See, e.g.*, WILLIAM J. BOWERS, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982 205-17 (1984) (reviewing empirical studies pre-dating Furman v. Georgia, 408 U.S. 238 (1972)); *see also* BALDUS ET AL., *supra* note 10, at 80-139 (summarizing results of both pre-*Furman* and post-*Furman* studies).

24. For summaries and analyses of empirical studies conducted before *Furman* showing that arbitrariness in the application of the death penalty was largely attributable to racism, *see* BALDUS ET AL., *supra* note 10, at 140-97; BOWERS, *supra* note 23, at 67-102, 205-17; SAMUEL R. GROSS & ROBERT MAURO, DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 17-20 (1989); MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 73-77 (1973); Marvin Wolfgang & Marc Reidel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 119, 126-33 (1973). *See also* Furman v. Georgia, 408 U.S. 238, 249-51 (1972) (Douglas, J., concurring) (citing studies and reports suggesting the discriminatory application of the death penalty); *id.* at 364-65 (Marshall, J., concurring) (same).

25. 408 U.S. 238 (1972).

26. *Id.* at 417 (Burger, J., dissenting). The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

27. Gregg v. Georgia, 428 U.S. 153, 179 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.). With the recent adoption of the death penalty in New York, thirty-eight states now have capital punishment statutes on the books. N.Y. S.B. 2850, 218th Legislature (1995); DEATH ROW USA, *supra* note 1, at 1. The United States Government and the United States Military also provide for the death penalty. *Id.* For a discussion of the feverish legislative response to the *Furman* decision, see Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 13-19 (1980); Rupert V. Barry, Note, Furman *to* Gregg*: The Judicial and Legislative History*, 22 HOW. L.J. 53, 84-95 (1979); Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1699-1712 (1974).

28. 428 U.S. 153 (1976).

29. 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); Proffitt v. Florida, 428 U.S. 242 (1976).

30. *Gregg*, 428 U.S. at 196-207 (upholding Georgia's "guided discretion" scheme which placed ultimate sentencing authority with jury); *Proffitt*, 428 U.S. at 247-60 (upholding Florida's "guided discretion" scheme which placed ultimate sentencing authority with trial judge); *Jurek*, 428 U.S. at 268-76 (upholding Texas's "structured discretion" statute, which

on a course intended to rationalize the application of the death penalty in the United States through the development of an intricate and unique set of substantive and procedural rules, derived primarily through its interpretation of the requirements of the Eighth Amendment.[31]

These rules, designed to ensure proportionality, consistency, and fairness in the administration of the death penalty,[32] have transformed capital cases into the most conceptually complex and emotionally demanding litigation in the United States.[33] Defending a capital case in the post-*Furman* era requires mastery of a plethora of legal, criminological, medical, and psychological concepts; a commitment of investigative resources that is unprecedented in the annals of criminal defense work; and a level of expert assistance that is largely unknown in non-capital criminal cases.[34] This

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required the death sentence for defendants convicted of capital murder if the jury answered each of three questions posed during penalty phase affirmatively); *Woodson*, 428 U.S. at 285-305 (invalidating North Carolina's mandatory death penalty statute); *Roberts*, 428 U.S. at 331-36 (invalidating Louisiana's mandatory death penalty statute).

31. *See infra* part I.A.

32. *See infra* part I.A.

33. *See* Bailey v. State, 424 S.E.2d 503, 505 (S.C. 1992) (stating that "capital trials today, as never before, present a myriad of complexities heretofore unknown"). As a recent report from the American Bar Association noted:

> [D]eath penalty cases have become so specialized that defense counsel has duties and functions definably different from those of counsel in ordinary criminal cases . . . . At every stage of a capital case, counsel must be aware of specialized and frequently changing legal principles and rules, and be able to develop strategies applying them in the pressure-filled environment of high-stakes, complex litigation.

AMERICAN BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES Commentary to Guideline 1.1, at 31 (1989) [hereinafter ABA GUIDELINES]. *See* Anthony Paduano & Clive A. Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 RUTGERS L. REV. 281, 292-300 (1991) (contrasting demands of capital and non-capital cases); Albert L. Vreeland, II, Note, *The Breath of the Unfee'd Lawyer: Statutory Fee Limitations and Ineffective Assistance of Counsel in Capital Litigation*, 90 MICH. L. REV. 626, 645-50 (1991) (reviewing the requirements of an effective capital defense); *see also* Andrea D. Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 MERCER L. REV. 695, 696 (1991) (asserting that "the trial for life" is "the most emotionally and intellectually difficult trial there is"). The Supreme Court's modern capital punishment jurisprudence has been described by the justices themselves as "exceedingly complex," Murray v. Giarratano, 492 U.S. 1, 27 (1989) (Stevens, J., dissenting), even "byzantine." Sochor v. Florida, 112 S. Ct. 2114, 2130 (1992) (Scalia, J., concurring). One attorney with extensive experience in protracted and complex civil litigation expressed a common view when he said that "there is nothing more difficult, more time consuming, more expensive, and more emotionally exhausting than handling a death penalty case after conviction." THE SPANGENBERG GROUP, TIME AND EXPENSE ANALYSIS IN POST-CONVICTION DEATH PENALTY CASES 22 (1987) [hereinafter SPANGENBERG, TIME AND EXPENSE ANALYSIS].

34. *See infra* part I.B.

Article reviews data that has been collected in time and expense studies of capital defense services and posits that in a *typical* death penalty case, a defense attorney who takes the procedural steps and pursues the defenses contemplated by the Court's modern Eighth Amendment jurisprudence can expect to expend at least 1900 attorney hours to defend his or her client's case through direct appeal (a process that takes about two years). In addition to this time commitment, which is conservatively valued at $190,000, the cost of investigators, experts, and other support needed to properly defend a death case would likely exceed $40,000.[35]

Most states that vigorously enforce the death penalty have done little to help defray this cost. Many jurisdictions provide indigent capital defendants with court-appointed attorneys who are compensated at rates that are well below prevailing market rates and are frequently insufficient to cover the attorney's overhead costs for the time spent working on the case—meaning that the attorney is losing money for each hour devoted to the case.[36] In other jurisdictions, the burdens of capital defense are foisted upon underfunded public defender offices. Public defenders often are required to represent over twenty capital murder defendants at one time or handle a felony caseload of several hundred while defending a capital case. Moreover, public defenders are so poorly paid in most jurisdictions that defender offices cannot retain experienced death penalty lawyers.[37]

State expenditures on defense experts in capital cases are pitifully inadequate. Authorizations for funds to pay expert fees usually do not exceed $1000 per case.[38] For a defendant charged with a capital crime to receive the level of expert assistance required, either the cost of that assistance must be paid by the defense attorney, or the defendant must go without. Almost always, he goes without.

The failure of the states to provide adequate resources for capital defense has predictable consequences. Although capital cases are among the most complex known in the law, poorly funded indigent defense systems as a rule do not attract the best criminal lawyers. The attorneys defending death penalty cases, as a class, are less experienced and far more likely to be disciplined for unprofessional conduct than the bar as a whole.[39] More fundamentally, even the experienced and competent defense lawyers as-

35. For the calculation and bases for these figures, see *infra* part I.C.
36. *See infra* part II.A-B.
37. *See infra* part II.C.
38. *See infra* part II.D.
39. *See infra* notes 328-36 and accompanying text.

signed to capital cases lack the resources to subsidize the cost of defending a poor person facing the death penalty. In litigation that requires proficiency in many areas of study, capital defendants are typically represented by lawyers who simply cannot afford to acquire that base of knowledge. In a sentencing process structured such that it is imperative that the defense be assisted by mental health experts, the vast majority of capital defendants do not receive such assistance.[40] Trials that should last a month or more are completed in three or four days.[41] Sentencing proceedings that should be the primary focus of the defense are completed in a matter of hours, with the defense offering virtually no evidence mitigating against the imposition of the death penalty.[42]

Resource deprivation at the level described in this Article is nothing less than a state-created systemic defect tainting most death sentences rendered in the United States. It virtually guarantees that most indigent defendants facing the death penalty will receive severely substandard representation, regardless of the abilities or shortcomings of individual defense lawyers. Moreover, it injects an extralegal factor—the defendant's poverty—into the death-sentencing process. The evidence reviewed in this Article shows that the determination of whether someone is executed in this country depends as much or more on this extralegal factor than on any factor relevant to the nature of the defendant's crime or the defendant's culpability.[43] Any system for selecting offenders to die for their crimes that is so strongly influenced by a legally irrelevant consideration such as the offender's poverty is operating arbitrarily.

The thesis of this Article is that the failure of the states to provide the resources necessary to give effect to the abstract values of fairness and reliability in individual capital cases offends the Eighth Amendment. At the core of the Supreme Court's modern capital punishment jurisprudence under the Eighth Amendment is a constitutional demand for procedural fairness.[44] The death pen-

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40. *See infra* part II.D.

41. *See infra* notes 187-88, 355-56 and accompanying text.

42. *See infra* notes 359-85 and accompanying text.

43. *See infra* part III.B.

44. *See infra* part I.A. *See also* McCleskey v. Kemp, 481 U.S. 279, 313 (1987) (While "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death,' " the Constitution is satisfied "when 'the mode [for determining guilt or punishment] itself has been surrounded with safeguards to make it as fair as possible.' ") (citations omitted); Strickland v. Washington, 466 U.S. 668, 704 (1984) (Brennan, J., concurring in part and dissenting in part) ("[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding.").

alty has survived as a constitutionally legitimate punishment in this country because of the substantive and procedural safeguards intended to assure that it is imposed fairly and accurately. But no matter how carefully we construct these procedures, they are worthless unless they are put to use: "A fair procedure translates its fairness to the outcome only when it is actually carried out."[45] The actors given primary responsibility for making sure that those procedures are carried out in individual cases—the defense attorneys—are repeatedly denied the resources necessary to translate theoretical protections into meaningful limitations on the arbitrary application of the death penalty. As applied in individual cases, the rules designed to assure procedural fairness are more often than not merely empty words. The arbitrariness that was found constitutionally offensive in *Furman* has persisted, because most states have been unwilling to pay for the implementation of the Supreme Court's post-*Furman* reforms.

Part I of this Article reviews the specialized rules of modern capital punishment jurisprudence and the Eighth Amendment values that underpin those rules. It discusses the centrality of the defense attorney's role in assuring that the death penalty is administered in a way that comports with these Eighth Amendment values and the burden this role entails, and it estimates the cost of developing and presenting a defense adequate to assure that the capital defendant's rights under the Eighth Amendment are observed. Part II examines how most states have failed to provide the resources necessary for meaningful capital defense. It specifically addresses deficiencies in public defense funding in nineteen states which have carried out eighty-nine percent of the nation's post-*Furman* executions and house sixty-nine percent of the inmates currently awaiting execution in the United States.[46]

Part III discusses the consequences of resource deprivation in capital cases. This section relates empirical and anecdotal evidence of the chronically deficient defense services provided to poor persons facing the death penalty in the United States. Part IV of the Article rebuts the common misperception that existing avenues for the review of death sentences are sufficient to remedy gross injustices produced by our system of capital punishment and refutes

45. JOHN RAWLS, A THEORY OF JUSTICE 86 (1971).

46. Those states, which are discussed in greater or lesser detail in this Article, are Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, Nevada, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, and Virginia. For data regarding the number of executions that have been carried out in those states as of April 20, 1994, see DEATH ROW USA, *supra* note 1, at 10. For data regarding the death row populations of those states as of that date, see *id.* at 11-41.

those judges and commentators who contend that it is appropriate for states to impose the burdens of defending those accused of capital crimes on the criminal defense bar. Part V reviews the litigation strategies that have been used recently in efforts to ameliorate the injustices of resource deprivation and the meager results these strategies have yielded. Finally, Part VI argues that the focus of existing litigation strategies has been misplaced and that the Eighth Amendment's bar of cruel and unusual punishments should be the foundation for a systemic attack on the arbitrariness and inequities caused by the states' failure to provide indigent defendants the resources necessary to develop meaningful defenses in death penalty cases.

I. THE COMPLEXITIES AND COSTS OF MODERN DEATH PENALTY JURISPRUDENCE

A. *The Emergence of the Eighth Amendment as the Primary Source of Rights for Those Accused of Capital Crimes*

The ramifications of the failure to allocate resources to the defense of those accused of capital crimes cannot be fully appreciated without understanding the peculiarities of death penalty litigation. While the Supreme Court has never found the death penalty to be unconstitutional *per se*,[47] it has long recognized fundamental distinctions between capital cases and other criminal cases.[48] These

47. *See* Gregg v. Georgia, 428 U.S. 153, 177-79 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.). *See also* Trop v. Dulles, 356 U.S. 86, 99-100 (1958) (indicating, in dicta, that the death penalty did not violate Eighth Amendment); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947) (carrying out execution after first attempt failed not found to be cruel and unusual punishment); *In re* Kemmler, 136 U.S. 436 (1890) (holding that electrocution as means of execution not cruel and unusual); Wilkerson v. Utah, 99 U.S. 130, 134-35 (1879) (holding that firing squad as method of execution not cruel and unusual). Capital punishment was not considered cruel and unusual at the time of the adoption of the Eighth Amendment and has long been seen as an accepted punishment in the United States. *See, e.g., Gregg*, 428 U.S. at 176-77; *In re* Kemmler, 136 U.S. at 446-47. While the effect of the Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), was to invalidate all then-existing death penalty statutes, *id.* at 417 (Powell, J., dissenting), a majority of the justices refused to foreclose the possibility that state legislatures could enact capital punishment schemes that did not violate the Constitution. *See id.* at 257 (Douglas, J., concurring); *id.* at 308 (Stewart, J., concurring); *id.* at 310-11 (White, J., concurring); *id.* at 375 (Burger, C.J., joined by Blackmun, Powell, and Rehnquist, JJ., dissenting).

48. *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," requiring that "the law [be] especially sensitive to demands for . . . procedural fairness" when death penalty might be meted out); *see also* Williams v. Georgia, 349 U.S. 375, 391 (1955) ("The difference between capital and non-capital offenses is the basis of differentiation in law in diverse ways in which the distinction becomes relevant."); Andres v. United States, 333 U.S. 740, 752 (1948) ("In death cases doubts such as those presented here should be resolved in favor of

distinctions stem naturally and inevitably from the oft-repeated truism that "death is different."[49] Doctrinally, this concept subsumes within it at least two distinct concerns. First, because death is final and irrevocable, one wrongfully punished cannot thereafter be recompensed by society.[50] Second, the deliberate act of the state in taking the life of one of its citizens is of such enormity, and the punishment is of such severity, that a death sentence must "be, and appear to be, based on reason rather than caprice or emo-

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the accused."); Powell v. Alabama, 287 U.S. 45, 71-72 (1932) (distinguishing capital from non-capital cases in determining that defendants' due process rights were infringed when they were denied assistance of counsel in preparing defense).

49. *See Gregg*, 428 U.S. at 188 (plurality opinion of Stewart, Powell, and Stevens, JJ.) ("[D]eath is different in kind from any other punishment imposed under our system of criminal justice.").

> From the point of view of the defendant, [the death penalty] is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (plurality opinion of Stevens, Stewart, and Powell, JJ.) (citations omitted); *see also* California v. Ramos, 463 U.S. 992, 998-99 (1983) ("The Court . . . has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."); Zant v. Stephens, 462 U.S. 862, 884-85 (1983) ("[B]ecause there is a qualitative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.' ") (citation omitted); Beck v. Alabama, 447 U.S. 625, 637 (1980) ("[D]eath is a different kind of punishment from any other which may be imposed in this country."); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) ("[T]he penalty of death is qualitatively different from any other sentence."); Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.) ("[D]eath is a punishment different from all other sanctions in kind rather than degree."); *Furman*, 408 U.S. at 306 (Stewart, J., concurring) (Capital punishment "is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.").

While the distinctions between capital and non-capital punishments traditionally have been invoked to justify greater procedural and substantive protections for capital defendants, several commentators have recently questioned the Court's continued faithfulness to the "death is different" doctrine, some even finding that the Court has used the distinctions between the death penalty and other punishments as justification for harsher rules in death cases than exist for non-capital cases. *See, e.g.*, Vivian Berger, *Born-Again Death*, 87 COLUM. L. REV. 1301, 1304 (1987) [hereinafter Berger, *Born-Again Death*]; Deborah W. Denno, *"Death is Different" and Other Twists of Fate*, 83 J. CRIM. L. & CRIMINOLOGY 437 (1992); William S. Geimer, *Death at Any Cost: A Critique of the Supreme Court's Recent Retreat from Its Death Penalty Standards*, 12 FLA. ST. U. L. REV. 737 (1985); Daniel R. Harris, Note, *Capital Sentencing After* Walton v. Arizona*: A Retreat From the "Death is Different" Doctrine*, 40 AM. U. L. REV. 1389 (1991).

50. *See, e.g., Furman*, 408 U.S. at 290 (Brennan, J., concurring).

tion."[51] Because the death penalty is a punishment qualitatively different from any other in the American criminal justice system, "the procedures that surround it, as well as the normative and legal discourse used to analyze it, must be sui generis."[52]

While the uniqueness of the death penalty has long been recognized, most of the substantive and procedural restrictions unique to capital punishment cases have emerged only within the last twenty years.[53] Before *Furman v. Georgia*, the courts directly or indirectly recognized differences in the rights of criminal defendants based on whether they faced the death penalty, but these were primarily differences in degree, not kind.[54] With *Furman*, the Court embarked on a course that would see fundamental structural and substantive changes in the administration of capital punishment in the United States.

This revolution was accomplished in large part through the Supreme Court's reappraisal of the Eighth Amendment's prohibition against cruel and unusual punishment.[55] Before *Furman*, Eighth Amendment challenges to death sentences were sporadic and unsuccessful, and the Court interpreted the cruel and unusual clause narrowly.[56] After *Furman* and *Gregg*, however, the Eighth

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51. *Gardner*, 430 U.S. at 357-58 (plurality opinion of Stevens, Stewart, and Powell, JJ.).

52. Dow, *When Law Bows to Politics*, *supra* note 14, at 166.

53. Margot Garey, Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221, 1225-45 (1985).

54. In his concurrence in *Furman*, Justice Brennan summarized how lawmakers, courts, and juries have treated capital cases differently from non-capital cases, arguing that these differences are rooted in the unusual severity, enormity, and finality of a state execution. 408 U.S. at 285-91. Nonetheless, for the most part, the pre-*Furman* doctrinal distinctions between capital and non-capital cases were subtle. For example, the Court on occasion seemed to give closer scrutiny to legal challenges in death cases than in cases where the punishment was not irreversible. *See, e.g.*, Andres v. United States, 333 U.S. 740, 752 (1948) (resolving in defendant's favor doubts arising because of ambiguous jury instruction). In one area, however, a distinction of great import was drawn between death cases and other criminal cases. For three decades, an indigent defendant facing a capital charge under state law was entitled to the assistance of an attorney at no cost, while this right was not extended to non-capital prosecutions under state law. *Compare* Powell v. Alabama, 287 U.S. 45, 71 (1932) (holding that indigent charged with rape and facing death penalty entitled to assistance of counsel in preparation and presentation of defense) *with* Bute v. Illinois, 333 U.S. 640, 674-75 (1948) (holding that conviction of unrepresented indigent of non-capital offense did not violate due process clause) *and* Betts v. Brady, 316 U.S. 455, 473 (1942) (same).

55. *See, e.g.*, Gillers, *supra* note 27, at 10-12.

56. *See* cases cited *supra* note 47. The pre-*Furman* history of the Eighth Amendment in the context of capital punishment is reviewed in Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970). In the non-capital context, the Court has continued to interpret the prohibition of cruel and unusual punishments restrictively when asked to limit the power of the state to punish crimes, showing great deference to legislative determinations of the appropriateness of a particular punishment. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957 (1991) (holding that mandatory

Amendment became the primary focus of the courts in death cases, and it has been the most significant source of procedural and substantive rights for those charged with capital crimes.[57]

Several overlapping principles drive the Court's death penalty jurisprudence. The Eighth Amendment requires an acceptable degree of proportionality, forbidding the death penalty if it is categorically disproportionate to the harm caused by the defendant's crime.[58] Thus, the Court has interpreted the Eighth Amendment to foreclose death as a punishment for certain offenses,[59] but to permit death as a punishment for aggravated murder.[60]

In addition, the Eighth Amendment requires that the procedures established by the states for selecting those offenders who are to be put to death operate in a rational and non-arbitrary manner.[61] In accordance with this principle, the death penalty can be imposed only through a procedure that guides the discretion of the sentencer, so that death sentences are not handed out "wantonly"

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sentence of life imprisonment without possibility of parole for possession of 672 grams of cocaine not violative of Eighth Amendment); Hutto v. Davis, 454 U.S. 370 (1982) (per curiam) (upholding 40-year prison sentence and $20,000 fine for possession and distribution of nine ounces of marijuana); Rummel v. Estelle, 445 U.S. 263 (1980) (holding that mandatory life sentence imposed on three-time felon who was convicted of obtaining $80 worth of merchandise through fraudulent use of credit card, passed a forged check for $28.36, and obtained $120.75 by false pretenses did not violate Eighth Amendment).

57. *See* Gillers, *supra* note 27, at 10-12; Garey, *supra* note 53, at 1230.

58. *See* McCleskey v. Kemp, 481 U.S. 279, 305-06 (1987) ("[A] societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense."). The Supreme Court has refused to extend this principle to require proportionality review by appellate courts in individual cases that fall within the categories of offenses that can be punished by death. *See* Pulley v. Harris, 465 U.S. 37 (1984).

59. *See, e.g.*, Enmund v. Florida, 458 U.S. 782 (1982) (holding that death sentence of accomplice to robbery during which a murder was committed is unconstitutional if accomplice did not kill, intend to kill, or intend that lethal force be used during robbery); Eberheart v. Georgia, 433 U.S. 917 (1977) (holding that death sentence for kidnapping violates Eighth Amendment); Coker v. Georgia, 433 U.S. 584, 593 (1977) (plurality opinion) (holding that death penalty for crime of rape "grossly disproportionate and excessive" and thus violative of Eighth Amendment). The Court has also found that the Eighth Amendment categorically prohibits the execution of certain classes of defendants. *See* Thompson v. Oklahoma, 487 U.S. 815 (1988) (prohibiting execution of defendant for offense committed while defendant was less than 16 years of age); Ford v. Wainwright, 477 U.S. 399 (1986) (holding that Eighth Amendment prohibits execution of prisoner who is insane).

60. Gregg v. Georgia, 428 U.S. 153, 187 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

61. *See, e.g.*, Zant v. Stephens, 462 U.S. 862, 874 (1983); Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (plurality opinion); *Gregg*, 428 U.S. at 188, 206 (opinion of Stewart, Powell, and Stevens, JJ.); Furman v. Georgia, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring); *id.* at 313 (White, J., concurring).

or "freakishly."[62] Prior to *Furman*, judges and juries were given largely unfettered discretion in deciding whether a defendant would be executed for committing a capital crime,[63] resulting in extreme arbitrariness in the application of the death penalty, due in large part to racism.[64] The common strand unifying the other-

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62. *Furman*, 408 U.S. at 310 (Stewart, J., concurring); *see also* Johnson v. Texas, 113 S. Ct. 2658, 2664 (1993); Graham v. Collins, 113 S. Ct. 892, 898 (1993).

63. Most of the pre-*Furman* capital punishment laws in force in the various states shared certain basic characteristics. First, a very large number of defendants were technically eligible for the death penalty ("death eligible"), with most capital punishment jurisdictions making everyone who committed murder, regardless of gradation, death eligible, and many jurisdictions included non-homicide felonies in their death penalty statutes. *See* BALDUS ET AL., *supra* note 10, at 7. At different points in time, a prosecutor, a judge, or the jury could remove a defendant from the pool of death-eligible defendants. *Id.* at 7-8. The ultimate sentencing determination was made by a jury—in contrast to the usual practice in non-capital cases, where jury sentencing is rare. *See* Gillers, *supra* note 27, at 15-19. Juries were given broad discretion in choosing whether to sentence a defendant to death, without "any sort of authoritative guidelines or standards to regulate their decisions." BALDUS ET AL., *supra* note 10, at 8-9. Mandatory death sentences were uncommon; there was a steady historical trend disfavoring anything that would interfere with the jury's discretion. HUGO A. BEDAU, DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW AND POLITICS OF CAPITAL PUNISHMENT 166 (1987); *see infra* note 71. In all but a few states, there was a single ("unitary") trial of all issues relating to guilt and sentence, and the jury decided the defendant's guilt and sentencing simultaneously. *See infra* note 88. Appellate review of sentences handed out in criminal cases, including capital cases, was very limited; appellate courts generally restricted their inquiry to assuring compliance with statutory limits, without considering the propriety or reasonableness of the sentence rendered in any particular case. *See, e.g.*, Charles B. Burr, II, *Appellate Review as a Means of Controlling Criminal Sentencing Discretion—A Workable Alternative?*, 33 U. PITT. L. REV. 1 (1971); *Criminal Procedure—Scope of Appellate Review of Sentences in Capital Cases*, 108 U. PA. L. REV. 434 (1960).

64. While an exceptionally small number of defendants eligible for the death penalty actually received death sentences in the pre-*Furman* era—about 100 per year in the 1960s, down from a high of 300-400 in 1935—a high proportion of death-eligible non-whites were sentenced to death. *See* BALDUS ET AL., *supra* note 10, at 9; *see also* sources cited *supra* note 24. Empirical studies of the operation of capital punishment in this country after *Furman* and *Gregg* reveal that the arbitrariness detected in earlier studies has not been remedied. *See, e.g.*, BALDUS ET AL., *supra* note 10, at 80-139; BOWERS, *supra* note 23, at 217-69, 337-48 (arguing that arbitrariness is linked with operation of discretion, including prosecutorial discretion, within capital punishment system). Modern studies continue to detect race-linked arbitrariness. There has been a particularly strong statistical relationship between sentencing patterns in death cases and the racial identity of the victim of the crime. *See, e.g.*, BALDUS ET AL., *supra* note 10, at 140-97 (reporting data collected in Georgia); *id.* at 254-67 (reviewing studies conducted in other states); BOWERS, *supra* note 23, at 217-69 (reporting sentencing patterns in Florida, Georgia, Ohio, and Texas); GROSS & MAURO, *supra* note 24, at 35-105 (examining sentencing patterns in Arkansas, Florida, Georgia, Illinois, Mississippi, North Carolina, Oklahoma, and Virginia); John F. Karns & Lee S. Weinberg, *The Death Sentence in Pennsylvania—1978-1990: A Preliminary Analysis of the Effects of Statutory and Nonstatutory Factors*, 95 DICK. L. REV. 691, 734 (1991) ("In virtually all situations except killing by torture, non-whites who kill whites have the highest probability of being sentenced to death [in Pennsylvania], while whites who kill nonwhites have the lowest.");

wise divergent views expressed in the five separate concurring opinions constituting the majority in *Furman* was a condemnation of capital punishment schemes that gave judges and juries standardless discretion in sentencing.[65] *Furman*'s core holding was that the Eighth Amendment demands an acceptable measure of consistency in sentencing decisions.[66] A death penalty statute must "channel" the discretion of the sentencing authority and provide meaningful guidance that minimizes arbitrariness in the selection of those defendants who will be executed.[67]

But the Court has also recognized that "a consistency produced by ignoring individual differences is a false consistency."[68] The Eighth Amendment requires that states allow "the sentencer sufficient discretion to take account of the 'character and record of the individual offender and the circumstances of the particular offense' to assure that 'death is the appropriate punishment in a spe-

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Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 U. FLA. L. REV. 1 (1991) (reviewing death sentencing in Florida); Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC. REV. 587 (1985) (reporting that blacks accused of killing whites most likely to be "upgraded" (increasing likelihood of ultimate death sentence) and least likely to be "downgraded" by Florida prosecutors); M. Dwayne Smith, *Patterns of Discrimination in Assessments of the Death Penalty: The Case of Louisiana*, 15 J. CRIM. JUST. 279 (1987) (studying sentencing in Louisiana).

65. Scholars have noted that support for a wide range of conflicting positions can be found in *Furman*'s five concurring and four dissenting opinions, which together span 231 pages in the United States Reports: "A certain amount of ambiguity is a feature of many legal opinions, but this is something different, a case that is not so much a precedent as a Rorschach test." GROSS & MAURO, *supra* note 24, at 7 (footnote omitted). Notwithstanding the cacophony of views expressed in *Furman*, each Justice that made up the plurality cited arbitrariness as a constitutional defect of then-existing death penalty statutes. Justices Brennan and Marshall, who would have found capital punishment *per se* unconstitutional, both cited arbitrariness in sentencing as one of the bases for their conclusion. *Furman*, 408 U.S. at 294-95, 305 (Brennan, J., concurring); *id.* at 364-66 (Marshall, J., concurring). Justice Douglas focused on the race- and class-based discrimination that was associated with the standardless discretion exercised by sentencing juries. *Id.* at 249-57 (Douglas, J., concurring). Justice Stewart thought existing schemes to be arbitrary because decisions to impose the death penalty seemed random. *Id.* at 309-10 (Stewart, J., concurring). Justice White's opinion focused primarily on the death penalty's lack of utility given its infrequent use, but he also decried that "there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Id.* at 313.

66. This has been repeatedly identified as the unifying principle running through *Furman*'s concurring opinions. *See, e.g.*, Callins v. Collins, 114 S. Ct. 1127, 1129 (1994) (Blackmun, J., dissenting from denial of certiorari); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982); Proffitt v. Florida, 428 U.S. 242, 259-60 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.).

67. *See, e.g.*, Johnson v. Texas, 113 S. Ct. 2658, 2664 (1993); Lewis v. Jeffers, 497 U.S. 764, 774 (1990); Maynard v. Cartwright, 486 U.S. 356, 362 (1988); *Gregg*, 428 U.S. at 189 (plurality opinion of Stewart, Powell, and Stevens, JJ.).

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

cific case.' "[69] The rationale underlying this individualization requirement is that any sentencing scheme which fails to strive for fairness and reliability will yield arbitrary results, and fundamental fairness and reliability cannot be attained in the death penalty

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69. Graham v. Collins, 113 S. Ct. 892, 898 (1993) (quoting Woodson v. North Carolina, 428 U.S. 280, 304-05 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.)); *see also Gregg*, 428 U.S. at 199 (plurality opinion of Stewart, Powell, and Stevens, JJ.) (noting that sentencing decision must "focus on the particularized circumstances of the crime and the defendant"). At various times, the justices have noted that there is some tension between the consistency and individualization principles drawn from the Eighth Amendment. *See, e.g., Callins*, 114 S. Ct. at 1129, 1132-37 (Blackmun, J., dissenting from denial of certiorari); *Graham*, 113 S. Ct. at 904-15 (Thomas, J., concurring); Walton v. Arizona, 497 U.S. 639, 656-73 (1990) (Scalia, J., concurring); Franklin v. Lynaugh, 487 U.S. 164, 182 (1988) (plurality opinion of White, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.); California v. Brown, 479 U.S. 538, 544 (1987) (O'Connor, J., concurring). Justice Scalia has concluded that the individualization requirement cannot be reconciled with *Furman* and has rejected the idea that the states must permit the sentencer to consider all relevant evidence offered by the defendant in mitigation of a death sentence. *Walton*, 497 U.S. at 656-73 (Scalia, J., concurring); *see also Callins*, 114 S. Ct. at 1127-28 (Scalia, J., concurring); *Johnson*, 113 S. Ct. at 2672 (Scalia, J., concurring). Justice Thomas has urged the Court to reconsider its ban on mandatory sentencing, arguing that individualized sentencing yields racially discriminatory results. *Graham*, 113 S. Ct. at 912 (Thomas, J., concurring). Justice Blackmun, on the other hand, has cited the futility of the Court's efforts to harmonize the consistency and individualization requirements as one basis for his conclusion that the death penalty cannot be administered constitutionally. *Callins*, 114 S. Ct. at 1137 (Blackmun, J., dissenting from denial of certiorari).

Others, however, have suggested that the consistency and individualization requirements can be reconciled. Justice Stevens observed that "[a]lthough these principles—one narrowing the relevant class, the other broadening the scope of considered evidence—seemingly point in opposite directions, in fact both serve the same end: ensuring that a capital sentence is the product of individualized and reasoned moral decisionmaking." Sawyer v. Whitley, 112 S. Ct. 2514, 2534 (1992) (Stevens, J., concurring). Professor Sundby argues that both requirements reduce the number of defendants actually sentenced to death, and both "work[] towards the same end of identifying the group of defendants most deserving of death . . . ." Sundby, *supra* note 9, at 1176. Professor Bilionis argues that while it is "cruel" to impose the death penalty without a "reliabl[e] determin[ation] that death is indeed the morally appropriate penalty," Louis D. Bilionis, *Moral Appropriateness, Capital Punishment, and the* Lockett *Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283, 288 (1991), the same degree of reliability need not accompany a jury's decision to show mercy: "The principle advanced by *Furman* and its progeny requires that the potential for arbitrary or capricious results in capital sentencing must be minimized—but not at the expense of the discretion necessary to ensure a morally appropriate sentence." *Id.* at 327. Ronald J. Mann, on the other hand, questions whether *Furman* really requires "consistency" at all. He suggests that the Court's modern death penalty jurisprudence is driven by an "individualized-consideration principle"; the death penalty is a "cruel" punishment within the meaning of the Eighth Amendment if the defendant is not afforded "a realistic opportunity for individualized consideration," Ronald J. Mann, *The Individualized-Consideration Principle and the Death Penalty as Cruel and Unusual Punishment*, 29 HOUS. L. REV. 493, 498-99 (1992), and individualized consideration is impossible if the sentencer is given too little guidance (*Furman*), or if the sentencer is precluded from considering all relevant factors mitigating against a death sentence (*Lockett*). *Id.* at 499.

context without individualized sentencing.[70] Thus, mandatory death sentences for the commission of specified crimes without regard to the personal characteristics and history of the accused or the particular circumstances surrounding the crime are unconstitutional.[71]

Finally, the Eighth Amendment requires that a capital punishment scheme serve the penological objectives of retribution, deterrence, or both.[72] The evidence of the death penalty's deterrent ef-

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70. *See, e.g., Eddings*, 455 U.S. at 110-12; Lockett v. Ohio, 438 U.S. 586, 604-05 (1978) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 303-05 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.). Only capital defendants have a constitutional right to individualized sentencing. The Court has refused to find this requirement in the prohibition of cruel and unusual punishments in non-capital cases. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 994-95 (1991); *see also* Markus Dirk Dubber, *Regulating the Tender Heart When the Axe is Ready to Strike*, 41 BUFF. L. REV. 85, 119 & n.141 (1993) (listing cases in which federal circuit courts have rejected individualized sentencing challenges to Federal Sentencing Guidelines). The Court has observed that individualized sentencing reflects "enlightened policy rather than a constitutional imperative" in non-capital cases, but it is a "constitutionally indispensable part" of capital sentencing. *Woodson*, 428 U.S. at 304 (plurality opinion of Stewart, Powell, and Stevens, JJ.).

71. *Woodson*, 428 U.S. at 304 (plurality opinion of Stewart, Powell, and Stevens, JJ.); *accord* Roberts v. Louisiana, 428 U.S. 325, 333-34 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.); Jurek v. Texas, 428 U.S. 262, 273-74 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.); Gregg v. Georgia, 428 U.S. 153, 189 n.38 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.); *see also* Johnson v. Texas, 113 S. Ct. 2658, 2665 (1993). In the century before the *Furman* decision, mandatory death sentences had fallen out of favor in the United States. Tennessee was the first state to reject mandatory death sentencing, in 1838; by 1900, the federal government and 22 states had abandoned mandatory sentencing; and by the mid-twentieth century, every jurisdiction with the death penalty had given the sentencer discretion—albeit uncontrolled discretion—to impose a death sentence or spare the defendant. Bilionis, *supra* note 69, at 289 & n.15. In the immediate aftermath of *Furman*, at least sixteen states enacted legislation providing mandatory death sentences for specified crimes such as contract murder, murder of a police officer, murder while serving a life sentence, and felony murder. Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1710-12 (1974). Mandatory schemes, however, risk the execution of defendants who were incapable of being deterred from committing their crimes and who were not "sufficiently culpable" under the Court's model of retributive justice. *See infra* text accompanying notes 74-78. *See also* F. Patrick Hubbard, *"Reasonable Levels of Arbitrariness" in Death Sentencing Patterns: A Tragic Perspective on Capital Punishment*, 18 U.C. DAVIS L. REV. 1113, 1116 (1985). In invalidating such schemes, the Court refused to accept "[u]niformity of result [that] was achieved by ignoring the particular circumstances of the crime, as well as the individual humanity of those who stood to be condemned." Stephen P. Garvey, *Death-Innocence and the Law of Habeas Corpus*, 56 ALB. L. REV. 225, 229 (1992).

72. *See Gregg*, 428 U.S. at 183 (plurality opinion of Stewart, Powell, and Stevens, JJ.); *see also* Spaziano v. Florida, 468 U.S. 447, 460 n.7 (1984) ("There must be a valid penological reason for choosing from the many criminal defendants the few who are sentenced to death."). A death sentence which does not serve a legitimate penological purpose would be deemed unnecessarily severe—"cruel"—and thus violative of the Eighth Amendment. *See, e.g., Furman*, 408 U.S. at 300 (Brennan, J., concurring); *id.* at 312-13 (White, J., concurring);

fect is at best inconclusive,[73] however, and retribution has emerged as the primary justification of capital punishment in the modern era.[74] The model of retributive justice[75] that has been articulated

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id. at 331-32, 342 (Marshall, J., concurring).

Generally, criminal punishments serve one of four penological goals: deterrence, retribution, rehabilitation, and incapacitation. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 23-27 (2d ed. 1986). In concluding that the death penalty was not *per se* unconstitutional, the Supreme Court was willing to "assume," that even in the absence of supporting empirical evidence, the death penalty was a "significant deterrent" for certain categories of homicide such as murders for hire and murders committed while serving a life sentence. *Gregg*, 428 U.S. at 185-86 (plurality opinion of Stewart, Powell, and Stevens, JJ.). Moreover, the Court found that society's interest in retribution—expressing "society's moral outrage at particularly offensive conduct"—was sufficient in itself to justify capital punishment. *Id.* at 183; *see also Furman*, 408 U.S. at 308 (Stewart, J., concurring). The other common penological purposes are not sufficiently furthered to justify capital punishment in the face of an Eighth Amendment challenge. Rehabilitation of the prisoner, obviously, is not served by killing him, *see Spaziano*, 468 U.S. at 478 (Stevens, J., concurring in part and dissenting in part), and although the goal of incapacitating the prisoner from committing other crimes is accomplished by executing him, the Court has found that because this goal is adequately served by a sentence of life imprisonment, incapacitation alone cannot justify the death penalty. *Id.* at 461-62. Although rehabilitation and incapacitation do not *justify* capital punishment as an alternative to other punishments, they may be relevant to capital sentencing decisions. Capital defendants frequently offer evidence of their rehabilitative potential in mitigation of their sentence. *See infra* note 140 and accompanying text. Moreover, the Court has held that juries may legitimately consider a defendant's "future dangerousness" in the capital sentencing process, *see Jurek*, 428 U.S. at 272-73, 276 (plurality opinion of Stewart, Powell, and Stevens, JJ.), and that the sentencer must consider evidence that the defendant does not pose a danger if incarcerated instead of executed. *See, e.g.*, Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986).

73. The weight of the extensive body of empirical evidence simply does not support claims that capital punishment deters capital crimes more effectively than life imprisonment, and some studies even show a slight "brutalization" effect, resulting in an *increase* in homicides by one or two murders per execution. *See, e.g.*, BOWERS, *supra* note 23, at 23-24, 103-29, 271-335, 381-83; ROYAL COMM'N ON CAPITAL PUNISHMENT, REPORT (1953); THORSTEIN SELLIN, A REPORT FOR THE MODEL PENAL CODE PROJECT OF THE AMERICAN LAW INSTITUTE (1959); David C. Baldus & James W.L. Cole, *A Comparison of Thorstein Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 170 (1975); James Alan Fox & Michael L. Radelet, *Persistent Flaws in Econometric Studies of the Deterrent Effect of the Death Penalty*, 23 LOY. L.A. L. REV. 29 (1989); Richard Lempert, *The Effect of Executions on Homicides: A New Look in an Old Light*, 29 CRIME & DELINQ. 88 (1983); Hans Zeizel, *The Deterrent Effect of the Death Penalty: Facts and Faiths*, 1976 SUP. CT. REV. 317; *see also Furman*, 408 U.S. at 345-54 (Marshall, J., concurring). *Contra* WALTER BERNS, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY 83-152 (1991); Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975); Stephen Layson, *Homicide and Deterrence: A Reexamination of the United States Times-Series Evidence*, 52 S. ECON. J. 68 (1985).

74. *Spaziano*, 468 U.S. at 461. *See also* BEDAU, *supra* note 63, at 172 (characterizing the plurality's reliance on deterrence in *Gregg* "somewhat half-hearted" and based on speculation rather than fact); Dubber, *supra* note 70, at 132 ("Over the course of capital jurisprudence since *Furman*, the Court has settled on a generally retributive approach to capital sentencing."). The primacy of the retribution rationale is reflected in the aggravating and

in the Court's Eighth Amendment jurisprudence, moreover, requires individualized sentencing, since the core of the Court's retributive rationale "is that a [death] sentence must be directly related to the personal culpability of the criminal offender,"[76] and may not exceed "the degree of punishment and suffering that is appropriate for or proportionate to the moral culpability of the offender and his offense."[77] Individualized sentencing, in the Court's

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mitigating factors expressly identified in all current capital punishment statutes. Those factors tend to focus on the moral culpability of the offender. *See* Robert Alan Kelly, *Applicability of the Rules of Evidence to the Capital Sentencing Proceeding: Theoretical and Practical Support for Open Admissibility of Mitigating Information*, 60 U. Mo.-K.C. L. Rev. 411, 446 (1992). Nonetheless, the deterrence rationale clearly underlies the states' decision to make certain crimes death-eligible and the legislative determination that certain circumstances aggravate a death-eligible crime. *See id.* at 448. *See also* Model Penal Code § 210.6(3)(a) (1962) (murder committed by prison inmate is aggravating circumstance); *id.* § 210.6(3)(e) (commission of murder for purpose of avoiding arrest or effecting escape is aggravating circumstance).

75. "Retribution" is a term used to describe several different theories of punishment. Jordan M. Steiker, *The Long Road Up from Barbarism: Thurgood Marshall and the Death Penalty*, 71 Tex. L. Rev. 1131, 1144 (1993); Robert Weisberg, *Deregulating Death*, 1983 Sup. Ct. Rev. 305, 390. Some advocate "categorical" (or "pure") moral retribution. "[R]ooted in religious belief or moral instinct," this theory of retribution holds "that certain crimes by their very nature merit death," regardless of the circumstances surrounding the crime or the perpetrator. *Id.* at 390. This theory would justify mandatory death sentences for the commission of specifically defined offenses. Others, however, noting the emphasis retributivist theory places on the moral choices of the offender, *see, e.g.*, Edmund L. Pincoffs, The Rationale of Legal Punishment 8 (1966), maintain that retribution theory "place[s] limits on punishment by insisting that punishment fairly reflect the moral culpability of the individual offender as well as the extent of the harm caused by the offense." Steiker, *supra*, at 1144; *see also* Peter Brett, An Inquiry into Criminal Guilt 51-52 (1963) (asserting that implied limit of retribution is that punishment can be no greater than defendant deserves). A just retributive judgment "must be scaled to the degree of societal condemnation, which in turn depends on the moral turpitude of the defendant." James S. Liebman & Michael J. Shepard, *Guiding Sentencer Discretion Beyond the "Boilerplate": Mental Disorder as a Mitigating Factor*, 66 Geo. L.J. 757, 811 n.240 (1978). Under this approach, "adjusting the degree of punishment to the extent of culpability of the individual, the criminal justice system succeeds in giving the offender his 'just deserts' " while at the same time "provid[ing] sufficient 'justice' to satisfy the public's need for vengeance . . . ." Randy Hertz & Robert Weisberg, *In Mitigation of the Penalty of Death*: Lockett v. Ohio *and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 Cal. L. Rev. 317, 369 n.239 (1981); *see also* Bilionis, *supra* note 69, at 286 (arguing that execution "is legitimate only when it can be said with confidence that it is not only a permissible *legal response* but also the *morally appropriate response* to the particular crime and the particular offender" (emphasis in original)). This latter approach to retribution, which is consistent with the long-standing American tradition of discretionary sentencing in capital cases, *see supra* notes 63 & 71, has been followed by the majority of the Supreme Court. *See infra* text accompanying notes 83-87.

76. Tison v. Arizona, 481 U.S. 137, 149 (1987).

77. Hertz & Weisberg, *supra* note 75, at 369. *See also* Saffle v. Parks, 494 U.S. 484, 492-93 (1990) (stating that capital sentencing scheme must allow sentencer to express its "rea-

view, assures that any decision to put an offender to death is a "reasoned moral response"[78] to the offender and his crime.

These principles are at the center of the modern movement toward constitutionalizing the basic structure of death penalty trials. Although the Supreme Court has been reluctant to insist on any particular combination of procedural safeguards, all capital punishment schemes currently operating in the United States share basic features that respond to the Court's Eighth Amendment jurisprudence.[79] For example, the states are required to "narrow the class of defendants eligible for the death penalty"[80] and channel the discretion of the sentencing authority.[81] This can be accomplished in two ways, both of which are employed in varying degrees in states with capital punishment. First, states limit the pool of defendants eligible for the death penalty to those who commit certain defined types of homicide; and second, states require the sentencer to find that aggravating circumstances exist before sentencing a defendant to die.[82]

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soned moral response" to defendant and crime); Penry v. Lynaugh, 492 U.S. 302, 328 (1989) (same); Franklin v. Lynaugh, 487 U.S. 164, 185 (1988) (O'Connor, J., concurring) (stating that statute that prevented a "reasoned moral response" by cutting off sentencer's ability to give effect to relevant mitigating evidence violated Eighth Amendment); *Tison*, 481 U.S. at 149 (concluding that death sentence must correlate with "personal culpability" of defendant); Enmund v. Florida, 458 U.S. 782, 825 (1982) (O'Connor, J., dissenting) (stating that "proportionality requires a nexus between the punishment imposed and the defendant's blameworthiness").

78. *Penry*, 492 U.S. at 319 (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

79. Many of these features were first proposed by an advisory committee of the American Law Institute in 1959 in the course of drafting the Model Penal Code. *See* MODEL PENAL CODE § 210.6 (1962).

80. Zant v. Stephens, 462 U.S. 862, 877 (1983).

81. *See, e.g.*, Johnson v. Texas, 113 S. Ct. 2658, 2664 (1993); Lewis v. Jeffers, 497 U.S. 764, 774 (1990); *Enmund*, 458 U.S. at 801; *Zant*, 462 U.S. at 879; *Godfrey*, 446 U.S. at 428; *Gregg*, 428 U.S. at 189 (plurality opinion of Stewart, Powell, and Stevens, JJ.); *Furman*, 408 U.S. at 310 (Stewart, J., concurring).

82. BEDAU, *supra* note 63, at 177. *See also* Graham v. Collins, 113 S. Ct. 892, 916 (1993) (Stevens, J., dissenting); Lowenfield v. Phelps, 484 U.S. 231, 244-46 (1988); WELSH S. WHITE, THE DEATH PENALTY IN THE NINETIES 74 (1991) [hereinafter WHITE, NINETIES] ("Requiring the sentencer to make its death penalty determination on the basis of a weighing of the aggravating and mitigating circumstances was designed to reduce the pool of those eligible for the death sentence and to inject a greater degree of rationality into the sentencing process."). The Court has explained that "there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold." McCleskey v. Kemp, 481 U.S. 279, 305 (1987). It is not enough that a statutory definition of capital murder or a statutory aggravating circumstance "enable the sentencer to distinguish those who deserve capital punishment from those who do not;" the narrowing device "must provide a principled basis" for making this

In addition, the Eighth Amendment requires that the sentencer give effect to all relevant mitigating evidence offered by the defendant before rendering a final sentence,[83] even if that evidence is not "relate[d] specifically to [the accused's] culpability for the crime he committed."[84] Under the Eighth Amendment, a legitimate retributive judgment must take into account, among other things, evidence that tends to emphasize the defendant's redeeming traits, explain (if not excuse) the defendant's acts, or show how circumstances partly or wholly beyond the defendant's control caused his life or personality to deteriorate to the point where he could commit a heinous crime.[85] In accordance with what has come to be known as the *Lockett* doctrine,[86] a defendant cannot be precluded from offering, and the sentencing authority cannot refuse to consider, "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence of less than death."[87]

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distinction. Arave v. Creech, 113 S. Ct. 1534, 1542 (1993). For example, "[i]f the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm." *Id.* at 1542 (emphasis in original).

83. *See, e.g., Johnson*, 113 S. Ct. at 2665-66; *Graham*, 113 S. Ct. at 900; McKoy v. North Carolina, 494 U.S. 433, 439-43 (1990); *Penry*, 492 U.S. at 319-28; Mills v. Maryland, 486 U.S. 367, 374-75 (1988); Hitchcock v. Duggar, 481 U.S. 393, 398-99 (1987); *McCleskey*, 481 U.S. at 304-06; Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986); Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982); Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 304 (1978) (plurality opinion of Stewart, Powell, and Stevens, JJ.); *see also Johnson*, 113 S. Ct. at 2675-77 (O'Connor, J., dissenting); *Graham*, 113 S. Ct. at 916-17 (Stevens, J., dissenting).

84. *Skipper*, 476 U.S. at 4; *see also McCleskey*, 481 U.S. at 304 ("In contrast to the carefully defined standards that must narrow a sentencer's discretion to *impose* the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence." (emphasis in original)).

85. *See, e.g.*, Franklin v. Lynaugh, 487 U.S. 164, 189 (1988) (Stevens, J., dissenting) (stating that evidence of defendant's "redeeming features" may reveal "virtues that can fairly be balanced against society's interest in killing [the defendant] in retribution for his violent crime"); *McCleskey*, 481 U.S. at 304 ("Any exclusion of the 'compassionate or mitigating factors stemming from the diverse frailties of humankind' that are relevant to the sentencer's decision would fail to treat all persons as 'uniquely individual human beings.'" (citation omitted)).

86. Lockett v. Ohio, 438 U.S. 586 (1978).

87. *Id.* at 604 (plurality opinion) (footnote omitted). The *Lockett* plurality explained that:

> [any death penalty system that] prevents the sentencer [from considering] aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

Individualized sentencing requires the sentencing authority to consider certain evidence which, while irrelevant and probably prejudicial to a determination of a defendant's guilt or innocence, is highly probative of the moral culpability of the offender. In order to assure that juries are able to consider this evidence without prejudicing their determination of whether the defendant has committed a crime making him eligible for the death penalty, all states which currently have capital punishment statutes provide a bifurcated trial procedure.[88] In the first stage, commonly called the

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Id. at 605; *see also Woodson*, 428 U.S. at 304 (plurality opinion of Stewart, Powell, and Stevens, JJ.); *accord Johnson*, 113 S. Ct. at 2665-66; *Graham*, 113 S. Ct. at 899-900; *Penry*, 492 U.S. at 319-28; *Hitchcock*, 481 U.S. at 398-99; *McCleskey*, 481 U.S. at 304-06; *Skipper*, 476 U.S. at 4-5; *Eddings*, 455 U.S. at 113-14; Roberts v. Louisiana, 428 U.S. 325, 333-36 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.); Jurek v. Texas, 428 U.S. 262, 270-74 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.); Proffitt v. Florida, 428 U.S. 242, 250-53 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.); *Gregg*, 428 U.S. 196-97 (plurality opinion of Stewart, Powell, and Stevens, JJ.).

The doctrine not only requires that defendants be free to introduce mitigating evidence, a capital punishment scheme, to be found constitutional, must provide a method through which the consideration of such evidence "affect[s] the sentencing decision." *Lockett*, 438 U.S. at 608. Moreover, a sentencer may not "refuse to consider, as a matter of law, any relevant mitigating evidence." *Eddings*, 455 U.S. at 113-14. Until recently, it was widely believed that there were virtually no limitations on the consideration of mitigation evidence by juries. *See, e.g., McCleskey*, 481 U.S. at 306 ("States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant."). The Court has backtracked from that position, finding that while the states cannot "plac[e] relevant mitigating evidence 'beyond the effective reach of the sentencer,' " the states are free to "guid[e] the sentencer's consideration of mitigating evidence." *Johnson*, 113 S. Ct. at 2666. For detailed discussions of the *Lockett* doctrine, *see* Bilionis, *supra* note 69, at 309-12; Hertz & Weisberg, *supra* note 75; Lyon, *supra* note 33; Mann, *supra* note 69; Sundby, *supra* note 9.

88. Gillers, *supra* note 27, at 102-19. Prior to *Furman*, a judge or jury decided whether the death penalty was appropriate based solely on the evidence presented during the trial of the defendant's guilt or innocence (a "unitary" trial procedure) and decided guilt and sentencing simultaneously. *See* BALDUS ET AL., *supra* note 10, at 10-11; MELTSNER, *supra* note 24, at 68. In some states, evidentiary rules limited the defendant to introducing evidence relevant only to guilt. *Id.* Even if the defendant was allowed to introduce evidence regarding his character, background, and mental health, he did so at risk of having the determination of guilt influenced by considerations unconnected with the state's evidence concerning the crime with which he was charged. Moreover, the unitary trial procedure forced defendants to either waive their constitutional privilege against self-incrimination or to surrender their opportunity to testify about mitigating circumstances. BALDUS ET AL., *supra* note 10, at 8.

Although the Supreme Court has never expressly required bifurcated proceedings in the aftermath of the jurisprudential revolution that began with *Furman*, the states have interpreted the Court's remarks condoning bifurcation as "virtually requiring it." Weisberg, *supra* note 75, at 309. *See, e.g., Gregg*, 428 U.S. at 195 (plurality opinion of Stewart, Powell, and Stevens, JJ.) ("As a general proposition [the] concerns [expressed in *Furman* regarding the arbitrary and capricious administration of capital punishment] are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of

"guilt phase," the issues of guilt, innocence, and the traditional defenses to criminal responsibility are tried. It is during this phase that the prosecution must prove that the defendant committed an offense, clearly defined by statute, that is potentially punishable by death (a "capital offense" that makes the defendant "death-eligible").[89]

If this burden is met, the court must conduct a separate sentencing hearing—commonly called the "penalty phase."[90] During the penalty phase, the sentencing authority (typically the same jury that has found the defendant guilty of the underlying capital offense)[91] is presented additional evidence of aggravating and mitigating circumstances relevant to the crime and the accused.[92] In order to obtain a death sentence, the prosecution must establish that at least one of a list of statutorily-defined aggravating circumstances is present.[93] The defendant is given an opportunity to pre-

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the information relevant to the imposition of sentence and provided with standards to guide its use of the information."); *see also* Helen Gredd, Comment, Washington v. Strickland: *Defining Effective Assistance of Counsel at Capital Sentencing*, 83 COLUM. L. REV. 1544, 1547 (1983) ("A separate sentencing hearing—in effect, a 'trial' on the issue of punishment held after determination of guilt—provides the primary means by which the requisite consistency and reliability are to be achieved.").

89. *See, e.g.*, ALA. CODE §§ 13A-5-40, 13A-5-43 (1994); CAL. PENAL CODE § 190.1 (West 1988); GA. CODE ANN. § 16-5-1 (1992); OHIO REV. CODE ANN. §§ 2929.022, 2929.03 (Anderson 1993).

90. WHITE, NINETIES, *supra* note 82, at 73 (stating that penalty phase is "most visible by-product" of modern death penalty); Weisberg, *supra* note 75, at 306 (describing the penalty trial as a "curious new legal form").

91. *See, e.g.*, ALA. CODE § 13A-5-46 (1994); CAL. PENAL CODE § 190.3 (West 1988); GA. CODE ANN. § 17-10-31 (1990); OHIO REV. CODE ANN. §§ 2929.022, 2929.03 (Anderson 1993); TEX. CODE CRIM. PROC. ANN. art. 37.071(2)(a) (West Supp. 1994). In almost all of the death penalty states, a sentencing hearing is conducted before a jury. The exceptions are Arizona, Idaho, Montana, and Nebraska, in which the presiding trial judge has exclusive sentencing authority. *See* ARIZ. REV. STAT. ANN. § 13-703(B) (Supp. 1993); IDAHO CODE § 19-2515(a) (1987); MONT. CODE ANN. § 46-18-301 (1993); NEB. REV. STAT. § 29-2520 (1989). In most of the remaining capital punishment states, the jury makes the binding decision of whether the defendant will be sentenced to death or life imprisonment. The exceptions are Alabama, Florida, and Indiana, where the jury makes a non-binding recommendation after the sentencing hearing, and the trial judge makes the final sentencing decision, and Nevada, where a three-judge panel makes the sentencing determination if the jury cannot unanimously agree on the sentence to be imposed. *See* ALA. CODE § 13A-5-46 (1982); FLA. STAT. ANN. § 921.141(2) (West 1985); IND. CODE ANN. § 35-50-2-9 (Burns 1994); NEV. REV. STAT. § 175.556 (1987). *See generally* Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to a Jury Trial*, 65 NOTRE DAME L. REV. 1 (1989).

92. *See, e.g.*, ALA. CODE §§ 13A-5-45, 13A-5-49 through 52 (1994); CAL. PENAL CODE § 190.3 (West 1988); GA. CODE ANN. § 17-10-30 (1990); OHIO REV. CODE ANN. § 2929.03 (Anderson 1993); TEX. CODE CRIM. PROC. ANN. art. 37.071(2)(e) (West Supp. 1995).

93. *See, e.g.*, ALA. CODE § 13A-5-45(f) (1994); CAL. PENAL CODE §§ 190.1, 190.3 (West 1988); GA. CODE ANN. § 17-10-30(c) (1990); OHIO REV. CODE ANN. §§ 2929.03, 2929.04(A) (Anderson 1993).

sent evidence that mitigates against a sentence of death and in favor of a lesser sentence,[94] usually life imprisonment without possibility of parole. The typical capital punishment statute permits the imposition of the death penalty if the sentencing authority concludes that the balance of aggravating and mitigating factors supports a decision to put the defendant to death.[95]

Finally, the Supreme Court has indicated that an automatic appeal of all death sentences is an "important additional safeguard against arbitrariness and caprice."[96] While it is unclear whether

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94. Mitigating evidence is evidence bearing on any facet of the defendant's character, record, background, or crime that might serve "as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion). *See also* McKoy v. North Carolina, 494 U.S. 433, 440 (1990); Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986); Bilionis, *supra* note 69, at 302 ("Any evidence about the offender or the offense that might support a conceivable moral argument against the death sentence in a particular case is protected under *Lockett*'s definition.").

95. "Guided discretion" statutes, where aggravating and mitigating circumstances are taken into consideration in the sentencing process, have been used in all states in the modern era except Texas and Oregon, which have "structured discretion" statutes. With regard to guided discretion statutes, the Supreme Court has distinguished between "weighing" and "nonweighing" sentencing schemes. In a "weighing" state, after the jury has found the defendant guilty of capital murder at the guilt phase and finds the existence of one or more statutorily-defined aggravating factors at the penalty phase, the jury must "weigh" the aggravating factors found against the mitigating factors found. Stringer v. Black, 112 S. Ct. 1130, 1136 (1992). Examples of "weighing" states are Mississippi, *see id.*, and Florida, *see* Parker v. Dugger, 498 U.S. 308, 318 (1991). In a "nonweighing" state, the jury is required to find the existence of at least one aggravating factor; after that, the jury makes its sentencing determination by "tak[ing] into consideration all circumstances before it from both the guilt-innocence and the sentence phases of the trial." *Stringer*, 112 S. Ct. at 1136 (quoting Zant v. Stephens, 462 U.S. 862, 872 (1983)). Thus, in nonweighing states, the statutory definitions of aggravating factors are relevant only to the determination that the defendant is *eligible* for the death penalty, but do not have a specific function with regard to the ultimate sentencing determination. Juries are permitted to consider nonstatutory aggravating factors in determining the defendant's sentence, so long as they are not "constitutionally impermissible or totally irrelevant to the sentencing process." *Zant*, 462 U.S. at 885. There are about fifteen states which expressly permit the sentencer to consider nonstatutory aggravators. Gillers, *supra* note 27, at 101-19 (app.). The distinction between weighing and nonweighing states is particularly significant with regard to the procedures that must be followed by appellate courts in reviewing cases in which the sentencer finds an invalid statutory aggravator. *See, e.g.*, Sochor v. Florida, 112 S. Ct. 2114, 2119 (1992); *Stringer*, 112 S. Ct. at 1136-39; *Parker*, 498 U.S. at 318. Oregon and Texas have "structured discretion" statutes, which require the jury to answer a series of questions upon the completion of the penalty phase of the defendant's trial, and the defendant's sentence is based on the jury's responses to the questions posed. *See* OR. REV. STAT. § 163.150 (1993); TEX. CODE CRIM. PROC. ANN. art. 37.071 (West Supp. 1995). Evidence of aggravating and mitigating circumstances is to be considered in answering the questions posed. *See* OR. REV. STAT. § 163.150(1)(c)(A) (1993); TEX. CODE CRIM. PROC. ANN. art. 37.071(2)(e) (West Supp. 1995).

96. Gregg v. Georgia, 428 U.S. 153, 198 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.).

automatic appellate review is required by *Furman*,[97] all states provide judicial review of a death sentence at some level.[98] Most states provide an automatic appeal to the highest appellate court in the state; a few states also provide an appeal as of right to an intermediate appellate court.[99]

Other special rules, developed in recognition of the need for greater reliability in capital cases than in non-capital cases, have added to the burdens of capital litigation. For example, there are rules governing the voir dire of jury venirepersons in capital cases that are largely unknown in non-capital criminal trials.[100] In death cases, the Court has exhibited greater willingness to scrutinize the adequacy and clarity of statutory aggravating factors[101] and jury instructions.[102]

As a consequence of the Court's efforts to rationalize the application of the death penalty, attorneys who represent capital defendants must master rules and procedures peculiar to death cases,

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97. *See* BEDAU, *supra* note 63, at 181.

98. Pulley v. Harris, 465 U.S. 37, 44 (1984); *see also* BEDAU, *supra* note 63, at 181.

99. Anthony G. Amsterdam, *In Favorem Mortis: The Supreme Court and Capital Punishment*, 14 HUM. RTS. 14, 16 (1987).

100. *See, e.g.*, Morgan v. Illinois, 112 S. Ct. 2222, 2229-30 (1992) (holding that defendant has due process right to adequate voir dire of venirepersons to identify and disqualify jurors who would automatically vote for the death penalty if defendant was found guilty of capital crime); Witherspoon v. Illinois, 391 U.S. 510, 517-18 (1968) (holding that inquiry into venirepersons' view on death penalty permitted); Turner v. Murray, 476 U.S. 28, 35-36 (1986) (plurality opinion) (allowing inquiry into racial attitudes of venirepersons in capital cases).

101. For example, the Court has invalidated the use of vaguely defined aggravating factors as violative of the Eighth Amendment. *See* Maynard v. Cartwright, 486 U.S. 356 (1988) (invalidating "especially heinous, atrocious, or cruel" aggravating circumstance); Godfrey v. Georgia, 446 U.S. 420 (1980) (invalidating "outrageously or wantonly vile, horrible or inhuman" aggravating circumstance). The Court has reasoned that a constitutionally-acceptable sentencing statute must "suitably direct[] and limit[]" the discretion of the sentencing authority in order to minimize the chances of arbitrary or capricious decisions, and that this can only be accomplished through " 'clear and objective standards' that provide 'specific and detailed guidance' [for the sentencer], and that 'make rationally reviewable the process for imposing a sentence of death.' " Lewis v. Jeffers, 497 U.S. 764, 774 (1990).

102. *See, e.g.*, Cage v. Louisiana, 498 U.S. 39, 41 (1990) (condemning use of reasonable doubt instruction in death case that suggested higher degree of doubt was required for acquittal than is permissible under Fourteenth Amendment); McKoy v. North Carolina, 494 U.S. 433, 444 (1990) (holding that jury instruction requiring that jury unanimously find existence of mitigating circumstance before it can be considered in sentencing determination impermissible); Mills v. Maryland, 486 U.S. 367, 384 (1988) (invalidating jury instruction that required jury to unanimously agree on mitigating factors); Francis v. Franklin, 471 U.S. 307, 315-18 (1985) (plurality opinion) (holding that jury instruction cannot place burden of proving element of intent on defendant); Beck v. Alabama, 447 U.S. 625, 637-38 (1980) (holding that, in death case, if evidence supports lesser included offense, jury must be instructed on it).

develop unique trial strategies resulting from these peculiarities, and expend a vastly greater amount of resources in extensive pretrial investigation and preparation than is required in other criminal cases. The constitutional responsibilities of defense lawyers have multiplied with each refinement of the capital punishment process of the past twenty years.

B. *The Constitutional Responsibilities of Attorneys Representing Defendants Accused of Capital Crimes*

The interrelated substantive and procedural rules that have been erected to assure the constitutionality of the death penalty are not self-executing. Our legal system places primary responsibility for the proper operation of this system on the attorneys who represent defendants accused of capital crimes.[103] It is through the zealous advocacy of the defendant's legal representative that all other rights of the accused are preserved.[104]

Long before the Supreme Court recognized that poor persons accused of crimes had a Sixth Amendment right to the assistance of state-provided counsel,[105] the Court acknowledged the centrality

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103. *See, e.g.*, Penson v. Ohio, 488 U.S. 75, 84 (1988) ("As a general matter, it is through counsel that all other rights of the accused are protected: 'Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other right he may have.'" (citation omitted)); Cuyler v. Sullivan, 446 U.S. 335, 343 (1980) ("Unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself."). For a discussion of the demands of representation in capital cases, see MILLARD FARMER & JAMES KINARD, TRIAL OF THE PENALTY PHASE (1981); Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59 (1986) [hereinafter Goodpaster, *Adversary System*]; Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299 (1983) [hereinafter Goodpaster, *The Trial for Life*]; Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323 [hereinafter White, *Effective Assistance*]; Ivan K. Fong, Note, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 STAN. L. REV. 461 (1987).

104. *Cf.* Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 60, 65-66 (1964) (arguing that the Court's determination that the Sixth Amendment required states to provide attorneys free of charge to indigents facing felony charges was "the watershed decision in the evolution of the criminal process" because it provided mechanism for achieving all other rights guaranteed to accused).

105. Gideon v. Wainwright, 372 U.S. 335 (1963). In *Gideon*, the Court recognized that indigents were entitled to the assistance of state-supplied counsel to defend felony charges at the trial level. *Id.* at 344-45. An indigent's right to appointed counsel was extended to other stages of proceedings and other types of proceedings in a series of cases in the decade following *Gideon*. *See, e.g.*, Douglas v. California, 372 U.S. 353, 356-58 (1963) (right to appointed counsel for first appeal of conviction); Miranda v. Arizona, 384 U.S. 436, 469 (1966) (right to appointed counsel during in-custody interrogations); *In re* Gault, 387 U.S. 1, 36-38

of defense counsel to the institutional legitimacy of capital punishment. In *Powell v. Alabama*,[106] thirty years before *Gideon*, the Court recognized that meaningful assistance of counsel in capital cases was indispensable to the procedural fairness of a capital trial.[107] The Court, relying on the Due Process Clause of the Fourteenth Amendment, found that the states were obligated to provide counsel to an indigent charged with an offense punishable by death:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . . Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.[108]

Every task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing execution. The responsibilities thrust upon defense counsel in a capital case carry with them psychological and emotional pressures unknown elsewhere in the law.[109] In addition, defending a capital case is an intellectually rigorous enterprise, re-

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(1967) (right to assigned counsel in juvenile proceedings that could result in incarceration); Mempa v. Rhay, 389 U.S. 128, 133-37 (1967) (right to appointed counsel at combined probation revocation and sentencing hearing); United States v. Wade, 388 U.S. 218, 236-37 (1967) (right to counsel during post-indictment line-ups); Coleman v. Alabama, 399 U.S. 1, 9-10 (1970) (right to counsel in preliminary hearings); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (right to appointed counsel extended to misdemeanor cases in which imprisonment might be imposed); Gagnon v. Scarpelli, 411 U.S. 778, 790-91 (1973) (limited right to assigned counsel during probation and parole revocation hearings).

106. 287 U.S. 45 (1932).

107. *Id.* at 68-69.

108. *Id.*

109. Attorneys representing defendants accused of capital crimes, of course, have always been confronted by these pressures. The attorney must pursue the case knowing that "[e]very motion has an impact on whether the client lives or dies," Lyon, *supra* note 33, at 697, and that any tactical decision that goes awry could land his client on death row. The psychological pressure inherent in capital litigation is often intensified by community outrage against the attorney's client that often is redirected toward the defense attorney. In addition, "[t]here is *always* a political component to a death penalty case, even if it is no more than the prosecutor's wish to appear tough on crime." *Id.* at 696 (emphasis in original). Capital cases are often tried in an atmosphere that makes miscarriages of justice more likely because the heinousness of the crime creates "more political and emotional pressure to find a defendant." Denno, *supra* note 49, at 451 (citing WELSH S. WHITE, THE DEATH PENALTY IN THE NINETIES 45 (1991)).

quiring command of the rules unique to capital litigation and constant vigilance in keeping abreast of new developments in a volatile and highly nuanced area of the law.[110]

The burdens of pre-trial motion practice are greater in death cases than other criminal cases.[111] To properly defend a capital case, defense counsel might be required to make or oppose up to fifty pre-trial motions, a level of activity unknown in non-capital felony cases.[112] Motions routinely made in non-capital cases often are more burdensome in death cases, both because the outcomes of those motions have greater ramifications, and because capital murder statutes tend to be more complex and give rise to more evidentiary issues than other criminal statutes.[113] In addition, death penalty attorneys are required to bring motions unique to capital litigation and to engage in more intensive pre-trial discovery than is typical in non-capital cases.[114]

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110. ABA GUIDELINES, *supra* note 33, Commentary to Guideline 8.1, at 73. The defense attorney must master a body of post-*Furman* death penalty jurisprudence notable for its sudden shifts in both fundamental assumptions and minor premises. *See generally* James R. Acker, *A Different Agenda: The Supreme Court, Empirical Research Evidence, and Capital Punishment Decisions, 1986-1989*, 27 LAW & SOC'Y REV. 65 (1993).

111. *See* PHILLIP J. COOK & DONNA B. SLAWSON, THE COSTS OF PROCESSING MURDER CASES IN NORTH CAROLINA 16-17, 28-30 (1993); NEW YORK STATE DEFENDERS ASS'N, CAPITAL LOSSES: THE PRICE OF THE DEATH PENALTY FOR NEW YORK STATE 12-15 (1982) [hereinafter CAPITAL LOSSES]; SOUTHERN POVERTY LAW CENTER, MOTIONS FOR CAPITAL CASES (1981); Ruth E. Friedman & Bryan A. Stevenson, *Solving Alabama's Capital Defense Problems: It's a Dollars and Sense Thing*, 44 ALA. L. REV. 1, 8-9 (1992); Garey, *supra* note 53, at 1247-51; Lyon, *supra* note 33, at 696-701; Vreeland, *supra* note 33, at 646-47.

112. *See, e.g.*, Paduano & Smith, *supra* note 33, at 297. Pre-trial motions "create a record and set a course of strategy upon which the entire litigation effort in a capital case is patterned." CAPITAL LOSSES, *supra* note 111, at 12. In most death penalty jurisdictions, a defendant cannot raise issues on appeal that were not raised, usually through motions, before trial or at trial. Particularly in light of the seriousness of capital cases and the instability of the current capital punishment jurisprudence, there are pressures on counsel to raise through motion practice all potential issues, even those not currently supported by existing precedent, or else risk waiving those issues on direct appeal and later during state and federal post-conviction proceedings. *See infra* notes 413-15 and accompanying text.

113. Garey, *supra* note 53, at 1248; *see also* CAPITAL LOSSES, *supra* note 111, at 12-13; Vreeland, *supra* note 33, at 647. The motions routinely made in ordinary criminal cases—motions to suppress physical evidence, challenge witness identification procedures, and the like—"are longer, more complicated and more heavily litigated in death cases." CAPITAL LOSSES, *supra* note 111, at 13. Moreover, the notoriety of most capital cases require defense attorneys to carefully prepare and support motions for a change of venue, individual voir dire, and sequestration of jurors during voir dire and trial—motions that are not unique to capital litigation, but are rarely important in non-capital cases. *See* CAPITAL LOSSES, *supra* note 111, at 131; NATIONAL JURY PROJECT, JURYWORK: SYSTEMATIC TECHNIQUES §§ 3.01, 3.06 (2d ed. 1989); Garey, *supra* note 53, at 1249; Vreeland, *supra* note 33, at 647.

114. For example, attorneys in capital cases must challenge aspects of the indictment that make the alleged offense a capital one, qualifying the defendant for the death penalty. Garey, *supra* note 53, at 1249. Defense counsel are required to make and support motions

Similarly, jury voir dire is lengthier and more difficult process in capital cases.[115] The scope of voir dire is broader,[116] reflecting greater concern about possible sources of juror bias, such as pretrial publicity or racial prejudice.[117] Most importantly, the Supreme Court has allowed inquiry into the attitudes of venirepersons regarding the death penalty, permitting the prosecution to disqualify individuals opposed to capital punishment.[118] An impressive body of social science research has shown that "death-qualified" juries are considerably more likely to return guilty verdicts, to convict on more serious charges, and to be less receptive to diminished capacity defenses than non-death-qualified juries.[119]

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for funds for investigators and experts, many of whom are only necessary in capital cases. *Id.* at 1249-50; *see also* Vreeland, *supra* note 33, at 647. Attorneys must make a host of pretrial motions arising out of the body of Eighth Amendment law relevant only to capital cases. Tabak & Lane, *supra* note 18, at 134.

115. The complexities of jury selection in capital cases are discussed in Marshall Dayan et al., *Searching for an Impartial Sentencer Through Jury Selection in Capital Trials*, 23 LOY. L.A. L. REV. 151 (1989). *See also* ABA GUIDELINES, *supra* note 33, Guideline 11.7.2 and commentary; COOK & SLAWSON, *supra* note 111, at 17-18; Friedman & Stevenson, *supra* note 111, at 10; Paduano & Smith, *supra* note 33, at 297.

116. Paduano & Smith, *supra* note 33, at 297; Tabak & Lane, *supra* note 18, at 134. There is a greater chance that voir dire will be conducted individually in a capital case, either as a result of statute or judicial discretion. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 35.17(2) (West Supp. 1994) (upon request, capital defendant entitled to individual voir dire); 42 PA. CONS. STAT. ANN. R. CRIM. P. 1106(e) (1989 & Supp. 1994) (right to individual voir dire, unless waived); Hovey v. Superior Court, 616 P.2d. 1301, 1354 (Cal. 1980) (establishing waivable right to individual voir dire); Bailey v. State, 424 S.E.2d 503, 506 (S.C. 1992) (holding that in a capital case "each juror, individually, must be interrogated by the attorney who, prior to trial, has searchingly researched and probed the background of every prospective juror").

117. The Supreme Court has recognized that "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." Turner v. Murray, 476 U.S. 28, 35 (1986) (opinion of White, J.).

118. *See* Witherspoon v. Illinois, 391 U.S. 510, 517-18 (1968).

119. *See* Lockhart v. McCree, 476 U.S. 162, 184 (1986) (Marshall, J., dissenting). Empirical studies showing that death-qualified juries are more prone to convict and less receptive to defense arguments than non-death-qualified juries. *See, e.g.*, WHITE, NINETIES, *supra* note 82, at 186-218; Edward J. Bronson, *On the Conviction Proneness and Representativeness of the Death Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 U. COLO. L. REV. 1 (1970); Claudia L. Cowan et al., *The Effects of Death-Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53 (1984); Phoebe C. Ellsworth et al., *The Death-Qualified Jury and the Defense of Insanity*, 8 LAW & HUM. BEHAV. 81 (1984); Michael Finch & Mark Ferraro, *The Empirical Challenge to Death-Qualified Juries: On Further Examination*, 65 NEB. L. REV. 21 (1986); Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAVIOR 31 (1984); Stephen Gillers, *Proving the Prejudice of Death-Qualified Juries After* Adams v. Texas, 47 U. PITT. L. REV. 219 (1985); Faye Goldberg, *Toward Expansion of* Witherspoon*: Capital Scruples, Jury Bias, and Use of Psychological Data to Raise Presumptions in the Law*, 5 HARV. C.R.-C.L. L. REV. 53 (1970);

A highly specialized procedure has evolved in connection with the selection of "death-qualified" juries,[120] and it is incumbent upon defense lawyers to minimize the harmful consequences of death-qualification by identifying potential jurors who favor the death penalty but might refrain from imposing it on the defendant, and to rehabilitate venirepersons who initially profess opposition to capital punishment.[121] To accomplish this, defense lawyers need to master sophisticated jury selection techniques, and they require the aid of social scientists and jury selection specialists who can assist in developing voir dire examinations and profiles of prospective jurors.[122]

Moreover, the guilt phase of a capital case alone, if properly defended, will last longer on average than the entirety of non-capital murder trials. Murder cases tend to be more difficult and time-consuming than other felony cases; the guilt phase of a capital murder trial is further complicated by the need to prove or disprove that the defendant's actions fall within the legal definition of capital murder. Further, capital cases commonly involve mental capacity defenses that add to the defense attorney's task. In addition to greater trial time, the defense of capital cases at the guilt phase often requires greater assistance from investigators and experts in pathology, psychiatry, ballistics and other forensic specialties.

It is the labor that must be expended by attorneys, investigators and experts to prepare and present evidence at the penalty phase of a capital trial, however, that makes the cost of capital defense exponentially greater than the cost of any other criminal proceeding tried in the state courts. At the penalty phase of a capital trial, the sentencing authority, usually a jury, is asked to make "a highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves."[123] During the guilt and penalty phases, the prosecution presents a narrative consisting

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Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121 (1984); George L. Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971); William C. Thompson et al., *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes Into Verdicts*, 8 LAW & HUM. BEHAV. 95 (1984).

120. ABA GUIDELINES, *supra* note 33, Guideline 11.7.2 commentary at 117 (footnotes omitted).

121. ABA GUIDELINES, *supra* note 33, Guideline 1.1 commentary at 31.

122. ABA GUIDELINES, *supra* note 33, Guideline 8.1 commentary at 74; *see also id.*, Guideline 11.7.2 commentary at 117 ("Determining what invisible but lethal currents of prejudice may exist in the jury pool and how to avoid letting the client be trapped therein may require sociological data, psychological expertise, skillful questioning and intuition.").

123. Turner v. Murray, 476 U.S. 28, 33-44 (1986) (internal quotations omitted).

of violent acts committed by the defendant, focused primarily if not exclusively on the circumstances surrounding the murder of the victim. During the penalty phase, the defense attorney must counter the prosecution's chronicle of often depraved or inhuman acts with a narrative that humanizes the perpetrator of those acts.[124] This typically is an account of physical or psychological violence and deprivation suffered by the defendant over a lifetime.[125] Defense counsel must come forth with evidence that "helps the jury understand the sources and origins of the lawless violence perpetrated by [the defendant] without suggesting that [the jurors] should forgive that violence or recant their judgment [of guilt]."[126]

For attorneys accustomed to a predominantly defensive role in which they respond to evidence presented by the prosecution, conducting a defense at the penalty phase is "an alien, unlawyerly task."[127] Because the defense must not only blunt the impact of evidence of aggravating circumstances but also come forward to establish affirmatively the existence of mitigating factors, "the whole

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124. *See, e.g.*, WHITE, NINETIES, *supra* note 82, at 76 (asserting that defense counsel must show during the penalty phase that the crime alone does not represent the defendant); Goodpaster, *The Trial for Life*, *supra* note 103, at 321 (arguing that "to ensure a meaningful penalty hearing in capital cases, it is essential that the client be presented to the sentencer as a human being"); *id.* at 335 (observing that defense counsel must counter prosecution's effort to portray defendant "as evil and inhuman, perhaps monstrous"); Weisberg, *supra* note 75, at 361 ("The overall goal of the defense is to present a human narrative, an explanation of the defendant's apparently malignant violence as in some way rooted in understandable aspects of the human condition, so the jury will be less inclined to cast him out of the human circle."). Professor Robin West observes that it is

> not just that criminal defendants have a right to a jury that has heard their life story, we need to hear the life story. We need to understand what happened and why. We need to hear about the event that caused the arrest, about the life circumstances that caused and arguably mitigates the criminality of the event, and the social realities that engendered, facilitated, or permitted the life circumstances. We need to learn once again to recognize these people as human, as "like us." We need that gap of emphatic understanding closed. We need to be given a stake in their lives, and in the communities from which they come. We need to be made responsible.

Robin West, *Narrative, Responsibility, and Death: A Comment on the Death Penalty Cases from the 1989 Term*, 1 MD. J. CONTEMP. LEGAL ISSUES 161, 175-76 (1990).

125. *See generally* Austin Sarat, *Speaking of Death: Narratives of Violence in Capital Trials*, 27 LAW & SOC'Y REV. 19 (1993). Sarat notes that "[i]n constructing a narrative of violence and pain [in telling the story of the victim's death], prosecutors . . . construct a sociologically simple world of good and evil and a morally clear world of responsibility and desert." *Id.* at 51. The defense must counter this with a more complex narrative; "the violence that was part of the defendant's life story was more diffuse, spread out over a longer period of time, and more systemic. In contrast to the violence that took [the victim's] life, the violence that [the defendant] had endured made his life what it is." *Id.* at 39.

126. *Id.* at 41.

127. Berger, *The Chiropractor as Brain Surgeon*, *supra* note 18, at 250.

theory of proceeding" at the penalty trial "stands outside normal criminal trial practice" for most defense lawyers.[128] Moreover, the evidence that should be presented at the penalty trial is exactly the sort that defense attorneys ordinarily endeavor to keep away from the jury; facts about the life and character of the defendant that probably has little or no direct connection to the crime with which he is charged.[129]

The potential scope of mitigation evidence is quite broad and continually expanding.[130] In making a reasoned retributive judgment, "there are no absolute criteria for gauging the degree of culpability or moral iniquity of an individual criminal offender."[131] Furthermore, as knowledge of the mysteries of severely aberrant conduct increases, so does recognition of the possible causes of that conduct.[132] At the penalty phase, the defendant's "whole career and soul" are subject to inquiry,[133] and the defendant's opportunity to present mitigating evidence relevant to the defendant or his crime is virtually unlimited.[134]

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128. ABA GUIDELINES, *supra* note 33, Guideline 11.8.6 commentary at 134. *See also* Goodpaster, *The Trial for Life*, *supra* note 103, at 337 (observing that "[m]ost defense advocates are accustomed to a purely defensive role, to responding, to attempting to defeat the prosecution's affirmative case").

129. *See* ABA GUIDELINES, *supra* note 33, Guideline 11.8.6 commentary at 134 ("Attorneys skilled in narrowing the focus of trial to exclude irrelevant references to the life and character of a client may find themselves unprepared for the sentencing phase of a capital case where the life and character of the client may have to be revealed in detail."); *see also* Berger, *The Chiropractor as Brain Surgeon*, *supra* note 18, at 250 (arguing that "[c]onstructing . . . a 'dramatic psychohistory' of the client and presenting it at the penalty phase smacks more of social work than of law" (footnote omitted)); Goodpaster, *The Trial for Life*, *supra* note 103, at 321 (asserting that the investigation of defendant's life history "is a very different inquiry from an investigation of facts relating to an offense"); Paduano & Smith, *supra* note 33, at 298 (noting that defense attorney in a capital case cannot limit investigation to witnesses with knowledge of the events surrounding the defendant's offense, as is typical in non-capital cases).

130. The state cannot limit the sentencer's consideration of mitigating evidence in such a way as to "create[] the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion). *Lockett* defines mitigating evidence to include all facts relevant to the defendant's character, record, background, and offense that militate against imposing the death penalty, *id.* at 604, a definition which "does not exclude very much." Weisberg, *supra* note 75, at 324.

131. Hertz & Weisberg, *supra* note 75, at 369-70.

132. *Cf.* Arnold v. Kemp, 813 S.W.2d 770, 775 (Ark. 1991) ("New scientific developments and an increased awareness in areas of social consciousness have served to drastically raise the complexity of criminal litigation.").

133. Weisberg, *supra* note 75, at 335.

134. WHITE, NINETIES, *supra* note 82, at 73; *see also* Goodpaster, *The Trial for Life*, *supra* note 103, at 315 ("As a matter of law and practice, the opportunity to present almost any arguably mitigating evidence crucially distinguishes death penalty trials from all other

In developing a case of mitigation, a defense lawyer must look beyond the rather narrow terms of the death penalty statutes themselves[135] and conduct an investigation that "[l]iterally . . . begins with the onset of the client's life: prenatal care and birth."[136] Experts have identified several broad categories of evidence that might be put forward by the defendant at the penalty phase:[137] (1) evidence that portrays the positive qualities the defendant possesses;[138] (2) evidence that makes the defendant's violent acts "humanly understandable in light of his past history and the unique circumstances affecting his formative development";[139] (3) evidence that tends to show that the defendant's life in prison will likely be productive, or at least unthreatening to others;[140] (4) evidence that

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criminal trials.").

135. There are two broad categories of mitigation: statutory mitigating factors and non-statutory mitigating factors. Typical statutory mitigating factors include the defendant's youth; lack of significant prior criminal activity; impaired capacity to appreciate the wrongfulness of his conduct; and lesser role in the criminal activity that resulted in the death of another. *See generally* MODEL PENAL CODE § 210.6(4) (1962). For the most part, statutory mitigators tend to be narrowly defined and generally "barren of helpful guidelines" for developing mitigating evidence. William S. Geimer, *Law and Reality in the Capital Penalty Trial*, 18 N.Y.U. REV. L. & SOC. CHANGE 273, 284 (1991). They usually do little more than mimic the mitigating circumstances listed in the statutory schemes found constitutional by the Supreme Court in Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); they "do not . . . represent a considered legislative policy judgment about what makes an offender comparatively less culpable." Geimer, *supra*, at 284. A well-prepared penalty trial will frequently focus on mitigating factors that are not specifically identified in statutes but which under the *Lockett* doctrine cannot be unduly restricted by the states. *See supra* notes 68-70, 83-87 and accompanying text. To identify these factors, the defense attorney must closely study the caselaw and the writings of death penalty experts.

136. Lyon, *supra* note 33, at 703.

137. The categories set forth here have been culled from Goodpaster, *The Trial for Life*, *supra* note 103, at 335-37; Lyon, *supra* note 33, at 703; and Geimer, *supra* note 135, at 286. Most mitigating factors are "comprised of circumstances that would be considered mitigating only in a retributive manner." Kelly, *supra* note 74, at 446.

138. Falling within this category would be evidence of general good character, military service, service to the community, or a minor or non-existent prior criminal record. *See, e.g.*, Coleman v. Risley, 839 F.2d 434, 453 n.7 (9th Cir. 1988), *vacated on other grounds sub nom.*; Coleman v. McCormick, 874 F.2d 1280 (9th Cir. 1989) (en banc); ABA GUIDELINES, *supra* note 33, Guideline 11.8.6(B)(3) & (6). Also relevant would be evidence of the defendant's employment history and hardworking nature, *see id.*, Guideline 11.8.6(B)(4); Armstrong v. Dugger, 833 F.2d 1430, 1433 (11th Cir. 1987), perseverance in overcoming hardships, *see* Johnson v. Wainwright, 806 F.2d 1479, 1483-84 (11th Cir.), *cert. denied*, 484 U.S. 872 (1986), or remorse for his crime, *see* Magill v. Dugger, 824 F.2d 879, 889 (11th Cir. 1987).

139. Goodpaster, *The Trial for Life*, *supra* note 103, at 335.

140. *See, e.g.*, Sumner v. Shuman, 483 U.S. 66, 82 (1987) (stating that a history of nonviolent behavior while incarcerated might be relevant to sentencing decision); Skipper v. South Carolina, 476 U.S. 1, 7 (1986) (holding that evidence of past peaceful behavior in

rebuts the prosecutor's evidence of aggravating circumstances;[141] and (5) evidence of extenuating circumstances surrounding the capital crime itself.[142]

Of these categories, the second is usually the most significant. A jury might be persuaded that a death sentence is unjust because of the defendant's youth,[143] impaired mental capacity,[144] or stunted intellectual or emotional development.[145] Evidence of the defend-

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prison is relevant mitigation evidence); Miller v. Wainwright, 798 F.2d 426, 430-31 (11th Cir. 1986) (holding that testimony concerning defendant's rehabilitative capacity is relevant mitigation); *see also* ABA GUIDELINES, *supra* note 33, Guideline 11.8.6(B)(5)-(7).

141. Especially burdensome is the need to investigate and possibly rebut the prosecution's evidence of victim impact. *See infra* note 159 and accompanying text.

142. This category would include evidence leaving a lingering doubt about the defendant's guilt of capital murder in the jurors' minds, a lesser role played by the defendant in a crime committed by several persons, or any confession made by the defendant. Geimer, *supra* note 135, at 286; *see also* Green v. Georgia, 442 U.S. 95, 96-97 (1979) (involving evidence that defendant was not triggerman); Chaney v. Brown, 730 F.2d 1334, 1352-55 (10th Cir.) (involving shared or limited participation in crime), *cert. denied*, 469 U.S. 1090 (1984); Foster v. Strickland, 707 F.2d 1339, 1347 (11th Cir. 1983) (involving cooperation with authorities), *cert. denied*, 466 U.S. 993 (1984). Evidence that the defendant was provoked or acted under duress or coercion, *see, e.g.*, Tison v. Arizona, 481 U.S. 137, 157 (1987), or was under the influence of drugs or alcohol at the time he committed his crime, *see, e.g.*, Sumner v. Shuman, 483 U.S. 66, 82 (1987); Roberts v. Louisiana, 431 U.S. 633, 637 (1977) (per curiam), has also been deemed mitigating.

143. *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361, 375 (1989) (plurality opinion); Thompson v. Oklahoma, 487 U.S. 815, 833-38 (1988); Eddings v. Oklahoma, 455 U.S. 104, 116 (1982); *see also* Johnson v. Texas, 113 S. Ct. 2658, 2674 n.* (1993) (O'Connor, J., dissenting) (noting that thirty of the thirty-six states with death penalty statutes either identify age as a statutory mitigating factor, or prohibit the execution of those who were under age 18 at the time of the commission of the crime). Youth is viewed as a factor that reduces a defendant's moral culpability for the offense because the "emotional and cognitive immaturity and inexperience with life render him less responsible," and because youthfulness "is transitory, indicating that the defendant is less likely to be dangerous in the future." Graham v. Collins, 113 S. Ct. 892, 924 (1993) (Souter, J., dissenting).

144. *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302, 340 (1989). At least twenty-five states specifically identify impaired mental capacity as a statutory mitigating circumstance. *See* Bilionis, *supra* note 69, at 303 n.62 (listing statutory provisions). Those who are mentally retarded or impaired are largely immune from the deterrent effect of punishment. Liebman & Shepard, *supra* note 75, at 827-28. Moreover, the mental capacity of the defendant is relevant to a retributive judgment about the defendant and his crime, because the criminal conduct of mental retardates often "stem from an impulsive reaction against the painful awareness, hammered home by frustration, failure, and humiliation, of the cruel trick that biology has played on him," *id.* at 825 (internal quotation omitted), and because the cognition and volition level of the mentally impaired are low, cutting against any sense that the defendant is fully responsible for his actions. *Id.* at 825-26. Thus, evidence of a capital defendant's mental capacity might persuade a jury to render "a sentence of less than death" because the defendant's personal responsibility for the offense is diminished by his inability "to control his impulses or to evaluate the consequences of his conduct." *Penry*, 492 U.S. at 322.

145. *See, e.g.*, Burger v. Kemp, 483 U.S. 776, 787 n.7 (1987); *Eddings*, 455 U.S. at 116.

ant's insanity, mental illness, or medically-diagnosed personality disorder is relevant to the jury's determination of the defendant's moral responsibility for his offense.[146] Evidence of a difficult childhood; domestic turbulence; physical, mental or sexual abuse; neglect; poverty; or other tragic formative influences might mitigate against the imposition of a death sentence.[147] Such evidence might help explain the defendant's distorted personality, warped development, and abhorrent acts. It might arouse compassion or mercy, or undermine the uncomplicated picture of good and evil that the

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146. For a general discussion of the mitigating effect of evidence of mental illness or diagnosed personality disorders, see Joshua N. Sondheimer, Note, *A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing*, 41 HASTINGS L.J. 409 (1990). Evidence of mental illness "has the potential to totally change the evidentiary picture by altering the causal relationship that can exist between mental illness and homicidal behavior." Middleton v. Dugger, 849 F.2d 491, 495 (11th Cir. 1988). The Model Penal Code lists "extreme mental or emotional disturbance" and "mental disease or defect" as mitigating circumstances, *see* MODEL PENAL CODE § 210.6(4)(b) & (g) (1980), and at least 22 states expressly identify some sort of mental illness as a statutory mitigator. Bilionis, *supra* note 69, at 303 n.63; *see also* ABA GUIDELINES, *supra* note 33, Guideline 11.8.6(B)(1). Personality disorders, such as the psychopathic condition called "anti-social personality," have been linked to "identifiable childhood characteristics and biological abnormalities," Liebman & Shepard, *supra* note 75, at 831, and evidence of such disorders mitigates against the imposition of the death penalty on those afflicted with them. *See, e.g., Eddings*, 455 U.S. at 107, 115; Clisby v. State, 456 So. 2d 99, 102 (Ala. Crim. App. 1983), *cert. denied*, 470 U.S. 1009 (1985). Even evidence of sociopathy—a lack of conscience or super ego—can mitigate against execution. Sociopaths typically are unable to conform to the rules of society or experience guilt. Liebman & Shepard, *supra* note 75, at 830. They cannot be deterred from committing crimes, because they are unable "either to suppress immediate gratification in favor of longterm needs or to conform to the basic moral codes of the society"; their conduct is unaltered by the threat of punishment. *Id.* at 833. The sociopath's impaired ability to conform his actions to the rules of society diminish the volitional character of his conduct, mitigating against a retributive judgment requiring a sentence of death. *Id.* at 832.

147. *See, e.g., Graham*, 113 S. Ct. at 926 (Souter, J., dissenting) (stating that evidence of defendant's unhappy upbringing, repeated custodial changes, and mother's mental illness and repeated hospitalization is mitigating); *Penry*, 492 U.S. at 319 (stating that "defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse"); *Eddings*, 455 U.S. at 115-16 (holding that evidence of defendant's "difficult family history and of emotional disturbance" is mitigating); *Middleton*, 849 F.2d at 495 (holding that evidence of "a childhood of brutal treatment and neglect" and sexual abuse is mitigating); Armstrong v. Dugger, 833 F.2d 1430, 1433 (11th Cir. 1987) (involving evidence of childhood poverty and poor living conditions, inadequate adult supervision, and irregular school attendance); Porter v. Wainwright, 805 F.2d 930, 933 (11th Cir. 1986) (involving mitigation evidence including testimony describing mental and physical abuse inflicted by stepfather during defendant's childhood and physical, emotional, and sexual abuse defendant suffered at juvenile detention centers), *cert. denied*, 482 U.S. 918 (1987); Pickens v. Lockhart, 714 F.2d 1455, 1466 (8th Cir. 1983) (involving turbulent family background, physical abuse by father, and repeated attempts to run away from home). *See also* ABA GUIDELINES, *supra* note 33, Guideline 11.4.1(D)(2) & (3), 11.8.6(B)(5).

prosecution would like the jury to accept in rendering a sentence.[148]

Amassing mitigation evidence[149] is an intimidating and time-consuming task.[150] An attorney or investigator must interview all "witnesses familiar with aspects of the client's life history,"[151] including relatives, childhood friends, neighbors, teachers, ministers, and social workers.[152] This is an enormous undertaking often complicated by the difficulty in locating such witnesses, many of whom may have not been in the defendant's life for years.[153] The defense attorney likely will be required to meet with the defendant and members of his family several times in an effort to gain their trust

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148. Goodpaster, *The Trial for Life*, *supra* note 103, at 335-36; *see also* WHITE, NINETIES, *supra* note 82, at 76 ("Defense counsel must gather together a massive amount of material pertaining to the defendant and present it to the jury in a way that will explain where the defendant has come from and why he has become the man he is now."); Weisberg, *supra* note 75, at 381 ("The artful defense lawyer describes a narrative chain from a childhood of abuse, neglect and family turmoil, to a youth in social or penal institutions and an introduction to brutality and crime, up to the present murder.").

149. For a discussion of the vital importance of extensive investigation of mitigation, see sources cited *supra* note 103. *See also* Geimer, *supra* note 135, at 290-91.

150. Preparation for the penalty phase of the defendant's trial must begin at the outset of the attorney's representation of the defendant. *See* ABA GUIDELINES, *supra* note 33, Guideline 11.4.1(A), 11.8.3(A), commentary to Guideline 1.1 at 32. At trial, counsel will be required to integrate a theory of the case at the guilt phase with a theory of mitigation at the penalty phase. ABA GUIDELINES, *supra* note 33, Guideline 1.1 commentary at 32; Goodpaster, *The Trial for Life*, *supra* note 103, at 329; Lyon, *supra* note 33, at 708-11. Capital punishment experts stress that:

> [c]ounsel's obligation to discover and appropriately present all potentially beneficial mitigating evidence at the penalty phase should influence everything the attorney does before and during trial: it should shape the relationship with the client, prosecutor, court personnel, and jurors; it should determine how voir dire proceeds, how potential jurors are questioned, which potential jurors are challenged for cause and which peremptorily; and it should directly affect the nature of the defense presented during the guilt trial and the affirmative mitigating case put on at the penalty trial.

Goodpaster, *The Trial for Life*, *supra* note 103, at 320 (citing Denis N. Balske, *New Strategies for the Defense of Capital Cases*, 13 AKRON L. REV. 331, 353-59 (1979)).

151. ABA GUIDELINES, *supra* note 33, Guideline 11.4.1(D)(3)(B) at 95; *see also* Lyon, *supra* note 33, at 704-05.

152. Goodpaster, *The Trial for Life*, *supra* note 103, at 321. *See also* WHITE, NINETIES, *supra* note 82, at 79 ("Someone will need to talk to the people who knew the defendant during the various stages of his life—family members, friends, teachers, psychiatrists—and who can trace the path of his life for the jury."); Tabak & Lane, *supra* note 18, at 133 ("[T]he defense should develop evidence . . . concerning the defendant's entire background—including childhood, mental and psychological conditions, family relations, employment history, prior arrests and convictions, medical history, and much more.").

153. *See* Goodpaster, *The Trial for Life*, *supra* note 103, at 321 ("Counsel will have to uncover witnesses from a possibly distant past, not only relatives, but childhood friends, teachers, ministers, neighbors, all of whom may be scattered like a diaspora of leaves along the tracks of defendant's travels.").

and develop an effective relationship with them.[154] The attorney may be met with resistance to the investigation of mitigating evidence;[155] this resistance must either be overcome or ignored, for without conducting a complete investigation, the attorney cannot properly advise the defendant at trial.[156] The attorney must assemble the documentary record of the defendant's life, collecting school, work, and prison records which might provide clues to the causes of the deterioration of the defendant's personality.[157] The attorney must also perform the wrenching task of interviewing members of the victim's family to determine whether any of them would be willing to testify in opposition of the defendant's execution.[158] In states in which "victim impact" evidence is deemed admissible, defense attorneys are required to investigate the victim's background in much the same way that they must examine the defendant's past, so that they can anticipate and, if possible, diminish the impact of such evidence.[159]

The preparation and presentation of mitigation evidence requires substantial expert assistance.[160] In addition to trained investigators competent to locate and interview witnesses and assemble demonstrative evidence,[161] an attorney will need the aid of persons

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154. *Id.* at 321-23; Lyon, *supra* note 33, at 703-04. In interviewing the defendant, as well as his family and friends, the attorney may require time to overcome racial, cultural, or socioeconomic barriers, or may be required to overcome problems of communication when the defendant is emotionally disturbed or mentally impaired. Berger, *The Chiropractor as Brain Surgeon*, *supra* note 18, at 250-51; Tabak, *Death of Fairness*, *supra* note 4, at 804.

155. The defendant or his family may distrust the attorney or may not want private facts they view as shameful or embarrassing aired publicly in a crowded courtroom. The defendant and his family may lack awareness that certain facts about the defendant's upbringing might be considered mitigating, making the attorney's investigation more difficult.

156. *See* ABA GUIDELINES, *supra* note 33, Guideline 11.4.1(C) and commentary at 93-96. Absent investigation of all potential mitigating evidence, "counsel's evaluation and advice amount to little more than a guess." *Id.* at 96. *See also id.* Guideline 1.1 commentary at 32 ("Substantial pretrial investigation is a necessary base for intelligent assessment of possibly conflicting options as to the defense.").

157. *See* Lyon, *supra* note 33, at 705-06.

158. ABA GUIDELINES, *supra* note 33, Guideline 11.4.1(D)(3)(C) at 95.

159. States may allow the sentencer to consider evidence of the *victim's* "uniqueness as an individual human being," Payne v. Tennessee, 501 U.S. 808, 823 (1991), and the impact of the defendant's crimes on the victim's survivors. *Id.* at 827. In permitting consideration of such evidence, the Supreme Court reasoned that "victim impact" evidence was relevant to "the specific harm caused by the crime in question," which in turn is germane to "the defendant's moral culpability and blameworthiness." *Id.* at 824. The *Payne* decision has been extensively criticized. *See, e.g.*, Dow, *When Law Bows to Politics*, *supra* note 14; Dubber, *supra* note 70, at 133-45.

160. The presentation of expert testimony in death cases is discussed generally in Geimer, *supra* note 135, at 291-92. *See also* ABA GUIDELINES, *supra* note 33, Guidelines 11.4.1(D)(7), 11.8.6(B)(1)-(8) at 94-95, 133.

161. ABA GUIDELINES, *supra* note 33, Guideline 8.1 commentary at 73-74; *see also id.*

skilled in social work and related disciplines to assist and possibly testify during the penalty phase.[162] Perhaps most importantly, counsel needs mental health experts to help develop mitigation theories, to prepare defense counsel to cross-examine experts testifying for the prosecution, and to testify of behalf of the defendant.[163]

If a client is sentenced to death, the responsibilities of counsel during the appellate process can be nearly as daunting as those during the trial stage. When a client faces death, the attorney cannot make the sort of cost-benefit choices that might be made in non-capital cases. The gravity of the punishment should overcome any hesitancy to raise an issue that, in the attorney's view, is unlikely to prove successful on appeal.[164] Cases are legion of defendants who have been executed after their counsel failed to raise "marginal" claims that proved successful when raised by other capital defendants.[165] Given the seriousness of death cases and the instability of capital punishment jurisprudence, there are pressures on counsel to raise all available "law reform" issues calling for a change in existing precedent, even under circumstances where such issues might not be pursued if the client was not facing death.[166] Further, since the federal courts have been constricting the availability of habeas corpus review of claims not raised before state

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Guideline 11.4.1(D)(7) at 95-96.

162. *Id.* Guideline 8.1 commentary at 73-74.

163. *Id.* Guideline 8.1 commentary at 74. *See also id.* Guideline 11.4.1(D)(7) at 95.

164. This principle must also inform the defense attorney's conduct during the pre-trial and trial stages. Most states adhere to strict procedural default rules, even in capital cases, and issues not adequately presented at the trial stage will not be considered on appeal. Thus, in deciding whether to pursue some legal strategy through a motion brought before or during trial, "trial counsel's perception that the effort needed to bring the motion probably outweighs the chances of the motion being granted should not alone preclude filing of the motion." *Id.* Guideline 11.5.1 commentary at 103.

165. There are numerous examples of different sentences meted out to similarly-situated defendants solely because one attorney decided to raise a legal issue at trial or on appeal that was not raised by another attorney. *See, e.g.*, Bright, *Counsel for the Poor*, *supra* note 10, at 1839-40 (noting that John Eldon Smith was executed by the State of Georgia after attorney failed to challenge jury composition, while co-defendant's death sentence was reversed because jury composition issue properly preserved); Friedman & Stevenson, *supra* note 111, at 20 n.103 (noting that the Alabama Supreme Court granted Paul Edward Murry relief from a death sentence because his attorney preserved an objection to the trial judge's failure to instruct the jury that it could not convict someone of the capital offense of killing an on-duty law enforcement officer unless the defendant knew the victim was a police officer, but refused relief to Ed Harrell, whose attorney did not preserve an identical objection). *See also* Stephen B. Bright, *In Defense of Life: Enforcing the Bill of Rights on Behalf of Poor, Minority and Disadvantaged Persons Facing the Death Penalty*, 57 Mo. L. Rev. 849, 885 (1992) [hereinafter Bright, *In Defense of Life*].

166. ABA Guidelines, *supra* note 33, Guideline 11.5.1 commentary at 103.

courts,[167] counsel must take pains to raise all possible federal constitutional issues at every opportunity, or risk falling into the "procedural 'black hole'" created by increasingly unforgiving procedural default rules.[168]

It is obvious, then, that an attorney representing a capital defendant must expend an extraordinary amount of time and resources in investigating, preparing, and presenting a defense that gives meaning to the safeguards erected by the Supreme Court against the arbitrary, irrational, or unfair application of the death penalty. One commentator characterized the required expenditures as "astronomical."[169] A more precise estimate of the required costs of capital litigation for the defense is elusive; the next section summarizes the efforts that have been made to quantify those costs.

C. *Estimating the Cost of Death Penalty Litigation During the Primary Trial and Direct Appeal*

Few studies have attempted to measure directly the expenditures necessary to properly defend a capital defendant during the initial trial—the "main event"[170] of capital litigation—or during the direct appeal.[171] The few studies that exist are informative, but

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167. *See infra* notes 413-15. Once a death row inmate has exhausted his direct appeals in state court, he may seek review of his conviction and sentence by the United States Supreme Court, usually by petitioning for a writ of certiorari. Amsterdam, *supra* note 99, at 16. If that petition is denied, the inmate must exhaust any collateral post-conviction remedies available to him under state law. Most states provide some procedure for raising post-conviction challenges to a conviction and sentence. *Id.* at 17. In those states, the inmate files a petition in the same court where he was originally convicted and sentenced, and the inmate can appeal the denial of a post-conviction petition through the state appellate courts. *Id.* Typically, the grounds for relief in state post-conviction are very limited, and petitions are rarely granted. *See infra* note 401 and accompanying text. After state court appeals are exhausted, and perhaps after another certiorari petition is filed with and denied by the United States Supreme Court, the death row inmate can file a petition for habeas corpus relief with the United States District Court for the district in which the inmate was convicted and sentenced. Substantively, federal habeas relief is available to an inmate who can show that his conviction or sentence was obtained in violation of the United States Constitution or federal law. 28 U.S.C. § 2254 (1988); Smith v. Phillips, 455 U.S. 209, 221 (1982); Brown v. Allen, 344 U.S. 443 (1953). In recent years, however, formidable procedural barriers have radically restricted the availability of habeas relief even to those inmates whose convictions and sentences were obtained in gross violation of the Constitution. *See infra* part IV.A.1.

168. Lyon, *supra* note 33, at 698.

169. Paduano & Smith, *supra* note 33, at 299.

170. *See* Wainwright v. Sykes, 433 U.S. 72, 90 (1977); *see also* Coleman v. Thompson, 501 U.S. 722, 744 (1991).

171. *See* UNITED STATES GEN. ACCT. OFFICE, CRIMINAL JUSTICE: LIMITED DATA AVAILABLE ON COSTS OF DEATH SENTENCES 1-2 (1989) (Report to the Chairman, Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, House of Representatives). Widely

tend to understate defense costs.[172] Most capital defendants are indigent and represented by appointed counsel or public defenders, and the resources provided for indigent defense services can be an artificial constraint on both the expenditures that are actually made on behalf of those indigent defendants[173] and on subjective perceptions of the level of funding required for capital defense.[174] As will be seen, most attorneys asked to defend those accused of capital crimes cannot or will not compensate for the shortfalls in state funding through the use of their own private resources. The result is that much of the research, investigation, and expert work required for the preparation of a meaningful defense in a capital

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ranging estimates of the cost of the death penalty have been offered in the reports of these studies. *See, e.g,* COMMITTEE TO STUDY THE DEATH PENALTY IN MARYLAND, FINAL REPORT: THE COST AND HOURS ASSOCIATED WITH PROCESSING A SAMPLE OF FIRST DEGREE MURDER CASES FOR WHICH THE DEATH PENALTY WAS SOUGHT IN MARYLAND BETWEEN JULY 1979 AND MARCH 1984 (1985); COOK & SLAWSON, *supra* note 111; Robert L. Spangenberg & Elizabeth R. Walsh, *Capital Punishment or Life Imprisonment?: Some Cost Considerations*, 23 LOY. L.A. L. REV. 45, 47-58 (1989).

172. Two reports are based on a study of expenditures of time and money made in actual cases. *See* COOK & SLAWSON, *supra* note 111 (studying North Carolina cases conducted in early 1990s); COMMITTEE TO STUDY THE DEATH PENALTY IN MARYLAND, *supra* note 171 (studying Maryland cases in early 1980s). Others are based, at least in part, on responses to questionnaires directed at prosecutors, defense lawyers, and judges. *See, e.g.*, CAPITAL LOSSES, *supra* note 111; Garey, *supra* note 53; Spangenberg & Walsh, *supra* note 171.

173. *Accord* Vreeland, *supra* note 33, at 649 n.187 ("Since most appointed counsel and public defenders operate under severe financial constraints, the time they would invest in effective representation of capital defendants could be discerned only if those constraints were lifted."). In most states, the financial constraints are less oppressive for defense attorneys who were retained, rather than appointed, to represent capital defendants, and somewhat better estimates of the work required to defend a capital case might be obtained from retained counsel. A cautionary note, however, was sounded by William P. Redick, Jr., the Director of the Capital Case Resource Center of Tennessee, who has been involved in capital litigation since 1978:

> I have never seen retained counsel in a capital case, rare as those instances are, in which the attorney quoted an adequate fee or was paid an adequate fee. In almost every instance, the defendant or his family has retained an attorney who does not appreciate the amount of work that the case would require and consequently quotes a fee that the defendant/family are willing to pay.

Letter from William P. Redick, Jr., to Douglas W. Vick 2 (March 2, 1994) (on file with author) [hereinafter Redick Letter].

174. The studies have sought estimates from defense attorneys, prosecutors, or judges regarding the level of funding that would be adequate to assure that the indigent receive an adequate defense in capital cases. These estimates will be colored by the modest expectations that become engrained in attorneys accustomed to the realities of day-to-day practice within jurisdictions suffering severe funding shortages. *Cf.* Redick Letter, *supra* note 173, at 1 (writing that funds provided for experts and investigators in Tennessee are artificially low in part "because the expectations of both the bench and bar concerning what the cases require are very low").

case goes undone.[175]

There have been a comparatively greater number of studies concerning the costs of capital punishment litigation during collateral post-conviction proceedings conducted after completion of the direct appeal.[176] This data can be helpful in estimating the costs associated with the defendant's primary trial and direct appeal, but they must be viewed critically. Typically, the primary (and often only) issue in post-conviction proceedings is whether the capital defendant received effective assistance of counsel during his primary trial and direct appeal.[177] In preparing an ineffective assistance of counsel claim in a death case, post-conviction counsel must perform most of the tasks that should have been performed by the inmate's original trial attorney.[178] Accordingly, cost estimates for pre-trial preparation of post-conviction cases provide some basis for approximating the cost of preparing for a capital defendant's initial trial. In some ways, however, data concerning the cost of post-conviction representation will understate defense costs at the initial trial, because post-conviction attorneys will already have the benefit of the knowledge gained and wrong turns taken by the defendant's original counsel.[179] In other ways, this data will overstate the costs of adequate representation during the defendant's initial trial, since a large number of the attorneys who have represented death row inmates in post-conviction proceedings lack experience in criminal matters at the outset of their representation,[180] and the difficult procedural nuances of post-conviction

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175. *See generally infra* part III.A.

176. *See, e.g.*, THE SPANGENBERG GROUP, A CASELOAD/WORKLOAD FORMULA FOR FLORIDA'S OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE (1987); THE SPANGENBERG GROUP, A REPORT ON POSTCONVICTION CAPITAL REPRESENTATION: PROBLEMS AND SOLUTIONS (Draft Report) (Feb. 1990); THE SPANGENBERG GROUP, A STUDY OF REPRESENTATION IN CAPITAL CASES IN TEXAS (1993) [hereinafter SPANGENBERG, TEXAS STUDY]; SPANGENBERG, TIME AND EXPENSE ANALYSIS, *supra* note 33; *see also* ABA Task Force, *supra* note 2; Alice McGill, Comment, Murray v. Giarratano: *Right to Counsel in Post-Conviction Proceedings in Death Penalty Cases*, 18 HASTINGS CONST. L.Q. 211 (1990). *See also supra* note 167 (describing post-conviction proceedings).

177. *See infra* part IV.A.2.

178. *See, e.g.*, WHITE, NINETIES, *supra* note 82, at 14 (explaining that preparations for federal habeas corpus challenges to death sentences "involve a tedious and prolonged search for critical mitigating or exculpatory evidence that was either not available or was not found at the time of the defendant's trial").

179. In addition, since post-conviction cases are almost always taken on a pro bono basis, the same economic constraints distorting the data gathered from the attorneys originally assigned to capital cases could affect estimates of the cost of the post-conviction representation of death row inmates. On the other hand, a greater percentage of the post-conviction cases that have been studied involved the work of attorneys with large law firms with greater resources to dedicate to the representation of indigents on America's death rows.

180. On the other hand, indigent defendants facing the death penalty are frequently

proceedings can add to the legal research costs of post-conviction representation.

The results of the studies that have attempted a cost analysis of the representation of defendants in capital cases must be scrutinized with these limitations in mind. Nonetheless, no matter how skeptically existing data is viewed, it incontrovertibly establishes that the costs of representing defendants charged with capital crimes are far greater than the resources provided for the representation of the poor in most states with the death penalty.[181]

A starting point for the evaluation of the costs of capital representation is data collected in studies conducted in the mid- and late-1980s, primarily in California.[182] Questionnaires completed by prosecutors and defense attorneys who had worked on capital cases indicated that defense attorneys file from two to six times as many pretrial motions in capital cases as they do in non-capital cases, and prosecutors file twice as many motions.[183] Because of their relative complexity, pre-trial motions in California death penalty cases consume an average of twelve days of court time, as opposed to the one day expended in non-capital murder cases.[184]

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represented by attorneys at their initial trial who have had little or no more criminal law experience than those who have taken on post-conviction death penalty appeals. These trial attorneys would face the same learning curve confronted by many post-conviction attorneys.

181. The estimate of the resources necessary to defend a capital case developed here assumes that most death penalty states will follow past practice and rely primarily on non-specialists to perform capital defense work at the initial stages rather than establish an office staffed by attorneys who work exclusively on death penalty cases. Currently, most attorneys who defend death cases are private attorneys with small practices, often sole practices, with no particular expertise in capital litigation at the outset of their representation. If death cases were handled solely by a cadre of trained specialists, certain costs (such as legal research) would be spread over a number of cases, and thus the cost of providing meaningful representation in death cases would probably decrease. A 1990 survey of capital trial lawyers in six Southern states—Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas—found "near unanimity" supporting the use of specially trained lawyers to handle death penalty trials. Marcia Coyle et al., *Fatal Defense: Trial and Error in the Nation's Death Belt*, NAT'L L.J., June 11, 1990, at 30, 44.

182. For a discussion of the costs of capital representation in California, see generally Stephen Magagnini, *Closing Death Row Would Save State $90 Million a Year*, SACRAMENTO BEE, March 28, 1988, at A1; *see also* Garey, *supra* note 53, at 1245-70; Spangenberg & Walsh, *supra* note 171. California dedicates far more resources to capital defense than other death penalty states. It is therefore alarming that the director of the California Appellate Project has observed that even in that state, the quality of the defense provided at the trial level is "substandard" in 15-20% of that state's death penalty cases. Millman, *supra* note 18, at 385.

183. Garey, *supra* note 53, at 1248; *see also* CAPITAL LOSSES, *supra* note 111, at 12 (estimating that attorneys filed between ten and twenty-five motions in capital cases, as contrasted to five to seven in non-capital cases); Vreeland, *supra* note 33, at 646-47 (same).

184. Magagnini, *supra* note 182, at A1 (citing a 1985 U.C. Davis Law Review study, a 1986-87 study by California's Administrative Office of the Courts, and interviews with pros-

One study indicates that jury selection in capital cases takes on average 5.3 times longer to complete than it does in non-death cases;[185] another indicates that jury voir dire in capital cases lasts from two days to two months longer in death cases than in non-death cases.[186] Data from the mid-1980s reveal that the capital trial itself lasts on average three to four times longer than non-capital murder trials,[187] with the average capital trial requiring thirty to forty days of court time.[188]

The resources required to try a capital case pale in comparison to the resources required to prepare for one. Death penalty experts have observed that defense lawyers must invest several hundred hours into research and investigation to properly prepare for a capital trial.[189] A national survey of lawyers representing death row inmates in post-conviction proceedings indicated that attorneys expended an average of 582 attorney hours when the case was at the trial court level in state post-conviction, and support staff ex-

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ecutors and defense lawyers).

185. Garey, *supra* note 53, at 1257 (citing L. Saunders et al., An Empirical Study Attempting to Compare the Trial Costs of Capital Cases with the Trial Costs of Noncapital Cases (Spring 1983) (unpublished manuscript on file with the *U.C. Davis Law Review*)).

186. *Id.*, at 1257 n.173; *see also* 1 CALIFORNIA ATTORNEYS FOR CRIM. JUST. & CALIFORNIA PUBLIC DEFENDERS ASS'N, CALIFORNIA DEATH PENALTY DEFENSE MANUAL at E-7 (1986); Spangenberg & Walsh, *supra* note 171, at 51-52; Vreeland, *supra* note 33, at 647-48. In California, jury selection in a capital case takes on average 25 days, while jury selection in the typical non-capital murder trial lasts three days. Magagnini, *supra* note 182, at A1.

187. Garey, *supra* note 53, at 1258 (citing study of twenty California cases involving first degree murder convictions (ten capital and ten non-capital) in which capital trials averaged 42 days and non-capital trials averaged 12 days); Magagnini, *supra* note 182, at A1 (reporting that guilt and penalty phases of average capital case in California lasts 42 days, while non-capital murder trials last an average of 11 days); *accord* Spangenberg & Walsh, *supra* note 171, at 53 (citing KANSAS LEGISLATIVE RESEARCH DEP'T, COSTS OF IMPLEMENTING THE DEATH PENALTY, HOUSE BILL 2062 at 3 (1987)).

188. Magagnini, *supra* note 182, at A1 (noting that average death penalty case in California requires 30 days of trial testimony at guilt phase, and an additional 12 days for the penalty phase); *see also* Spangenberg & Walsh, *supra* note 171, at 53 (average capital trial lasts 30 days); *accord* Garey, *supra* note 53, at 1258 & n.176.

189. *See* Vreeland, *supra* note 33, at 649. Professor Welsh White, quoting a psychologist who had worked on several death penalty cases, wrote:

> [U]nless someone is able to spend hundreds of hours interviewing witnesses and going through documents, "the defense can do little more than scratch the surface." That is why you see penalty trials in which the defense presents no mitigating evidence or in which only the defendant's mother is called to testify.

WHITE, NINETIES, *supra* note 82, at 86-87. To be cost-effective, much of this work should be conducted by non-attorneys. Currently, the average fee charged by criminal investigators is $40 per hour. NATIONAL FORENSIC CENTER, THE GUIDE TO EXPERTS' FEES 1992-1993 39 (1992). However, the hourly rates for experienced investigators in some jurisdictions can range between $75 and $200. CAPITAL LOSSES, *supra* note 111, at 13. In the early 1980s, the National College for Criminal Defense estimated that the minimum investigation cost for just the guilt phase of a capital trial was $10,000. *Id.*

pended on average 257 hours.[190] A survey from the mid-1980s showed that the staff attorneys in the Death Penalty Unit of Maryland's Public Defender's Office worked an average of 535 hours per case at the trial level.[191] A recent study showed that defense attorneys in North Carolina spend an average of 613 hours on a capital case at the trial level.[192] In New Jersey, staff attorneys with the State Public Defender Office spent between 630 and 1166 hours in out-of-court time preparing for each capital case handled by that office.[193]

The preparation and presentation of an adequate defense in a death penalty case requires substantial assistance from experts. No case of mitigation can be properly prepared without consulting mental health experts. Currently, psychiatrists charge an average of $250 per hour for trial preparation work and $300 per hour for court testimony;[194] psychologists charge an average of $100 per hour for trial preparation and $150 per hour for trial testimony.[195] Other experts are similarly expensive: physicians cost an average of $250 an hour before trial and $275 per hour at trial;[196] pathologists charge an average of $185 per hour for trial preparation and $275 per hour for trial testimony;[197] substance abuse experts charge an

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190. SPANGENBERG, TIME AND EXPENSE ANALYSIS, *supra* note 33, at 9, 17, 20. The median number of hours reported by the sample of attorneys was 400 hours. *Id.* at 9. The results of this survey are conservative, since the data included cases that were still pending at various stages of post-conviction (and thus all time expended on all cases was not reported) and because many of the attorneys responding to questionnaires were not compensated and thus did not keep records of all time and costs expended on their cases. *Id.* at 6-7, 19. Among attorneys who did maintain contemporaneous time records, the median number of attorney hours expended at the trial level in state post-conviction was 494 (average 887). *Id.* at 14. Data regarding support staff time was generally undocumented, and estimates were, again, conservative. *Id.* at 16.

191. THE SPANGENBERG GROUP, STUDY OF REPRESENTATION IN CAPITAL CASES IN VIRGINIA: FINAL REPORT 23 (1988) [hereinafter SPANGENBERG, VIRGINIA STUDY].

192. COOK & SLAWSON, *supra* note 111, at 61-63.

193. SPANGENBERG, VIRGINIA STUDY, *supra* note 191, at 23.

194. NATIONAL FORENSIC CENTER, *supra* note 189, at 50. Hourly fees for trial preparation range from a low of $125 to a high of $350; hourly rates for trial testimony range from $125 to $500. *Id.* Psychiatrists who bill for trial testimony on a daily basis charge from $1000 to $4000 per day, with an average of $2500 per day. *Id.* The average charge for the preparation of a report by a psychiatrist is $235 per hour. *Id.*

195. *Id.* at 51. The hourly rates charged by psychologists for pre-trial work range from a low of $50 to a high of $125; hourly rates for trial testimony range from $100 to $200. *Id.* The average daily rate for trial testimony is $1200 per day; daily rates range from $800 to $3000. *Id.* The average charge for the preparation of a report is $70 per hour. *Id.*

196. *Id.* at 48. Hourly fees for trial preparation range from a low of $100 to a high of $400; hourly rates for trial testimony range from $65 to $500 and daily rates range from $500 to $5000. *Id.* The average charge for the preparation of a report is $250 per hour. *Id.*

197. *Id.* at 47. Hourly fees for trial preparation range from a low of $100 to a high of $250; hourly rates for trial testimony range from $100 to $1000 and daily rates range from

average of $200 per hour before trial and $275 per hour for trial testimony.[198] In the mid-1980s, specialists on eyewitness identification cost approximately $500 per day for courtroom testimony and $100 per hour for consultation; jury selection experts cost $500 per day; crime scene reconstructionists and blood stain analysts cost $700 to $1000 per day.[199] In one year in the 1980s, New Jersey spent $6.9 million providing expert witnesses for the defense in death penalty cases, an average of $42,000 per trial.[200] In California, $15,000 is spent on psychiatrists and other expert witnesses in the typical capital case, with an additional $25,000-$50,000 spent on investigation costs.[201]

A direct appeal of a death sentence can be nearly as time-consuming as preparing and presenting a defense at trial. A number of estimates have placed the average attorney hours required to properly pursue such an appeal at around 700-1000.[202] In California, lawyers were paid an average $110,000 for appellate work at the state level in death cases, at an hourly rate ($75) that was not adequate to attract enough attorneys to represent all defendants appealing their death sentences.[203]

In sum, the defense of a capital case is a costly proposition. In

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$375 to $8000, with an average rate being $2100 per day. *Id.* The average charge for the preparation of a report is $180 per hour. *Id.*

198. *Id.* at 8. The hourly rates charged by such experts for pre-trial work range from a low of $100 to a high of $250; hourly rates for trial testimony range from $150 to $375. *Id.*

199. CAPITAL LOSSES, *supra* note 111, at 15; *see also* Garey, *supra* note 53, at 1253-54.

200. *Compare* Tabak & Lane, *supra* note 18, at 137-38 (citing Presentation of Dale Jones, New Jersey Office of the Public Advocate (Jan. 19, 1989)) and SPANGENBERG, TIME AND EXPENSE ANALYSIS, *supra* note 33, at 18-20 (concluding from data compiled from a survey of a sample of over 100 attorneys representing death row inmates during post-conviction proceedings that expenditures on expert witnesses and other necessary litigation costs ranged from $100 to $96,667 with an average of $4000).

201. Magagnini, *supra* note 182, at A1.

202. Millman, *supra* note 18, at 384; *see also* CAPITAL LOSSES, *supra* note 111, at 20 (estimating that, based on standards developed by the Appellate Section of the National Legal Aid and Defender Association, one appeal requires 800-900 attorney hours); Garey, *supra* note 53, at 1263 ("A typical capital appeal takes approximately 800-1000 attorney hours."); Spangenberg & Walsh, *supra* note 171, at 52 ("On average, capital appeals take 500-1000 hours of defense attorney time."); *see generally* COMMITTEE TO STUDY THE DEATH PENALTY IN MARYLAND, *supra* note 171; KANSAS LEGISLATIVE RESEARCH DEP'T, COSTS OF IMPLEMENTING THE DEATH PENALTY, HOUSE BILL 2062 at 4 (1987). One study indicated that in addition to the cost of direct appeals through the state court system, in cases in which a writ of certiorari from the United States Supreme Court is sought and granted, the attorney can expect to expend approximately 46% of one work year on Supreme Court proceedings alone. CAPITAL LOSSES, *supra* note 111, at 21-22. The study's estimate is based on time expended on research, preparing the certiorari petition, preparing briefs, and preparing for oral argument. *Id.*

203. Phillip Carrizosa, *Fixed Fees for Capital Appeals are Approved*, S. F. DAILY J., Dec. 16, 1993, at 3.

a system serious about minimizing the arbitrary or unfair application of the death penalty, attorneys representing the accused in an unexceptional death case would need to expend over 600 hours in pre-trial preparation, 600 hours in court time, and 700 hours during the direct appeal in state court, and these estimates are conservative. Under the terms of the federal Anti-Drug Abuse Amendments Act of 1988,[204] an attorney representing an indigent defendant facing the death penalty for a federal offense currently is paid around $100 per hour for both out-of-court and in-court work.[205] At this rate, the cost for attorney time alone in a typical capital case would be around $190,000.[206] On top of this figure, the

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204. 102 Stat. 4181 (1988). With this act, Congress greatly expanded the number of federal crimes punishable by death. *See* 21 U.S.C. § 848(e) (1988). At the same time, Congress gave indigents a statutory right to appointed counsel both in federal capital cases and in federal habeas proceedings in which death sentences received under state law were being challenged. *See id.* § 848(q)(4)(A)&(B). In addition to establishing minimum experience requirements for counsel appointed in death cases, *see id.* § 848(q)(5)-(7), the act provided that defense counsel would be compensated at the hourly rate set by the court and provided funds for "investigative, expert, and other reasonably necessary services" approved by the court. *See id.* § 848(q)(10).

205. Under 21 U.S.C. § 848(q)(10), compensation rates are left to the discretion of the district court, but the statute clearly calls for a departure from the "bargain-basement rates" and fee caps provided by the Criminal Justice Act, 18 U.S.C. § 3006A(d), which governs compensation rates for attorneys appointed in non-capital cases. United States v. Cooper, 746 F. Supp. 1352, 1352 (N.D. Ill. 1990). The United States Judicial Conference has recommended that fees under § 848(q)(10) be set between $75 per hour and $125 per hour. VII GUIDE TO JUDICIARY POLICIES AND PROCEDURES: APPOINTMENT OF COUNSEL IN CRIMINAL CASES ¶ 6.02(B) (1993). In the relatively few reported cases applying the statute, the compensation rates set for defense attorneys have usually exceeded $100 per hour. *See, e.g.*, Hill v. Lockhart, 992 F.2d 801, 802 (8th Cir. 1993) (refusing to disturb hourly rate of $85 set by Arkansas district court for work at habeas corpus stage); Simmons v. Lockhart, 931 F.2d 1226, 1231 (8th Cir. 1991) (deeming reasonable $115 per hour for attorney time and $40 per hour for law clerks and paralegals in Arkansas habeas case); United States v. Cheely, 790 F. Supp. 901, 909 (D. Alaska 1992) (setting attorney compensation at $125 per hour for out-of-court and in-court time in federal death penalty case); *Cooper*, 746 F. Supp. at 1354 (same). The $100 hourly rate appears to be close to the minimum necessary to attract competent counsel to do capital defense work. For example, a survey asked attorneys in Texas who had in the past represented defendants charged with capital crimes what minimum hourly rate would be necessary to persuade them to take another capital case, the median response was $100. SPANGENBERG, TEXAS STUDY, *supra* note 176, at 53.

206. Over a decade ago, it was estimated that if New York reinstated the death penalty, defense costs for the guilt and penalty phases of a capital defendant's trial would average $352,700, and a direct appeal within the state court system would cost another $80,000 for the defense. CAPITAL LOSSES, *supra* note 111, at 18, 21. A Maryland law firm which represented a capital defendant on a pro bono basis in the early 1980s reported that it expended 1,817 attorney hours on the case, valued at $156,462. Garey, *supra* note 53, at 1261 (citing *Amicus Curiae* Brief of Boston Bar Association at 68 n.21; Commonwealth v. Colon-Cruz, 470 N.E.2d 116 (Mass. 1984)). An attorney in Oregon was less conservative, estimating that it would cost approximately $700,000 to defend a death penalty case in that state. *Id.* at 1261-62.

cost of investigators, experts, and support staff needed to prepare an adequate defense in a typical capital case would likely exceed $40,000. While these figures may seem high to prosecutors and defense attorneys who are used to working in systems that provide much less for indigent defense, it bears reminding that these amounts are far below the legal costs associated with the litigation of a moderately complex commercial case.

Since the vast majority of capital defendants in the United States are indigent,[207] a state that actively enforced its death penalty laws but at the same time provided adequate funding for indigent defense would face a major budgetary problem.[208] Most death penalty states have had a simple response to this cost problem: they have ignored it. Refusing to adequately fund defense services, they have chosen instead to pass the costs of capital defense to the lawyers appointed to represent the poor, who have been unable or unwilling to bear them.

II. The Resources Provided for the Defense of Indigents Facing the Death Penalty

The vast majority of the indigent defense systems in place in the United States have had a short life, with most coming into existence little more than twenty years ago.[209] Modern systems for delivering defense services to the poor arose in the wake of *Gideon v. Wainwright*[210] and its progeny, which required the states to provide attorneys to indigents charged with various crimes.[211] Indigent defense systems developed in the late 1960s and early 1970s, when there was a de facto national moratorium on executions, and were not designed to meet the peculiar demands of the modern death penalty.[212] From the moment of their creation, these systems have been constrained by severe underfunding,[213] and to this day there

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207. *See supra* note 18.

208. For example, the death penalty costs state and local governments in California approximately $90 million a year. Magagnini, *supra* note 182, at A1.

209. Jonathan E. Gradess, *The Road From Scottsboro*, 2 CRIM. JUST., Summer 1987, at 2, 4. Gradess notes that "[f]rom a historical perspective, public defense systems are very young . . . [and i]n a real sense, they are experimental models." *Id.*

210. 372 U.S. 335 (1963).

211. *See* cases cited *supra* note 105.

212. *See* Gradess, *supra* note 209, at 4 ("[M]ost public defense systems were not created with capital punishment in mind . . . [and] assigned counsel and defender systems came into existence at the tail end of America's national commitment to the poor.").

213. Numerous studies have documented the adverse effects of inadequate funding of indigent defense services in non-capital cases. *See, e.g.*, AMERICAN BAR ASS'N & NATIONAL LEGAL AID AND DEFENDER ASS'N, *GIDEON* UNDONE: THE CRISIS IN INDIGENT DEFENSE FUNDING (1982); NORMAN LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR: METHODS AND PRO-

have been only sporadic efforts to develop a corps of defenders who become expert in the intricacies of the death penalty and who are given the resources to assure that the procedural fairness promised by the Constitution is realized in practice.[214]

Broadly speaking, there are three types of indigent defense systems, one or more of which are used in all states with the death penalty.[215] Nearly sixty percent of the counties in the United States rely primarily on assigned counsel systems,[216] through which

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GRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING 11-24, 56-60 (1982) [hereinafter LEFSTEIN, CRIMINAL DEFENSE SERVICES]; NATIONAL LEGAL AID AND DEFENDER ASS'N, THE OTHER FACE OF JUSTICE (1973); Laurence A. Benner, *Tokenism and the American Indigent: Some Perspectives on Defense Services*, 12 AM. CRIM. L. REV. 667 (1975); C. Anthony Friloux, Jr., *Equal Justice Under the Law: A Myth, Not a Reality*, 12 AM. CRIM. L. REV. 691 (1975); Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L. Q. 625 (1986) [hereinafter Klein, *Emperor* Gideon]; Norman Lefstein, *Financing the Right to Counsel: A National Perspective*, 19 LOY. L.A. L. REV. 391 (1985) [hereinafter Lefstein, *Financing the Right to Counsel*]; Joe Margulies, *Resource Deprivation and the Right to Counsel*, 80 J. CRIM. L. & CRIMINOLOGY 673, 677-82 (1989); Suzanne E. Mounts & Richard J. Wilson, *Systems for Providing Indigent Defense: An Introduction*, 14 N.Y.U. REV. L. & SOC. CHANGE 193, 200 (1986); *see also* Chester Fairlie, Gideon's *Muted Trumpet*, 69 A.B.A. J. 172 (1983); Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 483 [hereinafter Mounts, *Public Defender Programs*]. More recently, there have been several studies regarding the effect of poor compensation schemes on the representation of indigent persons charged with capital crimes. *See, e.g.*, COMMITTEE TO STUDY THE DEATH PENALTY IN MARYLAND, *supra* note 171; SPANGENBERG, TEXAS STUDY, *supra* note 176; SPANGENBERG, VIRGINIA STUDY, *supra* note 191.

214. Initial efforts at improving the quality of capital representation have focused on providing death row inmates with attorneys for post-conviction proceedings. In the late 1980s, capital defense resource centers were established in several states, and they have played an important role in tracking death cases and offering assistance to attorneys representing death row inmates in habeas corpus proceedings. *See, e.g.*, Sean D. O'Brien, *A Step Toward Fairness in Capital Litigation: Missouri Resource Center*, 16 WM. MITCHELL L. REV. 633 (1990); Arthur W. Ruthenbeck, *Dueling With Death in Federal Courts*, CRIM. JUST., 3 (1989); Richard Lacayo, *You Don't Always Get Perry Mason*, TIME, June 1, 1992, at 38. Unfortunately, these centers, which encounter funding problems of their own, have had little impact on the quality of representation during the initial trial of a capital defendant, when the greatest opportunity to have an impact on the ultimate outcome of the defendant's case exists.

215. *See, e.g.*, David Paul Cullen, *Indigent Defense Comparison of* Ad Hoc *and Contract Defense in Five Semi-Rural Jurisdictions*, 17 OKLA. CITY U. L. REV. 311, 320-23 (1992); Rudolph N. Stone, *The Role of State Funded Programs in Legal Representation of Indigent Defendants in Criminal Cases*, 17 AM. J. TRIAL ADVOC. 205, 209-10 (1993); Rodger Citron, Note, *(Un)*Luckey v. Miller*: The Case for a Structural Injunction to Improve Indigent Defense Services*, 101 YALE L.J. 481, 484 (1991).

216. A survey published in 1986 revealed that 59% of the 3082 counties in the United States relied primarily on the assigned counsel system, but that less than 30% of the American population resided in those counties. *See* Floyd Feeney & Patrick G. Jackson, *Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Coun-*

individual private attorneys are appointed to represent indigent defendants on a case-by-case basis.[217] A second type of system, the public defender system, provides defense services for the poor through public or private non-profit organizations with full-time or part-time salaried attorneys.[218] This system is popular in urban areas,[219] and some sixty-five percent of the American population resides in counties that use a public defender system.[220] A third system, used in relatively few jurisdictions,[221] is the contract system, where an individual attorney or law firm contracts with a county or other government unit to provide defense services for all indigent defendants in a particular area for a set fee.[222] Regardless of the system used, indigent defense is funded primarily by counties and

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sel Matter?, 22 RUTGERS L.J. 361, 363-64 (1991) (citing THE SPANGENBERG GROUP, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY: FINAL REPORT 11-14 (1986)). This system is particularly popular in rural areas. *Id.* Since the death penalty is particularly popular in rural areas, however, a disproportionately high number of inmates on death row in this country were represented at trial by assigned counsel.

217. *See, e.g.*, Jerry L. Anderson, *Court-Appointed Counsel: The Constitutionality of Uncompensated Conscription*, 3 GEO. J. LEGAL ETHICS 503, 503 (1990); Cullen, *supra* note 215, at 320-21; Stone, *supra* note 215, at 209. While some observers have been able to identify up to twelve different ways in which appointment systems have been organized, *see* Cullen, *supra* note 215, at 321 (citing Pauline Houlden & Steven Balkin, *Quality and Cost Comparisons of Private Bar Indigent Defense Systems: Contract vs. Ordered Assigned Counsel*, 76 J. CRIM. L. & CRIMINOLOGY 176 (1985)), these systems tend to fall within one of two broad categories. In some jurisdictions, a full- or part-time administrator is put in charge of a coordinated assigned counsel system. The administrator assigns the attorney to a case, reviews his or her payment vouchers, may set attorney qualification standards, and may (depending on the size of the system) provide training or investigatory services. Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 370 (1993) [hereinafter Klein, *The Eleventh Commandment*]. In other jurisdictions, the local courts maintain a list of attorneys who have volunteered for assignments, and assignments are made by judges or court clerks as each case comes up. *Id.* Under either approach, the ultimate power to authorize payments to the appointed attorney rests with the trial judges. *Id.*

218. Cullen, *supra* note 215, at 322-23; Klein, *Emperor* Gideon, *supra* note 213, at 656-57; Stone, *supra* note 215, at 209-10. Some public defender systems operate statewide, while others are organized at the county level. *Klein, Emperor* Gideon, *supra* note 213, at 657 n.179.

219. *See* Pauline Houlden & Steven Balkin, *Quality and Cost Comparisons of Private Bar Indigent Defense Systems: Contract vs. Ordered Assigned Counsel*, 76 J. CRIM. L. & CRIMINOLOGY 176, 177 (1985).

220. Only 34% of the nation's counties operate public defenders' offices, but about 65% of the nation's population reside in those counties. *See* Feeney & Jackson, *supra* note 216, at 363-64 (citing THE SPANGENBERG GROUP, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY 11-14 (1986)).

221. As of 1986, the contract system was used in only about six percent of the counties in the United States, affecting less than five percent of the American population. *See id.*

222. Cullen, *supra* note 215, at 321; Stone, *supra* note 215, at 209.

states.[223]

Almost all indigent defense systems in the United States, regardless of type, suffer ill effects resulting from resource deprivation. Chronic underfunding has its most serious consequences, however, in the area of capital defense. Because the resources required to defend capital cases are so great, the disparity between what is needed and what is provided is, almost inevitably, far more dramatic in death cases than in non-death cases. At the same time, the potential harm caused by the deprivation of resources from the defense is immeasurably greater when the defendant's very life is at stake. The problems caused by resource deprivation, moreover, are most prevalent in the nation's poorest states, where the death penalty tends to be most popular.

Resource deprivation of defense services is manifested in different ways in different states, but regardless of the system used, funding for the defense of capital cases is woefully insufficient in most jurisdictions in the United States. In those jurisdictions, the determination of whether a defendant lives or dies depends as much on factors that play no legitimate role in the death sentencing process—the poverty of the defendant and the resources provided by the states for his defense—than any factor relevant to the defendant's crime or culpability.

A. *Maximum Hourly Rates and Fee Caps for Appointed Counsel*

Many states rely partly or wholly on appointed counsel who labor under the constraints of statutorily-mandated maximum hourly rates and fee caps that are shockingly low. Most of the private practitioners assigned to death cases in these states are compensated at hourly rates of $20 to $40 per hour, a rate that does not even cover overhead costs.[224] In addition, in many of the states

223. Stone, *supra* note 215, at 209. Only a small percentage of indigent defense funding comes from the federal government, city and town governments, or private foundations. *Id.* Most of the state governments that provide funding make annual appropriations from the general fund. *Id.* Several states, however, rely on monies raised through filing fees and other costs imposed on litigants in civil suits. *Id.* Other states only fund the costs of appellate representation and leave the costs of providing representation for the poor at the trial level to the counties. *Id.*

224. *See, e.g.*, Lefstein, *Financing the Right to Counsel*, *supra* note 213, at 396. Overhead costs "include the cost of office, library, equipment, supplies, professional liability insurance, and secretarial help, all of which would be utilized in serving counsel for an indigent client." State *ex rel.* Stephen v. Smith, 747 P.2d 816, 837 (Kan. 1987). Even in the states where the cost of doing business are the lowest, these costs can range from $30 to $40 per hour of work expended by an attorney defending his or her client. *See, e.g.*, State v. Wigley, 624 So. 2d 425, 428 (La. 1993) (involving evidence that overhead costs were $30 per

in which the death penalty is most frequently sought, the maximum amount of compensation an assigned counsel can receive in a capital case is limited to as little as $2,000.

For example, Alabama compensates appointed counsel in capital cases at the rate of $20 per hour for out-of-court work, and $40 per hour for in-court time.[225] In addition, an appointed attorney cannot earn more than a statutory maximum of $2000 for out-of-court work, and before March 1991, the attorney was limited to a maximum of $1000.[226] An attorney who devotes 600 hours to pretrial preparation in Alabama would earn $3.33 an hour under Alabama's fee cap and would have earned half that much before 1991. Until recently, two attorneys representing an indigent in a capital case in Mississippi could earn no more than $2000 combined.[227] The hardship created by this fee maximum has been alleviated only somewhat by a 1989 Mississippi Supreme Court decision interpreting Mississippi's compensation statute as allowing appointed attorneys to recover an additional $25 per hour to cover some of their overhead costs.[228] In Tennessee, appointed counsel in

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hour billed); Wilson v. State, 574 So. 2d 1338, 1340 (Miss. 1990) (citing 1988 survey indicating that average cost of overhead for Mississippi lawyers was $34.86 per hour); State v. Lynch, 796 P.2d 1150, 1153-54 (Okla. 1990) (noting that hourly overhead rate for Oklahoma lawyers representing an indigent capital defendant averaged $45.80 for years 1986-88); Loyola Death Penalty Resource Ctr., Report on the Loyola Death Penalty Resource Center Survey on Court Appointed Counsel in Capital Murder Cases 1, 3 (1991) (on file with author) (reporting a 1991 survey of Louisiana attorneys who had defended capital cases that showed mean overhead cost was between $34 and $50 per hour); Redick Letter, *supra* note 173, at 1 (relating results of survey of members of Tennessee Bar Association and Tennessee Association of Criminal Defense Lawyers which indicated that average cost of overhead in Tennessee is $47 per hour). These figures, moreover, do not adequately measure the opportunity cost of capital defense work—potential business turned away, business contacts that are not cultivated because of the time demands of capital defense, the adverse effect of controversial cases on a lawyer's community standing—that accompanies death penalty defense work. Berger, *The Chiropractor as Brain Surgeon, supra* note 18, at 249.

225. ALA. CODE § 15-12-21(d) (Supp. 1994).

226. *Id.* § 15-12-21(d). In a March 21, 1991 advisory opinion provided to the State Comptroller, Alabama's Attorney General's Office stated that "[t]he sentencing stage of a capital case is a new case for § 15-12-21 out-of-court work maximum payment purposes," effectively increasing the maximum amount that defense attorneys could receive in death cases by $1000. Indigent Defense Fund: Attorneys Fees, Op. Att'y Gen. No. 91-00206 (Mar. 21, 1991).

227. MISS. CODE ANN. § 99-15-17 (Supp. 1993).

228. Wilson v. State, 574 So. 2d 1338, 1340-41 (Miss. 1989). The fee statute, in addition to setting fee caps, also allowed appointed counsel to obtain "reimbursement of actual expenses." MISS. CODE ANN. § 99-15-17 (Supp. 1993). The Supreme Court of Mississippi, in an effort to avoid constitutional challenges to the statute, interpreted this language to include "reimbursement for all actual costs to the lawyer for the purpose of keeping his or her door open to handle the case, i.e., the lawyer will receive a *pro rata* share of actual overhead." *Wilson*, 574 So. 2d at 1340. The court established a rebuttable presumption that an attor-

capital cases are limited to $20 per hour for out-of-court time and $30 per hour (with a daily $200 maximum) for in-court time.[229] Kentucky, which typically uses private appointed attorneys to represent the indigent in its rural counties, has placed a statutory limit on the compensation of defense counsel of $25 per hour for out-of-court time and $35 per hour for in-court time,[230] and attorneys commonly work under the constraints of a de facto fee cap of $2500.[231] As of April 20, 1994, 229 of the 2848 inmates on America's death rows were sentenced to die in Alabama, Mississippi, Tennessee, or Kentucky.[232]

Until December 1992, counsel appointed to represent indigent capital defendants in South Carolina were paid at the nation's lowest hourly rates: $10 per hour for trial preparation and $15 per hour for time spent in court.[233] While the accused was entitled to have two appointed attorneys, those attorneys together could earn no more than $5000 for work conducted on the defendant's behalf.[234] In December 1992, the Supreme Court of South Carolina declared that these fee rates and caps were unenforceable in death

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ney's overhead was equivalent to $25 for every hour the attorney billed, notwithstanding evidence that the average overhead for attorneys in Mississippi was nearly $10 per hour higher than that. *Id.* at 1340-41.

229. TENN. SUP. CT. R. 13, § 2(B)(10). Since the average overhead cost to maintain a practice in Tennessee is $47, "[a]n attorney loses twice as much as he makes every hour that he works on a capital case" in that state. Redick Letter, *supra* note 173, at 1.

230. *See* KY. REV. STAT. ANN. § 31.170(4) (Baldwin 1993). These rates were only $5 per hour higher than the rates paid appointed counsel in 1972, despite an inflation rate of 213% between 1972 and 1990. Klein, *The Eleventh Commandment*, *supra* note 217, at 373-74 n.64 (citing Edward C. Monahan, *Catching Up With Current Realities*, THE ADVOCATE (Ky. Dep't of Pub. Advoc.), Dec. 1991, at 7, 9).

231. Before 1991, appointed counsel in capital cases were often restricted to a $1250 fee cap. *See* KY. REV. STAT. ANN. § 31.170(4) (Baldwin 1993). In 1991, the Kentucky Court of Appeals determined that a capital murder case is *ipso facto* a special circumstance justifying a exception to this statutory cap. Klein, *The Eleventh Commandment*, *supra* note 217, at 374 & n.65 (citing Lavit v. Brady, No. 89-CA-2360-MR (Ky. Ct. App. 1991), *reprinted in* THE ADVOCATE (Ky. Dep't of Pub. Advoc.), Dec. 1991, at 3, *discretionary review granted*, 1991 WL 228037 (Ky. Dec. 9, 1992)). Nonetheless, a December 1993 task force study of indigent defense in Kentucky reported that the de facto limit for a capital case had only gone up to $2500. *See* Bright, *Counsel for the Poor*, *supra* note 10, at 1853 (citing *The Governor's Task Force on the Delivery and Funding of Quality Public Defender Service Interim Recommendations, reprinted in* THE ADVOCATE (Ky. Dep't of Pub. Advoc.), Dec. 1993, at 11).

232. DEATH ROW USA, *supra* note 1, at 11-12, 25-27, 36-37. Alabama has carried out 10 post-*Furman* executions, 4.31% of the total executions in the United States in the modern era of capital punishment. *Id.* at 10.

233. S.C. CODE ANN. § 17-3-50 (Law. Co-op. 1985) (amended by 1993 S.C. Acts 164, Part II, § 45F).

234. *Id.* § 16-3-26(B) (amended by 1993 S.C. Acts 164, Part II, § 45D).

cases,[235] and the state legislature responded with an act that increased the hourly compensation rate to $50 and $75 for out-of-court and in-court work, respectively.[236] The legislature, however, also established a statutory presumption that counsel would receive no more than $25,000 for one capital case.[237] If counsel in South Carolina committed 600 hours to pre-trial preparation and 600 hours for in-court time to defend a capital defendant, the attorneys would receive compensation at the effective rate of $20.83 an hour, still well below the average per-hour cost of overhead.

In Arkansas, appointed counsel were limited to a maximum fee of $1000[238] until July 1991, when the Arkansas Supreme Court declared the state's compensation statute unconstitutional as applied in capital cases.[239] Until 1990, attorneys working in Oklahoma counties without a public defender's office could be drafted to represent indigents charged with capital crimes, and they were paid a maximum of $3200 for their efforts.[240] After this compensation scheme was invalidated by the Oklahoma Supreme Court in 1990,[241] the Oklahoma legislature established a maximum statutory fee of only $20,000 for capital cases.[242] Not surprisingly,

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235. *See* Bailey v. State, 424 S.E.2d 503, 508 (S.C. 1992). In *Bailey*, two attorneys, who had managed to have their client's capital murder charge dismissed, brought a declaratory judgment action seeking to have South Carolina's statutory compensation scheme declared unconstitutional. *Id.* at 505. The court avoided the constitutional questions with a strained interpretation of the language of the challenged statutes, holding that the statutory hourly rates and fee caps were "not absolute allowances in capital cases, but merely limitations upon the State's funds allocated for the [d]efense of [i]ndigents," and that the counties were obligated to supplement the state expenditure in paying counsel a reasonable rate. *Id.* at 508.

236. S.C. CODE ANN. § 16-3-26(B) (Law. Co-op. Supp. 1993).

237. *Id.* § 16-3-26(B). The new hourly rates and statutory cap can be exceeded in exceptional cases, but:

> only if the court certifies, in a written order with specific findings of fact, the payment in excess of the rates is necessary to provide compensation adequate to ensure effective assistance of counsel and payment in excess of the limit is appropriate because the services provided were reasonably and necessarily incurred.

Id. § 16-3-26(D).

238. ARK. CODE ANN. § 16-92-108(b)(2) (1987) (repealed by 1993 Ark. Acts 1193, § 20).

239. Arnold v. Kemp, 813 S.W.2d 770, 775-76 (Ark. 1991) (finding that application of $1000 fee cap in capital case constituted unconstitutional taking of property and violated equal protection).

240. OKLA. STAT. ANN. tit. 21, § 701.14 (West 1983) (repealed by 1991 Okla. Sess. Laws ch. 238, § 37).

241. The court held that the statutory compensation scheme as applied in death penalty cases effected an unconstitutional taking of private property, violative of the due process clause of the Oklahoma Constitution. State v. Lynch, 796 P.2d 1150, 1153 (Okla. 1990).

242. OKLA. STAT. ANN. tit. 22, § 1355.13 (West Supp. 1994). The statute provides that the $20,000 limit can be exceeded only upon a determination that "the case was an exceptional one." *Id.* In Oklahoma, the Executive Director of the state-controlled Oklahoma Indi-

data compiled by the United States Department of Justice shows that South Carolina, Arkansas, and Oklahoma are among the five states that make the lowest per capita expenditures for public defense.[243] As of April 20, 1994, inmates on the death rows of these states numbered 214, 7.5% of the nation's total of condemned prisoners.[244]

While Florida has a public defender system, appointed counsel are frequently used in death penalty cases,[245] especially in Dade, Palm Beach, and Broward counties.[246] That state set a statutory cap of $3500 for work at the trial level in death cases.[247] Although the Florida Supreme Court held in the late 1980s that those limits should be exceeded in "cases involving extraordinary circumstances and unusual representation,"[248] including all death penalty cases,[249] the few recent reported cases discussing attorney compensation in capital cases have involved lawyers who documented less than 300 hours and fee awards below $20,000.[250] In Nevada, fees received by appointed counsel in even the most complex death cases do not significantly exceed a $12,000 statutory cap; before 1993, the statutory cap was $6000.[251]

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gent Defense System determines the compensation of private attorneys appointed to represent indigent capital defendants, subject to the review of the Oklahoma Indigent Defense Board. *Id.*

243. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1993 5 (1993) [hereinafter SOURCEBOOK]. Of the 15 states that rank at the bottom in per capita public defense expenditures, 14 have the death penalty, and those states have accounted for 155 of the 232 executions that have been carried out in the post-*Furman* era. *See id.*; DEATH ROW USA, *supra* note 1, at 10. The 15 states, in ascending order, are Louisiana, Arkansas, Mississippi, South Carolina, Oklahoma, North Dakota (a non-death penalty state), Indiana, Georgia, Utah, Kentucky, Alabama, Nebraska, Missouri, Texas, and Pennsylvania. SOURCEBOOK, *supra*, at 5.

244. DEATH ROW USA, *supra* note 1, at 13-14, 32-33, 35-36.

245. Bright, *Counsel for the Poor*, *supra* note 10, at 1849 n.79.

246. White v. Board of County Comm'rs, 537 So. 2d 1376, 1381 (Fla. 1989) (Overton, J., concurring).

247. FLA. STAT. ANN. § 925.036(2)(d) (West 1985).

248. Makemson v. Martin County, 491 So. 2d 1109, 1110 (Fla. 1986), *cert. denied*, 479 U.S. 1043 (1987).

249. *White*, 537 So. 2d at 1380.

250. *See* Brevard County v. Wells, 571 So. 2d 117 (Fla. Dist. Ct. App. 1990) (affirming fee of $9585 for 106.5 hours of work); Brevard County v. Eisenmenger, 567 So. 2d 1059 (Fla. Dist. Ct. App. 1990) (awarding $10,300); Leon County v. McClure, 541 So. 2d 630 (Fla. Dist. Ct. App. 1988) (holding $20,000 award for 208 hours of work); *see also White*, 537 So. 2d at 1377 (involving attorney awarded $6700 for 134 total hours, 63 of which were spent in court); *Makemson*, 491 So. 2d at 1111 (involving $9500 payment for work at trial level totalling 184 hours out-of-court and 64 hours in-court).

251. *See* NEV. REV. STAT. ANN. § 7.125(2) (Michie 1986 & Supp. 1993). The $12,000 fee cap currently in place applies "regardless of the number of offenses charged or ancillary matters pursued." However, the trial court is allowed to order compensation exceeding this

The compensation provided for appellate work in these states is no better. Despite the importance the Supreme Court has placed on the availability of appellate review in capital cases,[252] the maximum fee recoverable for appellate work in Alabama is $2000.[253] An attorney who expends 700 hours pursuing an appeal through Alabama's appellate courts would be compensated at an effective rate of $2.86 an hour. In Mississippi, the defense attorney would be paid at half that rate, since that state's fee cap on appellate work is $1000.[254] In Florida, appointed attorneys are paid a maximum of $2000 on appeal.[255] Several states often pay nothing at all for appellate work in death cases.[256]

B. *"Reasonable Fees" and the Exercise of Judicial Discretion*

The problem of underfunding is not limited to assigned counsel systems operating in states with hourly rate structures and fee caps dictated by statute.[257] Unconscionably low compensation is common even in states in which the compensation of appointed counsel is left entirely to the discretion of the courts. In many of these jurisdictions, judicial perception of the reasonableness of fee requests by defense attorneys is colored by the economic realities of underfunded indigent defense systems. In counties accustomed to paying modest sums for indigent defense services, judges view requests for the type of funding necessary to properly defend a modern death penalty case with suspicion. The "reasonableness" of a fee or expense request often is assessed by reference to a past history in which expenditures on indigent defense constituted a

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cap in particularly complex, severe, or time-consuming cases. *Id.* § 7.125(4); *see also* Lueck v. State, 669 P.2d 719 (Nev. 1983). While defense attorneys frequently are awarded excess fees in capital cases, this "has not become a major issue [in Nevada] primarily because many lawyers do not devote the amount of time necessary to litigate capital cases adequately and therefore do not exceed the fee cap by huge amounts." Letter from Michael Pescetta, Executive Director of Nevada Appellate and Postconviction Project, to Douglas W. Vick 2 (August 26, 1994) (on file with author).

252. Gregg v. Georgia, 428 U.S. 153, 198 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.).

253. ALA. CODE § 15-12-22(d) (Supp. 1993). An attorney can receive up to $1000 for work on an appeal to the Alabama Court of Criminal Appeals and up to $1000 for work on an appeal to the Alabama Supreme Court. *Id.*

254. MISS. CODE ANN. § 99-15-17 (1994).

255. FLA. STAT. ANN. § 925.036(2)(e) (West 1985).

256. Ronald Smothers, *A Shortage of Lawyers to Help the Condemned*, N.Y. TIMES, June 4, 1993, at A21.

257. *See, e.g.*, Lefstein, *Financing the Right to Counsel*, *supra* note 213, at 396 ("[I]n some areas of the country, regardless of whether the fees are adequate, the budgetary appropriation is not.").

small percentage of the costs of the criminal justice system.[258]

In Virginia, for example, judges are authorized by statute to award "reasonable" fees in death cases.[259] Nonetheless, a 1985 study showed that capital defense lawyers in that state were paid an average of $687 per case.[260] In 1990, defense attorneys in Allegheny County, Pennsylvania (which includes Pittsburgh) typically were paid $25 per hour for out-of-court work and $50 per hour for in-court time, subject to a $4000 cap.[261] In Philadelphia, Pennsylvania, appointed counsel are paid an average of $6399 per capital case.[262] Philadelphia hands out the second-highest number of death sentences of any American city,[263] and more individuals have been sentenced to death in Philadelphia in the post-*Furman* era than in twenty-two of the thirty-seven death penalty states combined.[264]

In Louisiana, the majority of poor persons accused of capital crimes in judicial districts with appointed counsel systems[265] have been represented by defense lawyers who received no compensation or reimbursement of expenses whatsoever,[266] despite the fact

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258. For example, a study of defense services in Texas revealed a strong tendency of judges to assess the reasonableness of requests for fees and expert funds through a lens distorted by the experience of a long period in which draconian fee caps were in place. *See* SPANGENBERG, TEXAS STUDY, *supra* note 176, at 14, 24.

259. VA. CODE ANN. § 19.2-163(2) (Michie 1990).

260. Tabak, *Death of Fairness*, *supra* note 4, at 801. A 1988 study showed that attorneys representing indigents in capital cases in Virginia earned only $13 per hour. Nancy Gist, *Assigned Counsel: Is the Representation Effective?*, CRIM. JUST., Summer 1989, at 18.

261. Bruce Ledewitz, *Sources of Injustice in Death Penalty Practice: The Pennsylvania Experience*, 95 DICK. L. REV. 651, 666 (1991).

262. Frederic N. Tulsky, *What Price Justice? Poor Defendants Pay the Cost as Courts Save on Murder Trials*, PHILA. INQUIRER, Sept. 13, 1992, at A18 [hereinafter, Tulsky, *What Price Justice?*].

263. Michael deCourcy Hinds, *Circumstances in Philadelphia Consign Killers*, N.Y. TIMES, June 8, 1992, at A7.

264. Bright, *Counsel for the Poor*, *supra* note 10, at 1846 n.60.

265. In Louisiana, a state-controlled indigent defender board is established in each of the state's judicial districts, and each local board has the option of providing attorneys for poor persons through an appointed counsel system, public defender system, or contract system. LA. REV. STAT. ANN. § 15:144-45 (West 1992) § 15:145.

266. Loyola Death Penalty Resource Ctr., *supra* note 224, at 2-3. A survey of attorneys who had been appointed to represent indigent capital defendants in Louisiana yielded highly skewed results, with respondents reporting total compensation ranging from $0 to $20,000. *Id.* at 2. Only 13 of 38 respondents indicated that they had sought reimbursement for expenses, with eight of those 13 receiving nothing, and five receiving from $25 to $2413. *Id.* at 2-3. In 1990, it was reported that defense lawyers in Louisiana often forsake compensation in order to persuade judges to provide some funds for experts and investigators. Coyle et al., *supra* note 181, at 37. The Louisiana Supreme Court sanctioned the practice of not compensating or reimbursing the expenses of appointed counsel in State v. Clifton, 172 So. 2d 657, 667 (La. 1965), and only recently has reconsidered the *Clifton* rule. State v.

that Louisiana has not had a statutory compensation cap since 1981.[267] A 1991 survey indicated that the average fee received by appointed counsel in death cases was $1616.[268] In September 1993, the Louisiana Supreme Court attempted to ease the extreme hardships caused by this situation by ruling that appointed counsel in death penalty cases were entitled to a fee equaling their overhead costs and to reimbursement for reasonable out-of-pocket expenses.[269] Nonetheless, the court was unwilling to allow defense counsel additional compensation that could be applied toward their own living expenses.[270] As of April 24, 1994, Virginia, Pennsylvania, and Louisiana had carried out 19% of all post-*Furman* executions in the United States, and 258 inmates await execution in those states.[271]

Texas has not had explicit statutory fee caps in its recent history, but its courts nonetheless have frequently refused to award fees for work performed on behalf of indigents.[272] Before 1987, most court-appointed attorneys received no compensation at all for out-of-court work,[273] and compensation for an attorney's in-court

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Wigley, 624 So. 2d 425 (La. 1993).

267. Until 1981, Louisiana imposed a statutory fee cap of $1000 on appointed defense lawyers. LA. REV. STAT. ANN. §§ 15:141-43 (repealed by 1981 La. Acts 873, § 4). Although Louisiana abolished its $1000 fee cap for capital cases in 1981, in many counties that figure served as a de facto cap for more than a decade afterward, with courts frequently expressing the belief that their discretion to authorize fees was limited to no more than that amount. *See, e.g.*, State v. Wigley, 599 So. 2d 858, 863 (La. Ct. App. 1992), *aff'd in part, rev'd in part*, 624 So. 2d 425 (La. 1993).

268. Loyola Death Penalty Resource Ctr., *supra* note 224, at 2.

269. State v. Wigley, 624 So. 2d 425, 427 (La. 1993). In *Wigley*, four attorneys—three of whom had little criminal law experience—had been chosen from a list of "nonvolunteer attorneys" to represent indigents in two unrelated capital cases. The trial court refused to compensate them for their services or to reimburse them for their expenses, and the attorneys appealed. *Id.* The Supreme Court of Louisiana, relying on its supervisory powers, ruled that "any assignment of counsel to defend an indigent defendant must provide reimbursement to the assigned attorney of properly incurred and reasonable out-of-pocket expenses and overhead costs." *Id.* at 429.

270. The court stated that "[u]ncompensated representation of indigents, when reasonably imposed, is a professional obligation burdening the privilege of practicing law in this state, and does not violate the constitutional rights of attorneys." *Id.* at 426. Two concurring justices believed that uncompensated representation in capital cases is, in every case, "so onerous that it constitutes an abusive extension of [an attorney's] professional obligations." *See id.* at 430 (Hall, J., concurring); *id.* at 431 (Dennis, J., concurring). However, the majority held that "a fee for services need not be paid, as long as the time the attorney must devote to cases for which he does not receive a fee does not reach unreasonable levels." *Id.* at 429.

271. DEATH ROW USA, *supra* note 1, at 10, 26, 33-35, 41.

272. *See generally* SPANGENBERG, TEXAS STUDY, *supra* note 176.

273. Before 1987, the statute governing the compensation of appointed counsel did not expressly provide for attorney compensation for anything other than court appearances, *see*

appearances was typically at or near the $25 per hour minimum rate set by statute, which as applied in many counties "became a de facto maximum."[274] This pattern has continued, even though the Texas legislature authorized courts to approve "reasonable" fee and expense reimbursement requests in 1987.[275] From 1987 to 1992, only slightly more than half of the judges presiding over capital trials compensated defense attorneys for out-of-court work, and two-thirds of the judges who did provide such compensation did so at an hourly rate of $50 or less.[276] Other judges compensated attorneys "on a one-time flat fee basis for the trial," with the flat fee ranging from $1500 to $25,000 per case.[277] In a telephone survey, some trial-level judges reported that their counties adhered to a maximum number of out-of-court hours for which a court-appointed attorney could be compensated, ranging from ten hours to sixty hours.[278] A survey of attorneys representing indigents on direct appeal revealed that the median rate at which they were paid was less than $40 an hour[279] and that several lawyers had received no compensation whatsoever.[280] Texas judges were asked the *largest* total fee they had approved for an appeal, and the median of the responses was $5000.[281] As of April 20, 1994, Texas had carried

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TEX. CODE CRIM. PROC. ANN. art. 26.05 (West 1989) (historical note), and in practice attorneys were not paid for time expended on a case outside the courtroom. SPANGENBERG, TEXAS STUDY, *supra* note 176, at 13-14 (discussing former Article 26.05).

274. SPANGENBERG, TEXAS STUDY, *supra* note 176, at 14.

275. Under the current version of TEX. CODE CRIM. PROC. ANN. art. 26.05 (West 1989), court-appointed attorneys are to be paid "reasonable attorney's fees" and to be "reimbursed for reasonable expenses." *Id.* art. 26.05(a). The statute grants county judges broad discretion to establish rates of compensation within their jurisdictions. *Id.* art. 26.05(b) & (c).

276. SPANGENBERG, TEXAS STUDY, *supra* note 176, at 102-03. This is consistent with the results obtained in a survey of attorneys who had been appointed to capital cases in that period. Almost two-thirds of attorneys surveyed reported that they received less than $50 an hour for the work they performed on capital cases, and the median hourly rate was $35. *Id.* at 62-63. The average hourly rate for defense counsel at the trial court level ranged wildly from $13 an hour to $150 an hour. *Id.* Some judges authorized compensation for in-court time at a per diem rate ranging from $250 to $525 a day, with no money paid for time spent outside of the courtroom. *See id.* at 56, 103.

277. *Id.* at 56. Seventy percent of the lawyers who had represented capital defendants reported that judges imposed maximum fees at the beginning of the case that ranged from $1500 to $25,000. *Id.* at 57. In some rural areas of Texas, however, it has been reported that lawyers are paid no more than $800 per capital case. Marianne Lavelle, *Strong Law Thwarts Lone Star Counsel*, NAT'L L.J., June 11, 1990, at 34.

278. SPANGENBERG, TEXAS STUDY, *supra* note 176, at 24.

279. *Id.* at 76-77. The attorney survey indicated that the average compensation for those who were paid on an hourly basis on appeal ranged from $11.11 to $159.06 an hour. *Id.* Additionally, several attorneys reported that they were paid a flat fee for their appellate work, with the fee ranging from $750 to $15,000. *Id.* at 71.

280. *Id.* at 77.

281. *Id.* at 112.

out the most executions and maintained the largest death row in the United States, accounting for 31.9% of America's executions and 13.6% of the nation's death row population.[282]

C. *Public Defender Systems*

In theory, a staff of full-time public defenders working exclusively on criminal matters should be able to provide higher quality defense services for the poor than would private, court-appointed attorneys who do not necessarily specialize in criminal law. Nonetheless, the representation provided by public defender systems to indigents charged with capital crimes is frequently substandard, an inevitable consequence of chronic underfunding.[283] Most public defenders in this country are underpaid, some grossly so,[284] and are required to juggle oppressive caseloads.[285] Working conditions are such that it has been difficult for defender offices to attract and retain good lawyers.[286] Moreover, the "assembly-line justice" of most defender offices is not conducive to the level of preparation

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282. DEATH ROW USA, *supra* note 1, at 37-40.

283. A special committee of the ABA conducted a multi-year study of crime and crime control in the United States and concluded that "indigent defense systems nationwide are underfunded," AMERICAN BAR ASS'N SPECIAL COMM. ON CRIM. JUSTICE IN A FREE SOCIETY, CRIMINAL JUSTICE IN CRISIS 39 (1988), and that indigent defense "is too often inadequate because of underfunded and overburdened public defender offices." *Id.* at 41. *Accord* NATIONAL INST. OF JUSTICE, NATIONAL ASSESSMENT PROGRAM: PRELIMINARY SURVEY RESULTS FOR PUBLIC DEFENDERS 1-4 (1990) (reporting results of survey of 375 counties nationwide).

284. For example, the starting salary for a Louisville, KY assistant district public advocate was $15,000 in 1991. Klein, *The Eleventh Commandment*, *supra* note 217, at 365 n.10 (citing Edward C. Monahan, *Who is Trying to Kill the Sixth Amendment?*, CRIM. JUST., Summer 1991, at 24, 27).

285. The United States Department of Justice reported that in just the four years from 1982 to 1986, the caseload for an individual attorney doing indigent criminal defense work increased by 40%. U.S. DEP'T JUSTICE, BUREAU OF JUSTICE STAT. BULL. 1 (Sept. 1988). This trend has continued. In 1990, the ABA Standing Committee on Legal Aid and Indigent Defendants noted that caseloads in most public defender offices had continued to grow "at an alarming rate." Klein, *The Eleventh Commandment*, *supra* note 217, at 393 (citing *Recent Trends in Indigent Defense Services*, INDIGENT DEF. INFO. (ABA Standing Comm. on Legal Aid and Indigent Defendants' Bar Info. Program), Spring 1990, at 1). In a 1990 survey of public defenders in 375 counties throughout the United States, 80% of the defenders contacted indicated that the number of attorneys representing indigent criminal defendants in their offices was insufficient and that the rate of growth of the defenders' caseload had outstripped the rate at which additional defenders were being hired to handle that caseload. NATIONAL INST. OF JUSTICE, *supra* note 283, at 3. *See generally* Klein, *Emperor* Gideon, *supra* note 213, at 656-81.

286. Sixty-six percent of the directors of public defender offices indicated in a nationwide survey that the heavy caseload of public defenders made it difficult to recruit attorneys, and 77% of defenders noted that heavy caseloads caused "burnout," making retention of staff a persistent problem. NATIONAL INST. OF JUSTICE, *supra* note 283, at 1-4.

contemplated by modern death penalty jurisprudence.[287]

For example, in Cook County, Illinois, which has the largest unified court system in the world,[288] each attorney who is part of the "murder task force" in the public defenders office handles over twenty pending murder cases *at any given time*, over one-third of which are capital cases.[289] Poor persons in Louisiana who face the death penalty in districts with public defender systems are no more likely to be represented by a lawyer with the time and resources to prepare a meaningful defense than are defendants in districts with appointed counsel systems. Public defenders in New Orleans might handle 70 felony cases at one time,[290] the public defender's office can afford to hire only three investigators for the more than 7000 cases assigned to it, and the office is provided no funds for expert witnesses.[291] In Missouri, indigent representation

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287. *See, e.g.*, Margulies, *supra* note 213, at 677-79; Suzanne E. Mounts, *The Right to Counsel and the Indigent Defense System*, 14 N.Y.U. REV. L. & SOC. CHANGE 221, 244 n.13 (1986) [hereinafter Mounts, *The Right to Counsel*].

The problems of excessive caseloads and limited resources that characterize most public defender systems also plague counties using the contract system. Localities that use this system typically enter into a contract with an attorney or law firm through which the locality agrees to pay a fixed fee for representation of all indigent defendants of a specified category for a specified period of time. Stone, *supra* note 215, at 210. Contracts tend to be awarded to the attorney or firm that submits the lowest bid for providing indigent defense services. *Id.*; *see also* Mark Curriden, *Begging For Justice: Indigent Defense in the South*, 77 A.B.A. J., Jan. 1991, at 64, 67; Klein, *Emperor* Gideon, *supra* note 213, at 679. In one extreme example, a county in Georgia paid a lawyer $4265 to represent all of the county's indigent defendants, and all investigative and expert expenses were to come out of that amount. Bright, *Counsel for the Poor*, *supra* note 10, at 1850 n.84. Critics note that the contract system creates a financial incentive to dispose of as many cases as possible with as little work as possible in order to maximize profits. *See, e.g.*, Klein, *Emperor* Gideon, *supra* note 213, at 680; Meredith A. Nelson, Comment, *Quality Control for Indigent Defense Contracts*, 76 CALIF. L. REV. 1147, 1149-55 (1988). In State v. Smith, 681 P.2d 1374, 1378-79 (Ariz. 1984), one county's contract system was found to be so flawed that it violated both the due process and assistance of counsel rights of indigent defendants. The Arizona Supreme Court established a rebuttable presumption that an indigent defendant convicted in that county had received ineffective assistance of counsel and was entitled to a retrial. *Id.* at 1381.

288. Stone, *supra* note 215, at 214.

289. *Id.* at 215. Private counsel who are appointed to death penalty cases in Cook County when the public defender is conflicted out of representation are constrained in another way: such attorneys are compensated at maximum hourly rates of $30 for out-of-court and $40 for in-court work, and he or she is subject to a fee cap of $1250 absent "extraordinary circumstances." ILL. ANN. STAT. ch. 725, para. 5/113-3(c) (Smith-Hurd 1992).

290. One public defender was required to represent 418 defendants in the first seven months of 1991. State v. Peart, 621 So. 2d 780, 784 (La. 1993).

291. *Id.* at 784. The excessive workload placed on public defenders in one section of the New Orleans judicial district was so unreasonable that the Louisiana Supreme Court permitted indigent defendants from that section to raise a pre-trial challenge to the effectiveness of the representation they were receiving and placed the burden of overcoming a rebut-

is provided through a Public Defender Commission, which is empowered to hire full-time public defenders or contract with private attorneys on a case-by-case basis.[292] Private attorneys in that state who have handled cases in which the death penalty was ultimately imposed were paid fees ranging from $5000 to $15,000 for their work.[293]

The Fulton County Public Defender program, which serves Atlanta, Georgia, is notorious for its heavy caseloads and inadequate funding.[294] Each defender must handle an average of 530 felony cases a year, in addition to other quasi-criminal matters such as parole revocations, commitments, and extraditions.[295] In 1992, the Georgia legislature created a small statewide capital defender program to relieve some of the pressures on county public defender offices,[296] but the program has been staffed with only four attorneys, while there are over 120 capital cases awaiting trial in Georgia at any one time,[297] and Georgia continues to rank near the bottom in per capita expenditures on defense services in the United States.[298] Between 1976 and April 20, 1994, thirty persons have been executed in Georgia, Missouri, and Illinois, and 354 more (12.4% of the condemned prisoners in the United States) await execution in those states.[299]

D. *Funding for Experts*

The reluctance to spend taxpayer money on indigent defense also manifests itself in the states' failure to provide adequate funding for defense experts and investigators. In principle, the Supreme Court has recognized that "a criminal trial is fundamentally unfair

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table presumption that the excessive workloads of defenders rendered their representation ineffective on the state. *Id.* at 783.

292. *See* MO. ANN. STAT. § 600.042 (Vernon 1994).

293. Letter from Sean D. O'Brien, Executive Director of Missouri Capital Punishment Resource Center, to Douglas W. Vick 1 (Feb. 10, 1994) (on file with author).

294. *See* Bright, *Counsel for the Poor*, *supra* note 10, at 1850.

295. *Id.* The day-to-day reality of handling such caseloads can be surreal:

> A public defender in Atlanta may be assigned as many as forty-five new cases at one arraignment. At that time, upon first meeting these clients—chained together—for a nonprivate, nonconfidential "interview" in a holding area near the courtroom, she may plead many of them guilty and have them sentenced on the spot . . . . This system of criminal procedure is known as "slaughterhouse justice."

Id.

296. GA. CODE ANN. § 17-12-91 (1992).

297. Bright, *Counsel for the Poor*, *supra* note 10, at 1876 & n.230.

298. SOURCEBOOK, *supra* note 243, at 5. The only states ranking below Georgia are Louisiana, Arkansas, Mississippi, South Carolina, Oklahoma, North Dakota, and Indiana. *Id.*

299. DEATH ROW USA, *supra* note 1, at 10, 21-24, 27-28.

if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense," including the assistance of experts.[300] In practice, most states have evaded this responsibility in capital cases, refusing to earmark sufficient funds for defense experts.[301]

No mitigation defense can be adequately prepared without the assistance of mental health experts, among others, and it would not be unreasonable to expect that the cost of defense experts in a typical capital case to exceed $40,000. Yet, in many states, the resources available to the defense for investigators or experts is constrained by statute.[302] In South Carolina, for example, there is a statutory limit of $2500 for the payment of experts and investigators in capital cases.[303] In Illinois, the statutory limit is $250.[304] Arkansas limited defense expenditures to $100[305] until that statutory limitation was struck down in 1991.[306]

In other jurisdictions, payments for defense experts are constrained by the penurious exercise of judicial discretion. For many judges, acutely aware of the financial pressures on county governments, "the high cost of experts and investigators is the *sub rosa* basis for denying them to the defense . . . ."[307] Many courts limit expenditures by requiring a preliminary showing of need for expert assistance which defense counsel simply cannot make without testimony from the very experts whose assistance the attorney seeks.[308] Even if a defense motion for funds for experts is granted,

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300. Ake v. Oklahoma, 470 U.S. 68, 77 (1985) (requiring state to provide defense with a psychiatrist when defendant's sanity is at issue).

301. *See* Berger, *The Chiropractor as Brain Surgeon*, *supra* note 18, at 249 ("Payment for expert or investigative services is . . . meager beyond belief."); Gradess, *supra* note 209, at 46 ("The *theoretical* standard under which counsel is to investigate, reflect, and prepare faces harsh *practical* reality in the reimbursement allowed in death states for necessary preparation." (citation omitted)).

302. Gradess, *supra* note 209, at 46.

303. S.C. CODE ANN. § 16-3-26(C) (Law. Co-op. Supp. 1993).

304. ILL. ANN. STAT. ch. 725, § 5/113-3(d) (Smith-Hurd 1992).

305. ARK. CODE ANN. § 16-92-108(b)(1) (Michie 1987) (repealed by 1993 Ark. Acts 1193, § 20).

306. Arnold v. Kemp, 813 S.W.2d 770, 777 (Ark. 1991).

307. Gradess, *supra* note 209, at 46.

308. Bright, *Counsel for the Poor*, *supra* note 10, at 1846. *See* Moore v. Kemp, 809 F.2d 702, 743 (Johnson, J., concurring in part and dissenting in part) ("[H]ow could [counsel] know if he needed a microbiologist, an organic chemist, a urologist, a hematologist, or that which the state used, a serologist? How further could he specify the type of testing he needed without first hiring an expert to make that determination?").

Other courts have narrowly interpreted the scope of the states' obligation to provide indigents with funds for experts. In Alabama, for example, defense attorneys are permitted by statute to recoup "reasonably incurred" expenses provided that prior court approval of

the amounts provided are grossly inadequate. In Philadelphia, for example, judges will often approve only a few hundred dollars for the hiring of defense investigators or experts in death cases, to be paid only when the case is over.[309] A random survey of twenty capital cases in Philadelphia found that the defense was given investigative support in only eight cases (an average of $605 for those eight cases) and was provided funds to hire psychologists in only *two* cases, with $400 granted in one case, and $500 granted in the other.[310] In some Georgia counties, no funds are expended at all for investigative or expert assistance on behalf of indigent defendants.[311] In Texas, one-third of the attorneys who had represented poor persons in death cases after 1987 stated that courts would approve the use of state funds for defense experts only up to a maximum of $500.[312] Qualified experts are simply unwilling to con-

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those expenditures is obtained. ALA. CODE § 15-12-21 (Supp. 1993). In the area of expert assistance, however, Alabama courts have often limited their approval of expenditures to cases in which the defendant's competency to stand trial or sanity at the time of the offense are at issue. *See, e.g.*, Smelley v. State, 564 So. 2d 74, 88 (Ala. Crim. App. 1990) ("The only [constitutional] requirement is that a defendant be provided competent psychiatric evaluation when he claims insanity to be a 'significant factor at trial.' "); Whisenhant v. State, 482 So. 2d 1225, 1229-30 (Ala. Crim. App. 1982) (concluding that once defendant is determined to be competent to stand trial and sane at the time of offense, trial court could conclude that there exists no reasonable basis for further psychiatric examination at state expense), *aff'd in part and remanded in part, Ex parte* Whisenhant, 482 So. 2d 1241 (Ala. 1983); *accord* Whittle v. State, 518 So. 2d 793, 794 (Ala. Crim. App. 1987) (non-capital case). This approach forecloses funding for psychiatric assistance in cases in which the defendant is not legally insane but nonetheless suffers serious mental health problems that mitigate his culpability for the crime he committed. *See supra* notes 144-46 and accompanying text.

In some jurisdictions, courts willing to order expert assistance for the defense have been met with resistance from county administrators. In Kentucky, for example, county officials embroiled in a political battle with state officials over who was responsible for paying such expenses have frequently refused to pay defense experts, even under threat of being held in contempt of court. Joseph Gerth, *Counties Balk at Paying Experts to Testify for Indigents*, THE COURIER-JOURNAL, Apr. 4, 1994, at 1A.

309. Frederic N. Tulsky, *Working for Better Legal Help for Poor*, THE PHILA. INQUIRER, Dec. 27, 1992, at B1, B6 [hereinafter Tulsky, *Working for Better Legal Help*].

310. Tulsky, *What Price Justice?*, *supra* note 262, at A18; Tulsky, *Working for Better Legal Help*, *supra* note 309, at B1, B6. A study conducted on behalf of the Philadelphia County courts showed that experts were used in only two percent of capital cases tried by court-appointed attorneys. *Id.* at B6.

311. Bright, *Counsel for the Poor*, *supra* note 10, at 1850 n.84.

312. SPANGENBERG, TEXAS STUDY, *supra* note 176, at 64. These attorneys reported that while other courts allowed defense attorneys to make motions requesting additional funds above an initial outlay of $500, such motions were denied in half of the cases in which they were made. *Id.* Before 1987, Texas had a statutory cap of $500 for defense expenditures on experts. TEX. CODE CRIM. PROC. ANN. art. 26.05 (West 1989) (historical note). In a telephone survey reported in 1993, many Texas judges referred to the $500 statutory maximum that had been repealed in 1987, apparently believing it was still in effect. SPANGENBERG, TEXAS STUDY, *supra* note 176, at 24.

sult with defense attorneys at these rates.[313]

E. *Summary*

This pattern of grotesque resource deprivation has multiple causes. In most death penalty states, indigent defense is funded at the county level,[314] where it "compete[s] as a very low priority among a multitude of other governmental services."[315] Many counties try to pay for indigent defense services through fines, civil court fees, and other sources which are simply inadequate to meet the monetary demands of indigent defense,[316] and in poorer or less populous counties, funding is constrained by a limited tax base.[317]

Yet lack of money is not the only factor explaining the crisis in indigent defense funding for capital cases. Prosecutors are not asked to endure the hardships that resource deprivation causes for the defense.[318] Prosecutors receive on average more than three times the funding that is provided to defenders in the United States,[319] and the differential is really much greater than that fig-

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313. Bright, *Counsel for the Poor*, *supra* note 10, at 1847 n.66; Tulsky, *What Price Justice?*, *supra* note 262, at A1, A18.

314. *See, e.g.*, ARK. CODE ANN. § 16-92-105 (Michie 1987); LA. REV. STAT. ANN. § 15:146 (West 1992); TEX. CODE CRIM. PROC. ANN. art. 26.05(d) (West 1989).

315. Gradess, *supra* note 209, at 4.

316. For example, Alabama, Arkansas, Louisiana, and Oklahoma have all tried to fund indigent defense primarily from these sources. THE SPANGENBERG GROUP, REVIEW OF THE INDIGENT DEFENSE SYSTEM IN ALABAMA, FINAL REPORT 76 (1988) [hereinafter SPANGENBERG, ALABAMA STUDY]. Experts in defense systems funding have consistently concluded that these sources will not produce sufficient revenue to assure adequate and competent representation. *Id.* at 76-80.

317. *See, e.g.*, SPANGENBERG, TEXAS STUDY, *supra* note 176, at 7.

318. *See, e.g.*, Vreeland, *supra* note 33, at 655. As Stephen Bright has explained:

> Many death penalty states have two state-funded offices that specialize in handling serious criminal cases. Both employ attorneys who generally spend years—some even their entire careers—handling criminal cases. Both pay decent annual salaries and provide health care and retirement benefits. Both send their employees to conferences and continuing legal education programs each year to keep them up to date on the latest developments in the law. Both have at their disposal a stable of investigative agencies, a wide range of experts, and mental health professionals anxious to help develop and interpret facts favorable to their side. Unfortunately, however, in many states both of these offices are on the same side: the prosecution.
>
> One is the District Attorney's office in each judicial district, whose lawyers devote their time exclusively to handling criminal matters in the local court systems. . . .
>
> The other office is the state Attorney General's office, which usually has a unit made up of lawyers who specialize in handling the appeals of criminal cases and habeas corpus matters.

Bright, *Counsel for the Poor*, *supra* note 10, at 1844.

319. For fiscal year 1990, the ratio between direct expenditures nationwide on prosecu-

ure indicates. Funding for the support services essential to the preparation of the prosecutor's case—police investigation, FBI and local crime labs, and state and local forensic experts—does not come out of the budget for the prosecutor's office, while analogous expenses by the defense must be paid out of the money provided for defense services.[320]

A more important reason that capital defense services continue to be drastically underfunded is the political popularity of the death penalty and the lack of public sympathy for those accused of capital crimes.[321] There is no political imperative driving legislatures toward creating fairer compensation systems; those accused of capital murder or awaiting execution on death row are not a part of any politician's constituency, and the fear of appearing "soft on crime" is a powerful force thwarting change through the legislative process.[322]

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tion services and expenditures on public defense was 3.22:1. *See* SOURCEBOOK, *supra* note 243, at 3. In some states, the ratio between prosecution and defense expenditures is more one-sided. In Oklahoma, the ratio is 13.47:1; in Arkansas, 7.34:1; in Mississippi, 6.77:1; in Utah, 6.7:1; in Indiana, 5.51:1; in Georgia, 5.26:1; in Kentucky, 5.21:1. *Id.* at 5. In Louisiana, the ratio between prosecution and defense expenditures was a ludicrous 106.82:1. *Id.*

320. *See* Margulies, *supra* note 213, at 681. In fiscal year 1990, for example, prosecutors and police in Kentucky received $156 million, while public defenders received $11.4 million, a 14:1 ratio. Bright, *Counsel for the Poor*, *supra* note 10, at 1852 n.93 (citing Edward C. Monahan, *Who Is Trying to Kill the Sixth Amendment?*, CRIM. JUSTICE, Summer 1991, at 24, 27-28). According to figures compiled by the United States Justice Department, direct governmental expenditures for the criminal justice system for the nation as a whole in fiscal year 1990 were allocated as follows: police protection 42.8%; corrections 33.6%; judiciary 12.5%; prosecution and legal services 7.4%; public defense 2.3%; and other justice activities 1.3%. SOURCEBOOK, *supra* note 243, at 3.

321. Several polls have shown that about 80% of the American population support the death penalty. WHITE, NINETIES, *supra* note 82, at 32 n.47. When *Furman* was decided in the early 1970s, only 42% of Americans favored capital punishment for murder. *Id.*

322. *See generally* Pierce & Radelet, *supra* note 14. *See also* Bright, *Counsel for the Poor*, *supra* note 10, at 1876 n.228 (quoting a Georgia State Senator who stated that "support for indigent defense is viewed by many in [Georgia] as being soft on crime"); Friedman & Stevenson, *supra* note 111, at 41-42 (stating that "[m]any legislators seem to fear that support for funding for defense services in capital cases is somehow the same as support for violent crime"). The popularity of the death penalty not only influences the legislative branch. The National Association of District Attorneys and other groups dominated by prosecutors have opposed even the most modest proposals for improving indigent defense in capital cases. *See* Bright, *Counsel for the Poor*, *supra* note 10, at 1875. In the 1988 presidential campaign, President Bush made the death penalty a central issue. Pierce & Radelet, *supra* note 14, at 711. In the 1990 campaign for the democratic nomination for Governor in Texas, all of the candidates emphasized their support for the death penalty. WHITE, NINETIES, *supra* note 82, at 24. The escalating fear of violent crime not only makes capital punishment a popular campaign issue, it directly affects the conduct of state executives once they get into office. Empirical studies have shown that the rate of executive commutations of death sentences to sentences of life imprisonment has declined from nearly one in four in the pre-*Furman* era to one in forty. Hugo A. Bedau, *The Decline of Executive Clemency in*

Most state judges also have been reticent to use their powers to require the expenditure of the funds necessary to assure adequate representation in modern death penalty cases. In awarding compensation to defense attorneys, state judges have usually shown greater concern for the public fisc than for the accused. This is sometimes reflected in judicial approval of unreasonably low hourly rates and the use of de facto compensation caps, even in jurisdictions in which there are no statutory restrictions on the discretion of judges. Trial judges may be motivated by political or ideological considerations of their own: many were elected to their positions because of their pro-death penalty views, or fear electoral backlash if their rulings are too conducive to the interests of those accused of brutal crimes;[323] others simply do not acknowledge the relevance of the sort of mitigating evidence that the Constitution allows defendants to present and are reluctant to require the state to pay for the development of such evidence.

In sum, most states in which the death penalty is vigorously pursued have decided not to pay the high costs of providing mean-

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Capital Cases, 18 N.Y.U. REV. L. & SOC. CHANGE 255, 266 (1990-91). This trend is fueled by "the perception that a governor who commutes a death sentence verges on committing political suicide." *Id.* at 268.

323. All judges must stand for election or retention on partisan, nonpartisan, or retention ballots in 31 of the 37 death penalty states: Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, and Wyoming. COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES 210-12 (Table 4.4) (1990); PATRICK M. MCFADDEN, ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS 177-88 (1990). As former California Supreme Court Justice Otto Kaus noted, "[t]here's no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he or she has to make them near election time. That would be like ignoring a crocodile in your bathtub." Reidinger, *supra* note 14, at 58. The potential effect of the political popularity of the death penalty on a popularly elected judiciary was realized in California in 1986, when three Justices of the California Supreme Court were unseated in a retention election in which the death penalty was the dominant issue. John H. Culver & John T. Wold, *Rose Bird and the Politics of Judicial Accountability in California*, 70 JUDICATURE 81, 86 (1986); *see also* Mary Ann Galante, *California Justices Face Own Executions*, NAT'L L.J., Nov. 3, 1986, at 1; Reidinger, *supra* note 14, at 52; John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348 (1987). Exit polls showed that among those who voted against retention of Chief Justice Bird in that election, 11% thought she was unqualified, 18% thought she was too liberal, and 66% voted against her because she opposed the death penalty. Joseph R. Grodin, *Judicial Elections: The California Experience*, 70 JUDICATURE 365, 367 (1987). Before the 1986 retention election, the California Supreme Court had affirmed only 7.8% of the death sentences it reviewed; after the retention election, the court's affirmance rate was 71.8%. Gerald F. Uelmen, *Review of Death Penalty Judgments by the Supreme Courts of California: A Tale of Two Courts*, 23 LOY. L.A. L. REV. 237, 297 (1989).

ingful assistance of counsel during the defendant's trial and direct appeal. On occasion, private attorneys will try to subsidize the costs of capital defense out of their own savings, but only at serious personal risk. For example, one Alabama lawyer reported that he had spent thousands of hours defending a capital murder case and that the cost of the case exceeded $340,000, pushing him into bankruptcy.[324] The vast majority of practitioners cannot or will not make such a sacrifice.[325] The consequences are predictable.

III. THE CRISIS OF REPRESENTATION IN CAPITAL CASES: THE RESULTS OF RESOURCE DEPRIVATION

A. *The Lack of Meaningful Assistance of Counsel in Capital Litigation*

The literature is replete with impressionistic, anecdotal, and empirical evidence that indigent capital defendants are routinely denied assistance of counsel adequate to put into practice the protections that on paper make the death penalty constitutional. This crisis in capital representation is caused by funding systems that discourage experienced and competent criminal attorneys from taking appointments in death penalty cases and prevent even the

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324. Curriden, *supra* note 287, at 67.

325. More typical is the Alabama attorney who was provided only $500 for expert and investigative expenses to defend a death case. During a deposition taken during state post-conviction proceedings, the attorney testified:

> Without more than $500, there was only one choice, and that is to go to the bank and to finance this litigation, myself, and I was just financially unable to do that. It would have cost probably in excess of thirty to forty thousand dollars, and I just could not justify taking those funds from my practice, or my family at the time.

Bright, *Counsel for the Poor*, *supra* note 10, at 1847 (quoting Deposition of Richard Bell at 24-25, Grayson v. State (Cir. Ct. Shelby County, Ala. Oct. 10, 1991) (No. CV 86-193)).

Some attorneys may find that their motivation to prepare a good defense will flag in the face of the tremendous expense involved. LEFSTEIN, CRIMINAL DEFENSE SERVICES, *supra* note 213, at 19 ("[W]hen compensation for assignments is inadequate, private attorneys are reluctant to accept assignments, or unwilling to put forth all necessary efforts on behalf of their clients."); Victoria R. Kendrick, Note, *Uncompensated Appointments of Attorneys for Indigent Criminal Defense: The Need for Supreme Court Standards*, 14 SW. U. L. REV. 389, 398-99 (1984) ("[A] lack of reasonable compensation for an appointed attorney may reduce his motivation to prepare a good defense."). Others may maintain their spirit, but simply lack the means to meet their obligations:

> Capital trials are highly complex and require a tremendous amount of time and resources, neither of which is available to the average practitioner representing an indigent defendant in a capital case. The reality is that the difficulties of providing effective defense counsel for those accused of capital crimes have frequently been insurmountable obstacles, making the chances of a fair trial for an indigent defendant highly unlikely.

Tabak & Lane, *supra* note 18, at 69 (footnote omitted).

most talented attorneys from preparing an adequate defense, particularly for the penalty phase.

Several observers have noted that poor compensation will not attract the best attorneys to represent indigents in death penalty cases.[326] This observation is supported by empirical data.[327] For example, as of January 1990, the Alabama attorneys who represented defendants sentenced to death had been subject to disciplinary action, including disbarment, at a rate twenty times that of the Alabama bar as a whole. For those attorneys whose clients were executed, the rate of disciplinary sanctions was almost forty times that of the bar as a whole.[328] One-quarter of the inmates on Kentucky's death row were represented at trial by attorneys who subsequently were disbarred or resigned rather than face disbarment.[329] As of January 1990, nearly 13% of the defendants executed in Louisiana had been represented by lawyers who had been disciplined, while the disciplinary rate for the Louisiana bar as a whole was 0.19%.[330] In Texas, the attorneys who represented defendants sentenced to death have been disciplined at a rate nine times that of the Texas bar as a whole; similar disparities exist in Georgia, Mississippi, and Florida.[331]

In addition to the incompetent, capital defense is often left to the inexperienced. The typical attorney representing the poor in death penalty cases is a non-specialist drafted into one of the most

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326. *See, e.g.*, Paduano & Smith, *supra* note 33, at 333; Uelmen, *supra* note 323, at 249.

327. One study, which was not limited to the defense provided in capital cases, exposed problems typical in states that underfund defense services. The study of the Alabama defense system, based on 1300 questionnaires returned by judges, prosecutors, and members of the private bar in 1980, documented that lawyers who represented indigent criminal defendants were generally younger and less experienced than the bar as a whole; many of the judges and lawyers surveyed perceived that the quality of representation provided indigents was inferior to that afforded defendants who could pay for their own lawyers; and that there was a "noted reduction" in legal action taken on behalf of indigents as compared to paying defendants. SPANGENBERG, ALABAMA STUDY, *supra* note 316, at 23-24 (quoting JOINT COMMITTEE ON INDIGENT DEFENSE SERVICES, ALABAMA STUDY: SURVEY OF LEGAL SERVICES PROVIDED INDIGENT CRIMINAL DEFENDANTS (Dec. 1980)). The study concluded that

> [e]ach of the foregoing problems [was] related, to a greater or lesser degree, to the lack of adequate funding for the assigned counsel system generally and for counsel fees specifically . . . . There was virtual unanimity among all groups responding to this survey that the lack of sufficient funds results in many repeated instances of ineffective representation and a systemwide reduction in the quality of representation afforded indigent persons.

Id. at 24 (quoting JOINT COMMITTEE ON INDIGENT DEFENSE SERVICES, ALABAMA STUDY: SURVEY OF LEGAL SERVICES PROVIDED INDIGENT CRIMINAL DEFENDANTS (Dec. 1980)).

328. Coyle et al., *supra* note 181, at 44.

329. Tabak & Lane, *supra* note 18, at 74 & n.92.

330. Coyle et al., *supra* note 181, at 44.

331. *Id.*

specialized fields of practice in American law.[332] Because of inadequate compensation, experienced criminal lawyers often work assiduously to avoid appointment to capital cases,[333] and most states with serious public defense funding problems do not impose demanding training or qualification standards for attorneys assigned to capital cases.[334] As a consequence, capital defendants are often

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332. *See, e.g.*, Anderson, *supra* note 217, at 505 ("[A]n ever-decreasing fraction of the bar considers itself competent to undertake the types of cases for which the demand for court-appointed counsel is greatest."); Thurgood Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1, 1 (1986) ("Death penalty litigation has become a specialized field of practice . . . . Often trial counsel simply are unfamiliar with the special rules that apply in capital cases."). Resource deprivation effectively prevents the development of a corps of attorneys who develop expertise in the defense of capital punishment cases.

333. *See, e.g.*, Klein, *The Eleventh Commandment*, *supra* note 217, at 365 n.8, 366 n.12. For example, 82% of Mississippi attorneys who represented indigent defendants in death penalty cases in the past would either refuse to accept another appointment, or be very reluctant to accept appointment, because of financial considerations. Friedman & Stevenson, *supra* note 111, at 31 n.148. A recent study of capital representation in Texas showed that "more experienced private criminal attorneys are refusing to accept court appointments in capital cases because of the time involved, the substantial infringement on their private practices, the lack of compensation for counsel fees and expert expenses and the enormous pressure that they feel in handling these cases." SPANGENBERG, TEXAS STUDY, *supra* note 176, at 152. One Alabama attorney has testified that inadequate compensation caused him to decline capital appointments:

> [The fee limitation] has stopped me from taking capital cases . . . . I would say that it has been a severe deterrent to me and other lawyers. That the lack of compensation, the wholly inadequate compensation [for] lawyers that do this kind of work—that have expertise to do this kind of work—[has] a severe chilling effect. It has prohibited me from currently—I don't get calls anymore for it. I think the courts know that I'm not going to accept them, [with] rare exceptions.

Friedman & Stevenson, *supra* note 111, at 30 (quoting Record at 101-02, State v. Wilson, No. CC-86.093.2 (Talladega County Cir. Ct. Mar. 4, 1991) (testimony of Richard Jaffe)). Yet, "when lawyers who have developed the expertise cannot afford to continue to represent indigent capital clients, any movement toward the creation of a specialized bar is thwarted." *Id.* at 31.

334. Several states have no training or qualification requirements whatsoever for appointing counsel to capital cases. *See* Coyle et al., *supra* note 181, at 31; Redick Letter, *supra* note 173, at 2 ("There are no case load limitations and there are no training or qualification requirements for appointment of capital cases in Tennessee."). Other states, such as Alabama, require some minimal experience in handling criminal matters, but these standards are so low that a capital defendant is "generally represented by a court appointed attorney who may have little or no experience in the intricate and unique rules that comprise capital litigation." Friedman & Stevenson, *supra* note 111, at 3-4 (footnote omitted). In any event, experiential standards that do not account for the defense attorney's competence to handle capital litigation can do more harm than good:

> Standards for the appointment of counsel, which are defined in terms of number of years in practice and number of trials, do very little to improve the quality of representation since many of the worst lawyers are those who have long taken criminal appointments and would meet the qualifications. Such standards can actually be counterproductive because they may provide a basis for denying ap-

represented by attorneys who have been out of law school for only a few years or have little or no experience handling criminal cases.[335] It is not surprising that a six-month survey conducted in 1989-90 by the *National Law Journal* found that over one-half of the death row inmates in six southern states had been represented by lawyers who had never previously handled a capital case.[336]

The substantial literature addressing the problems of capital representation recounts numerous stories of pathetic performances by defense counsel:[337]

> [A]mong the knowledgeable, horror stories abound: of defense counsel who refer to the accused as a 'nigger' in front of the jury, who indicate that they are representing the client with reluctance, who absent themselves from court while a prosecution witness takes the stand, who adduce no evidence in favor of the client at the penalty phase, or who file no brief on appeal.[338]

> pointment to some of the most gifted and committed lawyers who lack the number of prior trials but would do a far better job in providing representation than the usual court-appointed hacks with years of experience providing deficient representation.

Bright, *Counsel for the Poor*, *supra* note 10, at 1871 n.209. *See also* Redick Letter, *supra* note 173, at 2 ("Many of the attorneys with the most experience doing capital work, particularly from the private bar, are the least qualified; they are merely the only attorneys willing to represent clients whose lives are at stake at the very low compensation rate."). Recently, one scholar has advocated the creation of some mechanism to train and certify lawyers for criminal defense work as a means of better assuring that a defendant's Sixth Amendment rights are honored. *See* Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433 (1993).

335. *See, e.g.*, Paradis v. Arave, 954 F.2d 1483, 1490-91 (9th Cir. 1992) (involving defendant represented by attorney who had passed bar six months earlier, had no prior criminal trial experience, and had not taken law school courses in criminal law, criminal procedure, or trial advocacy); Tyler v. Kemp, 755 F.2d 741, 743 (11th Cir.) (involving defendant represented by lawyer recently admitted to bar), *cert. denied*, 474 U.S. 1026 (1985); Bell v. Watkins, 692 F.2d 999, 1008 (5th Cir. 1982) (involving defendant represented by recent law school graduate).

336. Coyle et al., *supra* note 181, at 30.

337. *See, e.g.*, ABA Task Force, *supra* note 2, at 62-71; Bright, *Counsel for the Poor*, *supra* note 10, at 1835-43; Friedman & Stevenson, *supra* note 111, at 32-37; Ronald J. Tabak, Gideon v. Wainwright *in Death Penalty Cases*, 10 PACE L. REV. 407 (1990); White, *Effective Assistance*, *supra* note 103, at 325-30.

338. Vivian Berger, *Justice Delayed or Justice Denied?—A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665, 1670 (1990) (footnotes omitted). Capital trials are frequently forums for surprisingly frank expressions of ignorance and bigotry. In one case, for example, the defense lawyer did not object when the prosecutor urged the jury to sentence the defendant to death because "[t]he defendant is homosexual, and we all know what goes on inside of prisons, so sending him there would be like sending him to a party." David R. Dow, Teague *and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L.Q. 23, 60 (1991) (citing Burdine v. State, 719 S.W.2d 309 (Tex. Crim. App. 1986) (en banc), *cert. denied*, 480 U.S. 940 (1987)) [hereinafter Dow, Teague *and Death*]. Numerous African-American defendants have gone to trial for their lives represented by attorneys who were openly hostile

Some of the defendants represented by bigoted, intoxicated, or inept lawyers obtain relief from their death sentences on appeal; many others do not.

For example, John Young was put to death by the State of Georgia on March 20, 1985,[339] after the federal courts refused on procedural grounds to consider clear evidence of trial counsel's woeful performance.[340] Young's attorney, who was subsequently disbarred, was on drugs during Young's trial.[341] The attorney was arrested on state and federal drug charges shortly after Young's trial, and he later claimed that his attention was not focused on the trial because he was experiencing personal and family problems.[342] The attorney failed to discover or introduce important mitigation evidence, including evidence that Young had witnessed his mother's murder at the age of three and was suffering from post-traumatic stress syndrome traceable to this childhood event at the time he committed his crime.[343]

On direct appeal, Larry Heath's appointed attorney filed a six-page brief on one issue with the Alabama Court of Criminal and a one-page brief citing one case with the Alabama Supreme Court; the attorney failed to appear for oral argument.[344] Heath died in

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to them on account of their race or referred to them in open court with racist epithets. *See, e.g.*, Goodwin v. Balkcom, 684 F.2d 794, 805 n.13 (11th Cir. 1982) (involving defense counsel who referred to client as "little old nigger boy" in closing argument), *cert. denied*, 460 U.S. 1098 (1983); Dobbs v. Zant, 720 F. Supp. 1566, 1577 (N.D. Ga. 1989) (involving defense attorney who testified during habeas corpus proceedings that blacks would not make good teachers but made good basketball players; that integration had caused deteriorating neighborhoods and schools; that a section of Chattanooga was a "black boy jungle"; and that blacks had inferior morals), *aff'd*, 963 F.2d 1403 (11th Cir. 1991), *rev'd and remanded on other grounds*, 113 S. Ct. 835 (1993); *Ex parte* Guzmon, 730 S.W.2d 724, 736 (Tex. Crim. App. 1987) (involving defense counsel who called client "wet-back" in front of all-white jury); Bright, *Counsel for the Poor*, *supra* note 10, at 1843 n.51 (citing Record Excerpts at 102, Dungee v. Kemp, No. 85-8202 (11th Cir.) (involving defendant referred to as "nigger" by defense counsel), *decided sub nom.* Issacs v. Kemp, 778 F.2d 1482 (11th Cir. 1985), *cert. denied*, 476 U.S. 1164 (1986)); Tabak & Lane, *supra* note 18, at 74 n.98-101 (citing Petitioner's Opening Brief at 38, Gates v. Zant, 863 F.2d 1492 (11th Cir. 1989) (involving attorney who referred to his African-American client as "boy" six times during closing argument)). In one particularly notorious case tried in Georgia, an African-American defendant accused of raping and murdering a white woman was represented by the former Imperial Wizard of the local Ku Klux Klan. Ross v. Kemp, 393 S.E.2d 244 (Ga. 1990); Paul Marcotte, *Snoozing, Unprepared Lawyer Cited*, 77 A.B.A. J., Feb. 1991, at 14, 16.

339. DEATH ROW USA, *supra* note 1, at 6.

340. Young v. Kemp, 758 F.2d 514, 516 (11th Cir. 1985) (dismissing ineffectiveness claim since it was not substantiated until after second habeas petition was filed).

341. Tabak, *Death of Fairness*, *supra* note 4, at 841.

342. Bright, *In Defense of Life*, *supra* note 165, at 860-61 (citing Young v. Kemp, Civ. No. 85-98-2MAC (M.D. Ga. 1985) (affidavit of Charles Marchman, Jr.)).

343. Tabak, *Death of Fairness*, *supra* note 4, at 841.

344. Bright, *Counsel for the Poor*, *supra* note 10, at 1860-61 (citing Appellant's Brief

Alabama's electric chair on March 20, 1992.[345] No appellate brief was filed on behalf of Herbert Richardson after he was sentenced to death;[346] this failure meant that Richardson's post-conviction attorneys were foreclosed from raising any issue other than ineffective assistance of counsel during federal habeas corpus proceedings.[347] Richardson was executed on August 18, 1989.[348] At the guilt phase of James Messer's trial, his defense lawyer did not give an opening statement, did not offer any evidence on behalf of his client, and in a closing argument emphasized "the horror of the crime," expressed "frustration" with Messer's case, and suggested that death was the most appropriate punishment for Messer's crime.[349] Messer was executed on July 28, 1988.[350] At the penalty phase of Jesús Romero's trial, his attorney called no witnesses and offered a twenty-nine word summation in defense.[351] The State of Texas executed Romero on May 20, 1992.[352]

Most examples of deficient representation, however, do not involve incapable or irresponsible attorneys, but rather lawyers who lack the time, resources, or expertise to handle death cases. Most lawyers drafted into representing indigents facing the death penalty may be willing, but simply are unable to prepare a meaningful defense.[353] As appointed attorneys begin to realize the number of

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and Argument in Support of Petition for Writ of Certiorari at 1-2, State v. Heath, 455 So. 2d 905 (Ala. 1984)). The attorney did not raise issues regarding the prosecutor's improper references to Heath's failure to testify, the trial court's refusal to discharge for cause sixty-seven venirepersons who knew that Heath had been convicted of charges in a neighboring state that arose out of the same facts, and the denial of a motion for change of venue. *Id.* at 1861.

345. DEATH ROW USA, *supra* note 1, at 9.

346. Friedman & Stevenson, *supra* note 111, at 37 (citing Rule 20 Petition, Richardson v. State, No. CC-77-318.62 (Houston County Cir. Ct. Aug. 5, 1989)).

347. *See infra* part IV.A.

348. DEATH ROW USA, *supra* note 1, at 8.

349. *See* Messer v. Kemp, 474 U.S. 1088, 1089-90 (1986) (Marshall, J., dissenting from denial of certiorari).

350. DEATH ROW USA, *supra* note 1, at 7.

351. The defense attorney's opening and closing argument at the penalty phase was the same: "Jesse, stand up. You are an extremely intelligent jury. You've got that man's life in your hands. You can take it or not. That's all I have to say." Coyle et al., *supra* note 181, at 34 (citing Romero v. Lynaugh, 884 F.2d 871 (5th Cir. 1989)).

352. DEATH ROW USA, *supra* note 1, at 9.

353. Justice Marshall observed that

> capital defendants frequently suffer the consequences of having trial counsel who are ill-equipped to handle capital cases. Death penalty litigation has become a specialized field of practice, and even the most well intentioned attorneys often are unable to recognize, preserve and defend their client's rights . . . . Though acting in good faith, they inevitably make very serious mistakes.

Marshall, *supra* note 332, at 1-2.

hours capital representation can consume, and that each additional hour spent on a death case is an hour in which they are not meeting their overhead costs, they are driven by economic realities to ration their time. This compromises their ability to adequately prepare, which in turn affects every aspect of their clients' cases.[354] Empirical studies dramatically illustrate the consequences of these economic forces. Although a properly defended capital case should require a month or more to try,[355] a study conducted in Alabama revealed that over three-quarters of the capital trials there last less than a week.[356] The average length of a random sample of a dozen capital trials conducted in Louisiana from 1978 to 1987 was three days.[357] A Tennessee survey showed that defense lawyers in that state frequently invest less than 100 hours before trial preparing for a capital case.[358]

Nowhere is the problem of resource deprivation of capital defense felt more deeply than during the penalty phase of a capital trial.[359] Those most familiar with the operation of the capital punishment in the United States have frequently expressed dismay at the surprising number of cases in which little or no evidence is presented by the defense during sentencing proceedings.[360] A para-

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354. Margulies, *supra* note 213, at 678-79. *See* ABA Task Force, *supra* note 2, at 78 ("A lawyer who is paid $1,000 will not devote 1,000 hours to a case, even if the case requires it."); Friedman & Stevenson, *supra* note 111, at 27 ("An attorney's rate of compensation and the quality of his or her representation cannot be easily separated."); *see also* Kendrick, *supra* note 325, at 398; Paduano & Smith, *supra* note 33, at 333-35; Tabak, *Death of Fairness*, *supra* note 4, at 801-04.

355. *See supra* notes 187-88 and accompanying text.

356. Friedman & Stevenson, *supra* note 111, at 37 n.185 (citing Susan J. Craighead, Trial Representation of Capital Defendants: A Case Study in Alabama 5 (1992) (unpublished manuscript)). The *National Law Journal* examined the records of a random sample of twenty Alabama capital trials conducted from 1981 to 1989 and found that those trials lasted an average of 4.2 days. Coyle et al., *supra* note 181, at 36.

357. Coyle et al., *supra* note 181, at 36.

358. Redick, *supra* note 18, at 23.

359. Failures of counsel that are felt in the sentencing phase of a capital defendant's trial are usually the easiest to perceive and measure. There are, however, other types of attorney errors, more difficult to identify, that can be just as detrimental to an indigent's defense and which can be fairly attributed to the constraints of inadequately funded indigent defense systems.

360. The experience of Clifford Sloan, a former law clerk to a United States Supreme Court Justice, is revealing:

> Again and again, in cases that I reviewed, potential mitigating evidence was readily available—medical experts who could testify to mental retardation or other evidence of diminished capacity; relatives who could help explain how and when this individual had been brutalized; fellow veterans who could testify about the defendant's combat valor, or about the haunting, warping effects of the battles they experienced together. Again and again, defense counsel made little or no effort to reach such witnesses.

digmatic case is that of Earnest Knighton, executed in Louisiana on October 30, 1984.[361] Knighton was arrested for murder in April 1981 and was sentenced to death by June of the same year.[362] His trial counsel was unaware of existing mitigating evidence because he had been unable to conduct any mitigation investigation whatsoever.[363] At the penalty phase of Knighton's trial, which commenced one hour after the return of a guilty verdict, the lawyer offered no evidence, and instead simply pleaded for his client's life.[364]

Also typical is the case of Billy Mitchell, who was electrocuted by the State of Georgia on September 1, 1987,[365] even though Mitchell's trial attorney failed to investigate or offer mitigating evidence.[366] Had Mitchell's attorney interviewed his client's family and friends and reviewed his client's school and psychological records, he would have discovered that Mitchell had undergone steady psychological deterioration resulting from extreme poverty, a history of family turbulence, and a series of violent prison rapes.[367] A number of character witnesses who were willing to testify on Mitchell's behalf were never contacted by Mitchell's lawyer.[368]

The attorney representing Leonard Laws offered no evidence in mitigation during the penalty phase of his trial.[369] Although Laws was a highly-decorated Vietnam War veteran, his lawyer did not use the available evidence concerning his military record.[370] The lawyer did not pursue evidence that the defendant suffered from post-traumatic stress syndrome related to his military service

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Clifford Sloan, *Death Row Clerk in the Court of Last Resort: U.S. Supreme Court and Capital Cases*, THE NEW REPUBLIC, Sept. 16, 1987, at 18; *see also* WHITE, NINETIES, *supra* note 82, at 77 ("[T]here has been a surprisingly large number of cases in which defendants have been executed after their attorneys presented little or no mitigating evidence at their penalty trials."); Tabak & Lane, *supra* note 18, at 71 ("Often, no investigation at all is conducted with respect to the sentencing phase, so that exculpating or mitigating evidence is never discovered or presented.").

361. DEATH ROW USA, *supra* note 1, at 6.

362. Knighton v. Maggio, 468 U.S. 1229, 1230 (1984) (Brennan, J., dissenting).

363. Goodpaster, *Adversary System*, *supra* note 103, at 76.

364. *Id.*

365. DEATH ROW USA, *supra* note 1, at 7.

366. Fong, *supra* note 103, at 461; *see also* Mitchell v. Kemp, 483 U.S. 1026, 1027-31 (1987) (Marshall, J., dissenting from denial of certiorari).

367. Fong, *supra* note 103, at 461; *see also Mitchell*, 483 U.S. at 1027 (Marshall, J., dissenting from denial of certiorari).

368. Fong, *supra* note 103, at 461.

369. Laws v. Armontrout, 490 U.S. 1040, 1041 (1989) (Marshall, J., dissenting from denial of certiorari).

370. *Id.*

in Vietnam, or evidence that Laws' personality had undergone dramatic changes during his service.[371] Laws was executed by the State of Missouri on May 17, 1990.[372]

These cases are not simply anecdotal examples of serious miscarriages of justice, but rather evidence of a larger phenomenon. Empirical studies indicate that the virtual forfeiture of a capital defendant's essential right to introduce evidence mitigating against a death sentence upon conviction of a capital offense is the rule, not the isolated exception. For example, in 1989, the Tennessee Supreme Court noted that in seventeen post-*Furman* capital cases it had reviewed—representing one-quarter of the death sentences that had been rendered at that time—the defense offered no mitigation evidence at all.[373] This total did not include the cases in which some proof of mitigation was offered, no matter how "ill-financed, ill-conceived, ill-prepared or ill-presented."[374] In 1990, the *National Law Journal* found that in Alabama, the penalty phase of capital trials lasted an average of only 3.6 hours.[375] A Harvard University study of randomly selected capital cases showed that in more than one-half of Alabama's capital cases, the entire proceedings of the penalty phase—opening arguments, the presentation of evidence, and closing arguments by *both* sides—were completed in *less than one hour*.[376] In nearly 40% of the cases sampled, defense counsel called two or fewer witnesses, including the defendant, during the penalty phase, and in over three-quarters of those cases, no evidence of the defendant's life history was presented.[377]

The Louisiana Supreme Court has lamented the "recurring problem" of lawyers who do little at the penalty phase,[378] but an examination of available judicial opinions involving capital defendants ultimately electrocuted in that state shows how reluctant the

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371. *Id.*

372. DEATH ROW USA, *supra* note 1, at 8.

373. State v. Melson, 772 S.W.2d 417, 421 (Tenn. 1989); *see also* Redick, *supra* note 18, at 24. The Tennessee Supreme Court saw this not as evidence of a systemic problem with Tennessee's death penalty procedures, but as justification for finding that Melson's attorney was not incompetent for failing to present mitigating evidence. The court reasoned that in Tennessee, defense counsel frequently "have seen fit not to offer any evidence at the sentencing phase of the trial." 772 S.W.2d at 421.

374. Redick, *supra* note 18, at 24.

375. Coyle et al., *supra* note 181, at 36.

376. Friedman & Stevenson, *supra* note 111, at 35. This data was drawn from the fifteen cases out of a random sample of forty-two cases in which the court reporter noted the time elapsed during the various proceedings of the trial. *Id.* at 35 & n.176.

377. *Id.* at 35. The defense "strategy" at the penalty phase in the overwhelming majority of the Alabama cases studied consisted solely of a plea for sympathy. *Id.*

378. State v. Williams, 480 So. 2d 721, 728 n.14 (La. 1985).

court has been to take steps necessary to remedy that problem. Those opinions reveal that at the trials of at least 85% of those executed by the State of Louisiana between 1976 and April 1994, trial counsel failed to present mitigation evidence of the sort identified by experts as being essential.[379] In eight cases, little or no mitigation evidence was offered at the penalty phase.[380] In at least

379. Twenty-one men have been executed by the State of Louisiana between 1976, when the Supreme Court lifted its moratorium on executions, and April 20, 1994. DEATH ROW USA, *supra* note 1, at 6-10. The author was unable to determine what mitigation evidence, if any, was offered by or available to the attorney who represented Willie Watson, who was executed on July 24, 1987. Based on the descriptions provided by reviewing courts in the remaining twenty cases, it appears that substantial mitigation evidence of the sort typically contemplated by those knowledgeable in the field was offered at the trials of Jimmy Wingo (executed on June 16, 1987), John Brogdon (executed on July 30, 1987), and Sterling Rault (executed on August 24, 1987). *See* State v. Wingo, 457 So. 2d 1159, 1163 (La. 1984), *cert. denied*, 471 U.S. 1030 (1985); State v. Brogdon, 457 So. 2d 616 (La. 1984), *cert. denied*, 471 U.S. 1111 (1985); State v. Rault, 445 So. 2d 1203, 1207, 1220 (La.), *cert. denied*, 469 U.S. 873 (1984). An examination of the remaining seventeen cases reveal severe shortcomings in the manner in which mitigation evidence was investigated and presented to the jury during the penalty phase.

380. Earnest Knighton's attorney, who spent all of six hours conferring with his client before trial, expended no time at all investigating Knighton's background, and introduced no evidence in mitigation at the sentencing phase of Knighton's trial. Knighton v. Maggio, 468 U.S. 1229, 1230 (1984) (Brennan, J., dissenting). Knighton was put to death on October 30, 1984. DEATH ROW USA, *supra* note 1, at 6. The record of John Taylor's trial did "not disclose any interruption between the verdict on the guilt phase and the argument on the penalty phase." State *ex rel.* Taylor v. King, 446 So. 2d 741, 742 (La. 1984). Taylor was executed on February 29, 1984. DEATH ROW USA, *supra* note 1, at 6. After a trial in which his attorney failed to introduce any mitigation evidence whatsoever, *see* Berry v. King, 476 U.S. 1164 (1986) (Marshall, J., dissenting), Benjamin Berry was electrocuted on June 7, 1987. DEATH ROW USA, *supra* note 1, at 7. Alvin Moore was put to death on June 9, 1987, after a trial in which the penalty phase lasted approximately one hour. *Id.*; *see* Moore v. Maggio, 435 So. 2d 997, 997 (La. 1983) (Dixon, C.J., dissenting from denial of writ of habeas corpus). A unanimous jury recommended that Jimmy Glass be sentenced to death only one day after the completion of the guilt phase of his trial. State v. Glass, 455 So. 2d 659, 666 (La. 1984), *cert. denied*, 471 U.S. 1080 (1985). Glass's trial attorney admitted during federal habeas proceedings that he failed to call mitigation witnesses during the penalty phase because of "mental and physical fatigue" after the guilt phase. Glass v. Blackburn, 791 F.2d 1165, 1170 (5th Cir. 1986), *cert. denied*, 481 U.S. 1042 (1987). Glass was executed on June 12, 1987. DEATH ROW USA, *supra* note 1, at 6. Counsel for Willie Celestine, executed on July 20, 1987, *id.*, did not introduce any evidence at the penalty phase, failing to call a number of available mitigation witnesses to testify. Celestine v. Blackburn, 750 F.2d 353, 356 (5th Cir. 1984), *cert. denied*, 472 U.S. 1022 (1985). The penalty phase of Leslie Lowenfield's trial was completed in two hours and five minutes on the evening of the day the jury rendered its verdict as to guilt. State v. Lowenfield, 495 So. 2d 1245, 1258 (La. 1985), *cert. denied*, 476 U.S. 1153 (1986). Even though Lowenfield's attorney made pre-trial motions arguing that Lowenfield suffered from a mental condition rendering him incapable of assisting in his defense, *id.* at 1250, the jury was not provided evidence of Lowenfield's mental defects during the sentencing hearing. *See* Lowenfield v. Phelps, 817 F.2d 285, 290 (5th Cir. 1987), *aff'd on other grounds*, 484 U.S. 231 (1988). A psychologist's affidavit, prepared only weeks before Lowenfield's execution, indicated that at the time of his crime Lowenfield was likely a para-

eight additional cases, important psychiatric mitigation evidence was either not discovered or not introduced at trial.[381] In still an-

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noid schizophrenic with persecution delusions and an impaired ability to distinguish between right and wrong, and that no effort had ever been made to investigate the origins of Lowenfield's mental illness or whether his illness was caused by a brain lesion or other trauma. Lowenfield v. Butler, 843 F.2d 183, 188-89 (5th Cir.), *cert. denied*, 485 U.S. 1014 (1988). Lowenfield was electrocuted on April 13, 1988. DEATH ROW USA, *supra* note 1, at 7. Wayne Felde's attorney did not offer mitigation evidence at the penalty phase, and in fact argued in favor of a death sentence, at Felde's request. Felde, a Vietnam veteran suffering from post-traumatic stress syndrome, later unsuccessfully challenged his sentence, claiming he was suicidal at the time of his trial, and that he received ineffective assistance of counsel when his attorney affirmatively sought the death penalty rather than merely refusing to offer mitigation at the sentencing hearing. *See* State *ex rel.* Felde v. Maggio, 457 So. 2d 1180, 1180 (La. 1984) (Cologero, J., dissenting from denial of habeas corpus); State v. Felde, 422 So. 2d 370, 393-95 (La. 1982), *cert. denied*, 461 U.S. 918 (1983). Felde was electrocuted on March 15, 1988. DEATH ROW USA, *supra* note 1, at 7.

381. In the case of Elmo Sonnier, counsel failed to pursue mental health mitigation evidence at the penalty trial, even though concern over Sonnier's mental health before his trial was sufficient to cause the trial judge to convene a sanity commission. Sonnier v. Maggio, 720 F.2d 401, 410 (5th Cir. 1983), *cert. denied*, 465 U.S. 1051 (1984). Sonnier was executed on April 5, 1984. DEATH ROW USA, *supra* note 1, at 6. Timothy Baldwin alleged in his habeas petition that his attorney did not prepare for the penalty phase of Baldwin's trial until the jury had rendered a verdict at the guilt phase. Baldwin v. Maggio, 704 F.2d 1325, 1333 (5th Cir. 1983), *cert. denied*, 467 U.S. 1220 (1984). Baldwin argued that once he had been determined to be sane and capable of standing trial, his attorney did not pursue psychiatric mitigation evidence; the attorney also failed to make a strong evidentiary showing regarding the effects of Baldwin's alcoholism and failed to call witnesses who could have testified as to the positive aspects of Baldwin's character, his good work habits, the effects of his financial problems, and his despondency. Baldwin v. Blackburn, 524 F. Supp. 332, 338 (W.D. La.), *aff'd*, 653 F.2d 942 (5th Cir. 1981), *cert. denied*, 456 U.S. 950 (1982). Baldwin died in Louisiana's electric chair on September 10, 1984. DEATH ROW USA, *supra* note 1, at 6. While Robert Lee Willie's attorney offered penalty phase testimony from the defendant and his aunt about the defendant's troubled childhood, counsel failed to contact numerous friends and relatives who could have bolstered this testimony, and failed to produce evidence of Willie's mental condition. *See* Willie v. Maggio, 737 F.2d 1372, 1394 (5th Cir.), *cert. denied*, 469 U.S. 1002 (1984). Willie was executed on December 28, 1984. DEATH ROW USA, *supra* note 1, at 6. Although David Martin's attorney presented evidence in mitigation, he did not present expert evidence or testimony relating to Martin's mental state at the time of his offense or the effect of drugs and alcohol on his mental capacity at the time of the offense. State *ex rel.* Martin v. Blackburn, 392 So. 2d 648, 648 (La. 1981) (Calogero, J., dissenting from denial of stay of execution). Martin was put to death on January 4, 1985. DEATH ROW USA, *supra* note 1, at 6. Similarly, Edward Byrne was never evaluated by a mental health professional before being sentenced to death. Byrne v. Butler, 845 F.2d 501, 512 (5th Cir.), *cert. denied*, 487 U.S. 1242 (1988). Byrne's death sentence was carried out on June 14, 1988. DEATH ROW USA, *supra* note 1, at 7. Dalton Prejean was executed on May 18, 1990, *id.* at 8, despite ample evidence that the state psychologist who examined Prejean before trial was incompetent, failing to determine Prejean's history, to conduct sufficient tests, or to recognize and investigate signs of brain damage. Prejean v. Whitley, 560 So. 2d 447, 447 (La.) (Dennis, J., dissenting from denial of stay of execution), *cert. denied*, 495 U.S. 943 (1990). A competent independent psychologist would have discovered that Prejean had suffered damage to the frontal and parietal lobes of his brain, rendering him unable to con-

other case, counsel failed to present significant non-psychiatric mitigation evidence that was available at the time of the defendant's sentencing hearing.[382] The *National Law Journal* reported that the average length of the penalty phase of a random sample of Louisiana capital trials was 2.9 hours.[383]

Under Pennsylvania's death penalty statute, the jury *must* return a death sentence if it finds the existence of one of sixteen statutory aggravating factors and no mitigating factors.[384] Notwithstanding the harsh consequence of failing to introduce mitigating evidence under Pennsylvania's capital punishment scheme, no mitigation evidence or virtually no mitigation evidence was introduced in seven of the thirty-one death cases *affirmed* by the Pennsylvania Supreme Court from 1988 through 1990.[385]

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trol his violent impulses; suffered from paranoia and schizophrenia; had been rejected by his mother and aunt; and had been physically abused by his aunt. Prejean v. Smith, 889 F.2d 1391, 1398 (5th Cir. 1989), *cert. denied*, 494 U.S. 1090 (1990). The attorney representing Andrew Lee Jones also failed to procure an independent psychiatric examination of his client before trial. Counsel's failure to investigate and present evidence of Jones' mental condition meant that the jury was never apprised of Jones' organic brain damage, history of head injuries, migraine headaches, transient psychotic episodes, borderline retardation, anxiety and depression, and medical history of drug and alcohol abuse. Jones v. Whitley, 938 F.2d 536, 539 (5th Cir.), *cert. denied*, 501 U.S. 1267 (1991). Jones was executed on July 22, 1991. DEATH ROW USA, *supra* note 1, at 8. Robert Wayne Sawyer's trial counsel failed to introduce Sawyer's mental health records or other expert evidence at the penalty phase that would have revealed brain damage and retarded mental development. Sawyer v. Whitley, 112 S. Ct. 2514, 2537 (1992) (Stevens, J., concurring). Sawyer died in the electric chair on March 5, 1993. DEATH ROW USA, *supra* note 1, at 9.

382. The attorneys representing Robert Wayne Williams failed to interview numerous readily available witnesses who could have offered mitigation evidence on his client's behalf, instead relying solely on the testimony of the accused's mother to put this mitigation evidence before the jury. *See* Williams v. Maggio, 679 F.2d 381, 391-92 (5th Cir. Unit A 1982), *cert. denied*, 463 U.S. 1214 (1983). Williams was executed on December 14, 1983. DEATH ROW USA, *supra* note 1, at 6.

383. Marcia Coyle, *Fatal Defense Close-Up: Louisiana, A Triple Whammy Here Foils Justice*, NAT'L L.J., June 11, 1990, at 36, 36.

384. 42 PA. CONS. STAT. § 9711(c)(1)(iv) (1990). If the jury finds the existence of at least one mitigating factor, it must then determine that the aggravating evidence outweighs mitigating evidence before imposing a death sentence. *Id.*

385. Ledewitz, *supra* note 261, at 661 n.55, 667. Those cases were Commonwealth v. Bryant, 574 A.2d 590 (Pa. 1990); Commonwealth v. Tedford, 567 A.2d 610 (Pa. 1989); Commonwealth v. Wallace, 561 A.2d 719 (Pa. 1989); Commonwealth v. Thomas, 561 A.2d 699 (Pa. 1989); Commonwealth v. Logan, 549 A.2d 531 (Pa. 1988); Commonwealth v. Blystone, 549 A.2d 81 (Pa. 1988), *cert. granted, in part*, 489 U.S. 1096 (1989), *aff'd*, 494 U.S. 299 (1990); and Commonwealth v. Appel, 539 A.2d 780 (Pa. 1988). *See* Ledewitz, *supra* note 261, at 661 n.55. In several other cases, preparation for the penalty phase was clearly inadequate. *See, e.g.*, Commonwealth v. Williams, 570 A.2d 75 (Pa. 1990) (attorney argued that defendant's age (18) was a mitigating factor; opinion is silent as to whether other mitigation was introduced). In the *Williams* case, the Pennsylvania Supreme Court showed how undemanding it has been in reviewing the quality of representation received by death row in-

The chronic failure of defense attorneys to present favorable mitigation evidence cannot be facilely attributed to the absence of such evidence. Justice Marshall maintained that "except perhaps in the extraordinary case, counsel's failure even to attempt to give the jury some reason for believing a defendant is not deserving of death denies defendant his Sixth Amendment right to the effective assistance of counsel," and that he had "yet to see that extraordinary case."[386] Indeed, one of the ironies of the modern death penalty is that those who are capable of committing the egregious crimes that would motivate prosecutors to seek the ultimate punishment are precisely those who are likely to have compelling mitigators—people with serious mental disorders, brain damage, or extreme childhood deprivations.

The underlying message delivered by the studies examining indigent defense services and the experts who have observed the administration of the death penalty in the United States is the same: "The quality of counsel makes a difference to the outcome of a criminal case, and there is a relationship between the conduct of professionals and the compensation available to reward them."[387] The repeated failure to defend capital cases at their most vital stage can be directly blamed on resource deprivation. Most attorneys asked to defend capital cases are not familiar enough with capital litigation to appreciate the significance of the penalty phase,[388] and those who do lack the resources to undertake the ex-

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mates during the penalty phases of their trials. The court noted that "trial counsel, on a number of occasions, advised appellant that he should be prepared, in the event of his conviction, to supply counsel with factors about his life that could be seen as mitigating. Appellant failed to provide such information." 570 A.2d at 83. The court found this level of preparation to be constitutionally sufficient. *Id.*

386. Berry v. King, 476 U.S. 1164, 1164 (1986) (Marshall, J., dissenting).

387. Norman Lefstein, *Colloquium on Effective Assistance of Counsel for the Indigent Criminal Defendant: Has the Promise Been Fulfilled? (Keynote Address)*, 14 N.Y.U. REV. L. & SOC. CHANGE 5, 7 (1986). *See also* Bailey v. State, 424 S.E.2d 503, 508 (S.C. 1992) (recognizing that "[t]he link between compensation and the quality of representation remains too clear" (quoting Makemson v. Martin County, 491 So. 2d 1109, 1114 (1986), *cert. denied*, 479 U.S. 1043 (1987))); White v. Board of County Comm'rs, 537 So. 2d 1376, 1380 (Fla. 1989) (noting that "[t]he relationship between an attorney's compensation and the quality of his or her representation cannot be ignored"); Jewell v. Maynard, 383 S.E.2d 536, 544 (W. Va. 1989) (stating "[i]nevitably, economic pressure must adversely affect the manner in which at least some cases are conducted").

388. Many ascribe the chronic failure to present a case of mitigation at the sentencing hearing to a failure to understand either the significance or the dynamics of the penalty phase. Professor White notes that

> many attorneys who represent capital defendants do not understand the significance of the penalty trial. The typical defense attorney has had little or no prior experience in dealing with capital cases . . . . [M]any attorneys do not even begin to prepare for the penalty trial until after their clients have been adjudicated

haustive investigation necessary to effectively develop mitigating evidence.[389]

In sum, every shortcoming in the quality of capital defense—the disproportionate number of incompetent attorneys assigned to death cases, the lack of experience and expertise of defense counsel, the repeated failure of defense attorneys to investigate and present available mitigating evidence—is ultimately rooted in society's unwillingness to pay for a meaningful defense in death penalty cases. This policy decision not to fund indigent defense has directly resulted in the execution of defendants who were never provided the substantive and procedural rights supposedly required by the Constitution.

B. *Socioeconomic Status and Death Sentencing*

In light of the severe underfunding of indigent defense at the initial stages of capital litigation and the consequences of that underfunding discussed above, it is hardly surprising that a high correlation between the socioeconomic status of the accused and the outcome of his trial has been found in several studies. For example, a study by the Texas Judicial Council in the mid-1980s showed that a defendant's chances of being convicted of a capital crime rose by nearly thirty percent if represented by an appointed rather than retained attorney, and the chances of receiving a death sentence rose by twenty-four percent.[390]

A comprehensive empirical study of the operation of the death penalty in Georgia after *Furman* showed that "[a]fter adjustment for all other legitimate case characteristics and the defendant's

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guilty of a capital crime . . . .

WHITE, NINETIES, *supra* note 82, at 76. *See also* Tabak & Lane, *supra* note 18, at 73 (arguing that "[s]ome of the most significant mistakes made by attorneys in capital cases are based on misunderstandings regarding the highly complex bifurcated trial"). This is just a symptom, however, of the resource deprivation afflicting the indigent defense system. Just as defense counsel lack the resources to adequately investigate penalty phase evidence, they are frequently unable, because of economic pressures, to commit the time necessary to master the nuances of capital representation.

389. Tabak & Lane, *supra* note 18, at 70-71.

390. The study indicated that 65% of charged defendants represented by retained counsel were convicted of capital murder while 93% of charged defendants who could not afford their own attorney were convicted of a capital offense. Moreover, 55% of those represented by retained counsel were sentenced to death, as compared to 79% of those represented by appointed counsel. *Id.* at 74 (citing *Factors that Lead to Death Row*, DALLAS TIMES-HERALD, Nov. 17, 1985, at 18, col. 3). Data gathered by David R. Dow indicates that this study understated the problem. Dow, Teague *and Death*, *supra* note 338, at 26-27, 61-72 (reporting data showing that capital defendants represented by court-appointed attorneys are far more likely to be sentenced to death than are those defended by a public defender system).

race, defendants with court-appointed attorneys faced odds of receiving a death sentence that were 2.6 times higher than defendants with retained counsel."[391] Data gathered in that study indicate that the differential treatment of defendants based on their poverty has been exacerbated by the growing complexity of modern capital punishment jurisprudence.[392]

A similarly exhaustive study of the operation of the death penalty in Florida from 1973 through 1977 was designed to identify the factors that explained different outcomes in murder cases in which the prosecutor sought or could have sought the death penalty.[393] The study is one of several that demonstrated that racial biases—and particularly considerations of the race of the victim—have continued to influence capital sentencing decisions in the post-*Furman* era.[394] But the study also revealed another influence on death-sentencing decisions: the poverty of the defendant. In Florida, representation by a court-appointed lawyer or public defender was a stronger predictor of a death sentence than the fact that the defendant killed a white person rather than a black person.[395] Moreover, the fact that the defendant was represented by a court-appointed attorney was as strong a predictor of a death sentence as the existence of any legitimate aggravating circumstance and a stronger predictor than most legally relevant considerations.[396]

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391. BALDUS ET AL., *supra* note 10, at 158.

392. The authors found "no compelling evidence" that Georgia's pre-*Furman* death sentencing system was affected by the socioeconomic status of the defendant. *Id.* at 400. The authors warned that "there [was] little variation in the socioeconomic status" of the defendants charged with capital crimes in the pre-*Furman* era, and that the study's "measures of . . . economic status are far from perfect." *Id.*

393. BOWERS, *supra* note 23.

394. *See supra* notes 24 and 64.

395. BOWERS, *supra* note 23, at 355-56. Among other things, the study used regression coefficients, which measure the strength of the relationship between one variable (for example, the fact that the victim was a police officer) and an outcome variable (for example, whether the defendant is sentenced to death) after controlling for all other variables. The regression coefficients can be compared to determine which variables are the strongest predictors of the outcome. Using black defendants who kill black victims as the reference category, the Florida study found that the regression coefficient measuring the relationship between a white victim and a death sentence was 0.13 (regardless of whether the defendant was white or black), and the regression coefficient for white defendants who kill black victims was -0.17 (indicating that that class was much less likely to receive a death sentence). *Id.* at 354 (Table 10-4). In comparison, using defendants represented by privately retained counsel as the reference category, the study found that the regression coefficient measuring the relationship between representation by a court-appointed attorney and a death sentence was 0.22, and the relationship between representation by a public defender and a death sentence was 0.16. *Id.*

396. *Id.* at 355-56. Controlling for all other factors, and using defendants represented

These studies, while yielding disturbing results, probably tend to *understate* the effect of resource deprivation on the quality of representation provided to the poor. They are based on comparisons between appointed and retained attorneys, and even most retained counsel in capital cases are subject to serious economic constraints. Few defendants or their families can afford to pay in excess of $200,000 to defend a capital case through the direct appeal stage, and, as a consequence, even retained counsel will usually lack the resources to do all that is necessary to assure that the defendant is provided the full measure of procedural and substantive protections guaranteed by the Constitution.[397]

In sum, resource deprivation of defense services for the poor is among the most significant factors influencing the outcome of death penalty cases. As the Executive Director of the Capital Representation Resource Center of Tennessee observed, "[t]he inmates on death row are . . . characterized more by their economic and political powerlessness than by their culpability."[398] Yet, the socioeconomic status of a particular defendant is an extralegal factor that has no legitimate role in determining which offenders should be put to death for their crimes. The influence of this extralegal factor is so pronounced that it calls into question the constitutionality of all death sentences in states with underfunded indigent defense systems.

IV. JUSTIFICATIONS FOR THE STATUS QUO

In a shockingly high percentage of cases, the constitutional guarantees identified in the Supreme Court's capital punishment jurisprudence have been nothing more than an elaborate set of empty promises. Despite the considerable evidence that primary responsibility for this lies with the failure to adequately fund indigent defense, there have been only sporadic and largely inadequate

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by privately retained counsel as the reference category, the study found that being represented by a court-appointed attorney was a significant predictor of being *indicted* for a capital, as opposed to non-capital, crime (with a regression coefficient of 0.17) and among the strongest predictors of a death sentence (with a regression coefficient of 0.22). *Id.* at 343 (Table 10-1), 348, 354 (Table 10-4), 356. In comparison, the only legally relevant factors that were comparably strong predictors of a death sentence—committing the murder in the course of committing another felony, and killing a child who was age 16 or younger—had regression coefficients of 0.23 and 0.20, respectively. *Id.* at 354 (Table 10-4).

397. *See* Redick, *supra* note 18, at 23 (stating "[r]etained representation, when it does occur, is usually financed by family, not the defendant; and retained counsel is almost always underfinanced, either because counsel does not charge enough or the defendant/family can not pay enough").

398. *Id.*

efforts to remedy the injustices of resource deprivation.[399] Indeed, there has been substantial resistance to any changes that will further burden financially strapped state and local governments in order to improve defense services for those charged with capital crimes.[400]

Two chief arguments have been advanced to justify non-action. The first focuses on the availability of collateral post-conviction remedies as a safety valve that identifies unjust death sentences before they are carried out. Since America's criminal justice system gives death row inmates several opportunities to show they are undeserving of the death sentences they have received, the argument goes, at the end of this process only the "truly deserving" will be executed. The second argument focuses on the ethical obligation of practicing attorneys to provide legal representation to the poor without pay. This line of reasoning maintains that providing free indigent defense services in death penalty cases is part of the pro bono obligation of the bar and that the poor quality of representation received by indigent capital defendants ultimately is the fault of the bar, not the states. Upon close examination, neither of these arguments can excuse the failure of the courts to remedy the injustices occasioned by the gross underfunding of defense services in capital cases.

A. *The Illusory "Safety Valve" of Post-Conviction Collateral Proceedings*

Death row inmates typically have two levels of collateral post-conviction review available to them after they have exhausted their direct appeals. In most states, an inmate may file a petition in the state court in which he was convicted and sentenced, seeking whatever relief might be available under the state's post-conviction laws.[401] If relief is denied, the inmate can appeal to the state's ap-

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399. *See infra* part V.A.

400. *See, e.g.*, Gary Taylor, *Texas Death-Penalty Study Hit*, NAT'L L.J., Apr. 26, 1993, at 3, 50 (discussing prosecutor's attack on study calling for increased funding of capital defense in Texas as "a plan to load the system up with so many costs that the death penalty would become unworkable").

401. The Supreme Court has held that the states have no constitutional obligation to provide post-conviction procedures for attacking a verdict and sentence that has been affirmed on direct appeal. *See* Murray v. Giarratano, 492 U.S. 1, 10 (1989) (plurality opinion); Pennsylvania v. Finley, 481 U.S. 551 (1987). Typically, the grounds for relief in state post-conviction are very limited. Except for claims of ineffective assistance of counsel, only the rarest of claims can survive the doctrines of waiver, forfeiture, and issue preclusion that bar substantive review in state post-conviction proceedings. Amsterdam, *supra* note 99, at 17; *see, e.g., Ex parte* Singleton, 548 So. 2d 167 (Ala. 1989) (discussing Alabama's post-conviction rules); Whitmore v. State, 771 S.W.2d 266 (Ark. 1989) (severely limiting availability of

pellate courts.[402] Upon exhaustion of available state post-conviction proceedings, an unsuccessful inmate can file a petition with a federal district court seeking habeas corpus relief from his conviction and sentence.[403] Substantively, federal habeas relief is available to an inmate who can show that his conviction or sentence was obtained in violation of the United States Constitution or federal law.[404]

It is widely believed that these avenues provide ample opportunity for the criminal justice system to remedy any wrongful convictions or death sentences it has produced.[405] This contention is not entirely without historical support. While state post-conviction proceedings have rarely played any role in curing injustices that occurred during an indigent's trial or direct appeal,[406] about sev-

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post-conviction remedies in Arkansas); Clark v. State, 533 So. 2d 1144 (Fla. 1988) (discussing Florida's strict rules barring claims raised for the first time in state post-conviction proceedings); Valenzuela v. Newsome, 325 S.E.2d 370 (Ga. 1985) (discussing Georgia's strict default rule barring most claims in post-conviction); Evans v. State, 441 So. 2d 520, 524 (Miss. 1983) (Robertson, J., dissenting) (noting that Mississippi's procedural default rules are so strict that "[a]ll constitutional claims are . . . precluded from post-conviction review"). Moreover, even when state courts do reach the merits of a post-conviction claim, relief is rarely granted. Professor Anthony Amsterdam has observed that some state judges "are so intractably hostile to federal constitutional rights and locally unpopular criminal defendants that a condemned inmate's pursuit of the theoretically available state post-conviction remedies is a foregone fool's errand." Amsterdam, *supra* note 99, at 17. The numbers support this observation: from 1984 through 1990, post-conviction relief for ineffective assistance of counsel was granted at the state court level only nine times in Florida, twice in Mississippi, once each in Alabama, Louisiana, and Georgia, and not at all in Texas. Marianne Lavelle & Marcia Coyle, *Effective Assistance: Just A Nominal Right?*, NAT'L L.J., June 11, 1990, at 42, 42.

402. Amsterdam, *supra* note 99, at 16.

403. *Id.*

404. 28 U.S.C. § 2254 (1988); *see* Smith v. Phillips, 455 U.S. 209, 221 (1982); Brown v. Allen, 344 U.S. 443 (1953). There is one conspicuous exception to the substantive reach of federal habeas corpus relief: the Supreme Court has removed Fourth Amendment exclusionary rule claims from habeas review altogether. *See* Stone v. Powell, 428 U.S. 465, 466 (1976).

405. *See, e.g.*, State *ex rel.* Stephan v. Smith, 747 P.2d 816, 831 (Kan. 1987) ("Simply because the system *could* result in the appointment of ineffective counsel is not sufficient reason to declare the system unconstitutional; those rare cases where counsel has been ineffective may be handled and determined individually by the appellate courts." (emphasis added)); *see also* Wilson v. State, 574 So. 2d 1338, 1341 (Miss. 1990).

406. Seemingly, the most significant role played by state post-conviction proceedings in the administration of the death penalty is the additional opportunities they provide for forfeiting substantive constitutional claims. Failure to raise claims in state post-conviction proceedings can preclude federal courts from considering them during habeas proceedings. *See* Coleman v. Thompson, 501 U.S. 722 (1991). Frequently, these defaults occur when a death row inmate proceeds (or fails to proceed) without the aid of an attorney during collateral proceedings in state court. An inmate has no constitutional right to the assistance of counsel during such proceedings, Murray v. Giarratano, 492 U.S. 1 (1989) (plurality opinion), and "there is no guarantee that counsel will be appointed to assist a condemned person

enty percent of the federal habeas corpus petitions in death cases decided between 1976 and 1983 resulted in the reversal of the inmate's conviction, sentence, or both.[407] Since 1984, however, the percentage of death row inmates who have obtained habeas corpus relief has dropped precipitously. In the period from 1984 to 1990,

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in bringing a collateral review petition." Goodpaster, *The Trial for Life*, *supra* note 103, at 356. In recent years, the pool of attorneys willing and able to represent death row inmates during post-conviction proceedings has declined at a time when the number of inmates needing representation has increased dramatically. *See generally* ABA Task Force, *supra* note 2; Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513 (1988); McGill, *supra* note 176. *See also* Smothers, *supra* note 256, at A21.

In addition, while state post-conviction proceedings have provided inmates little opportunity for relief from their sentences, they have given the states the opportunity to insulate their death sentences from federal review. For example, for several years the State Attorney General's office in Alabama has followed a practice of submitting lengthy drafts of full opinions (often running 50 pages or more) to trial judges in post-conviction proceedings, which the judges sign with little or no modification. *See, e.g.*, Holladay v. State, 629 So. 2d 673, 687 (Ala. Crim. App. 1993), *cert. denied*, 114 S. Ct. 1208 (1994); Bell v. State, 593 So. 2d 123, 126 (Ala. Crim. App. 1991), *cert. denied*, 112 S. Ct. 2981 (1992); Hubbard v. State, 584 So. 2d 895, 900 (Ala. Crim. App. 1991), *cert. denied*, 502 U.S. 1041 (1992); Weeks v. State, 568 So. 2d 864, 865 (Ala. Crim. App. 1989), *cert. denied*, 498 U.S. 882 (1990). Those opinions invariably contain language designed to procedurally foreclose federal review of the defendant's conviction and sentence. The Mississippi Attorney General has frequently urged the Mississippi Supreme Court to invoke procedural bars, so as to prevent subsequent federal review of the merits of the defendant's claims. *See, e.g.*, Wheat v. Thigpen, 793 F.2d 621, 626 n.5 (5th Cir. 1986), *cert. denied*, 480 U.S. 930 (1987); Evans v. State, 441 So. 2d 520, 531 (Miss. 1983) (Robertson, J., dissenting), *cert. denied*, 467 U.S. 1264 (1984); *see also* Bright, *Counsel for the Poor*, *supra* note 10, at 1873-74.

407. Barefoot v. Estelle, 463 U.S. 880, 915 (1983) (Marshall, J., dissenting). Yet even in this period of close federal supervision of the administration of capital punishment, several death row inmates slipped through the system and were executed despite serious errors of commission and omission by their attorneys during their trials. A few examples of substandard representation received by men who have since been executed were recited above. *See supra* notes 338-52, 361-72 and accompanying text. Other observers have recounted examples that are similar or worse. *See* sources cited *supra* note 337. Even those who ultimately obtained relief in federal court from often abominably unfair trials suffered years of uncertainty and the psychological torment attendant with long confinement on America's death rows before their convictions were overturned.

The most troubling implication of the success death row inmates had in federal habeas proceedings before 1984 is that "[i]n every one of the[] cases [in which habeas corpus relief was granted by a federal court], the inmate's claims had been rejected by a state trial court and by the state's highest court, at least once and often a second time in state post-conviction proceedings." Amsterdam, *supra* note 99, at 51; *see also* WHITE, NINETIES, *supra* note 82, at 22 (arguing that the "astonishingly high" success rate of death row inmates in habeas proceedings before 1987 "indicates that state courts often failed to apply federal law correctly in death penalty cases and, therefore, suggests that the state courts cannot be relied on to protect capital defendants' constitutional protections"). If, as suggested, many state courts have abdicated their role in assuring that the death penalty is administered in accordance with the requirements of the Constitution, the Supreme Court's recent retrenchment in the habeas area is particularly disturbing. *See infra* part IV.A.1.

federal habeas relief for ineffective assistance of counsel—the primary legal theory available to capital defendants under current habeas corpus law—was granted once and denied thirty-one times by the Fifth Circuit, granted once and denied nine times by the Fourth Circuit, and granted fourteen times and denied forty-one times by the Eleventh Circuit.[408]

Several developments in the past decade have dramatically reduced the utility of post-conviction proceedings as a safety valve for the criminal defense system. With the ascent to the federal bench of conservatives sympathetic to public impatience with delays in carrying out death sentences,[409] the federal courts have been increasingly unreceptive to habeas claims, and the scope of federal review has been severely contracted through the erection of imposing procedural barriers to habeas relief. Under these procedural rules, unprepared attorneys who fail to make and preserve objections or neglect to discover or present evidence can forfeit their clients' most compelling defenses and waive their clients' strongest claims. In such cases, often the only recourse for the condemned is a Sixth Amendment ineffective assistance of counsel claim, which has been a difficult claim to sustain since the Supreme Court decided *Strickland v. Washington*[410] in 1984.

1. *Restrictions on the Availability of Habeas Relief.* In recent years, the Supreme Court has retreated steadily from active federal habeas review of state court convictions.[411] Primarily, this

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408. Lavelle & Coyle, *supra* note 401, at 42. Claims of ineffective assistance of counsel were successful eight times and unsuccessful sixteen times in the Seventh, Eighth, Ninth, and Tenth Circuits. *Id.*

409. *See* WHITE, NINETIES, *supra* note 82, at 23-24. Currently, support for the death penalty is considered the "touchstone" for Senate Republican support for federal judicial appointees of President Clinton. Henry J. Reske, *Liberal Detectors: Judicial Nominees Sized Up Based on Death-Penalty Stance*, 80 A.B.A. J., Jan. 1994, at 14.

410. 466 U.S. 668 (1984).

411. This trend, which has accelerated dramatically since the late 1980s, has been the subject of several excellent law review articles. *See, e.g.*, John Blume & William Pratt, *Understanding* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 325 (1991); Markus Dirk Dubber, *Prudence and Substance: How the Supreme Court's New Habeas Retroactivity Doctrine Mirrors and Affects Substantive Constitutional Law*, 30 AM. CRIM. L. REV. 1 (1992); Timothy J. Foley, *The New Arbitrariness: Procedural Default of Federal Habeas Corpus Claims in Capital Cases*, 23 LOY. L.A. L. REV. 193 (1989); Garvey, *supra* note 71; Steven M. Goldstein, *Chipping Away at the Great Writ: Will Death Sentenced Federal Habeas Corpus Petitioners Be Able to Seek and Utilize Changes in the Law?*, 18 N.Y.U. REV. L. & SOC. CHANGE 357 (1991); Bruce S. Ledewitz, *Procedural Default in Death Penalty Cases: Fundamental Miscarriage of Justice and Actual Innocence*, 24 CRIM. L. BULL. 379 (1988); Linda Meyer, *"Nothing We Say Matters":* Teague *and New Rules*, 61 U. CHI. L. REV. 423 (1994); Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303 (1993); Dow, Teague *and Death*, *supra* note 338; Ronald J. Tabak & J. Mark Lane, *Judicial*

retreat has been accomplished through formidable procedural barriers that prevent federal courts from considering the merits of claims raised in habeas petitions.[412] As a general rule, federal courts cannot address claims that were not raised in state court in accordance with state procedural rules ("procedural default");[413] claims that are substantially identical to claims raised and decided in a previous federal habeas corpus petition (the rule against "successive" petitions);[414] or claims that could have been raised but were not in a previous habeas petition (the rule against "abusive" petitions).[415]

Activism and Legislative "Reform" of Federal Habeas Corpus: A Critical Analysis of Recent Developments and Current Proposals, 55 ALB. L. REV. 1 (1991); Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575 (1993); *see also* ABA Task Force, *supra* note 2, at 93-134; Tabak & Lane, *supra* note 18, at 85-89. As this Article has gone to press, Congress is considering further restrictions on habeas relief.

412. In addition to the barriers discussed in the text, the Court has recently held that even if a habeas petitioner is not otherwise procedurally barred from obtaining relief and can show that his substantive constitutional rights were violated, the state can avoid a new trial by satisfying a "harmless error" standard that is less demanding in habeas proceedings than on direct appeal. When an error of constitutional magnitude is made, the state is ordinarily required to show that the error was harmless beyond a reasonable doubt in order to avoid reversal. Chapman v. California, 386 U.S. 18, 24 (1967). For habeas cases, however, the Court has opted for a "less onerous standard" for determining whether a constitutional error was harmless, Brecht v. Abrahamson, 113 S. Ct. 1710, 1722 (1993), looking to whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 1718 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). Under this test, a petitioner cannot obtain habeas relief for most types of constitutional error unless he "can establish that 'actual prejudice' resulted." *Id.* at 1712 (citing United States v. Lane, 474 U.S. 438, 449 (1986)). Justice O'Connor has noted that in adopting a less demanding harmless error standard for habeas proceedings, the Court "tolerat[es] a greater probability that an error with the potential to undermine verdict accuracy was harmful, . . . [and] increases the likelihood that a conviction will be preserved despite an error that actually affected the reliability of the trial." *Id.* at 1730 (O'Connor, J., dissenting). *Contra* John H. Blume & Stephen P. Garvey, *Harmless Error in Federal Habeas Corpus After* Brecht v. Abrahamson, 35 WM. & MARY L. REV. 163, 164 (1993) (concluding that the *Brecht* rule and the *Chapman* rule, "though doubtlessly different, turn out not to be that different").

413. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 728-29, 742 (1991) (holding that claims procedurally barred because petitioner's attorney failed to file an appeal in state collateral proceeding); Murray v. Carrier, 477 U.S. 478 (1986) (barring claims not raised in petitioner's direct appeal because of attorney error); Wainwright v. Sykes, 433 U.S. 72 (1977) (holding that failure to comply with state contemporaneous objection rule forecloses federal habeas review).

414. *See, e.g.*, Sawyer v. Whitley, 112 S. Ct. 2514, 2518 (1992); Kuhlmann v. Wilson, 477 U.S. 436, 444-51 (1986) (plurality opinion).

415. *See, e.g.*, McCleskey v. Zant, 499 U.S. 467, 488-93 (1991). These procedural bars pose a unique problem for attorneys representing death row inmates who at some point express a desire to abandon their appeals and have their sentences carried out. There is a fairly predictable pattern of vacillation "between vigorously pursuing their appeals and resisting all efforts to prevent their executions" exhibited by many defendants who have been sentenced to die, who after all tend to be mentally disturbed in the first place and are

A petitioner can overcome these procedural barriers and obtain review of his claims of constitutional error by showing "cause" for the failure to raise the claims on an earlier occasion and "prejudice" so serious that there is a "substantial likelihood" that the constitutional error led to a different outcome.[416] However, in recent years the "cause and prejudice" standard has been interpreted so restrictively that it has become "virtually insurmountable."[417] "Cause" cannot be established merely by showing that the petitioner's claims were not raised or were forfeited because of the mistakes of the petitioner's attorney,[418] despite the fact that attorney error is the primary reason claims are not properly raised in a timely manner; "prejudice" cannot be established by anything short of a "showing that the prisoner was denied 'fundamental fairness' at trial."[419]

Until recently, one of the ways that "cause and prejudice" could be established in capital cases was to show that "the factual or legal basis for [the] claim was not reasonably available to counsel" at the time of the procedural default.[420] Since the law governing capital punishment has been in a state of flux in the last two decades, with new rulings frequently providing grounds for relief from convictions or sentences obtained in violation of the Con-

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subjected to great psychological pressures while confined on death row. WHITE, NINETIES, *supra* note 82, at 165. An attorney who acquiesces to his or her client's expressed wish not to proceed with appeals, even if that wish is transient, will forfeit the client's ability to have his substantive claims heard in federal habeas proceedings. *See id.* at 164-65. For a discussion of the dilemmas created for defense attorneys by this common pattern of behavior, see *id.* at 165-81.

416. "Cause and prejudice" was established as the primary test for determining whether procedural errors should be excused in *Wainwright*, 433 U.S. at 72, but the Supreme Court did not precisely define the terms "cause" and "prejudice" in that case. In *Murray*, 477 U.S. at 478, the Supreme Court stated that "cause" exists only if there is "some objective factor external to the defense [that] impeded counsel's efforts to comply with the State's procedural rule." *Id.* at 488. For example, "cause" might exist if the factual or legal basis for claim was unavailable at the time of trial, *id.*, although other procedural rules may effectively block claims that were "unavailable" when petitioner's case was pending before the state courts. "Prejudice" requires a showing of "substantial likelihood" that the constitutional error led to a different outcome. *See, e.g.*, United States v. Frady, 456 U.S. 152, 174 (1982). Petitioner "must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 170.

417. Denno, *supra* note 49, at 464 (quoting Mark Hansen, *Final Justice: Limiting Death Row Appeals*, 78 A.B.A. J., Mar. 1992, at 67).

418. *Murray*, 477 U.S. at 488.

419. *Id.* at 494.

420. *Id.* at 488 (citing Reed v. Ross, 468 U.S. 1, 16 (1984)); *see also* McCleskey v. Zant, 499 U.S. 467, 493 (1991).

stitution, this was an important exception to the Supreme Court's harsh default rules. In *Teague v. Lane*,[421] however, the Court sharply curtailed the availability of this exception by largely precluding retroactive application of "new" rules of constitutional law.[422] Under this "nonretroactivity principle," a federal court is in most cases prevented "from granting habeas corpus relief to a state prisoner based on a rule announced after his conviction and sentence became final."[423] A "new rule" is defined broadly as one that "was not *dictated* by precedent existing at the time the defendant's conviction became final."[424] This standard invites federal courts to find that virtually any holding in a case decided after a petitioner has exhausted his direct appeals is a "new rule" that cannot be applied retroactively.[425]

If the habeas petitioner fails to establish cause and prejudice, a federal court can reach the merits of a constitutional claim otherwise procedurally barred only if failure to do so would result in a "miscarriage of justice."[426] But this standard is also nearly impossible to meet. Recent decisions have limited this exception to cases in which the petitioner can establish by probative evidence that

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421. 489 U.S. 288 (1989).

422. *Id.* at 301 (plurality opinion).

423. Caspari v. Bohlen, 114 S. Ct. 948, 953 (1994).

424. *Teague*, 489 U.S. at 301 (plurality opinion). In order to divine whether a particular rule is a "new rule" within the meaning of *Teague*, the federal court presented with the habeas claim must first determine the date on which the defendant's conviction and sentence "became final for *Teague* purposes." *Caspari*, 114 S. Ct. at 953. The court must then " '[s]urve[y] the legal landscape' " as it existed as of that date, and " 'determine whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution.' " *Id.* (citations omitted).

425. There are only two narrow exceptions to the non-retroactivity principle of *Teague*. First, cases that announce a "new rule" prohibiting states from punishing certain conduct under any circumstances can be applied retroactively. This exception is for rulings that place " 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.' " *Teague*, 489 U.S. at 307 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971)). This is a very limited; if *Teague* had been the law in the 1960s, this exception might have applied if the state tried to criminalize one's involuntary status as a drug addict, *see* Robinson v. California, 370 U.S. 660 (1962), or the distribution of contraceptives, *see* Griswold v. Connecticut, 381 U.S. 479 (1965). The second exception is for cases that announce " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." Saffle v. Parks, 494 U.S. 484, 495 (1990) (quoting *Teague*, 489 U.S. at 311).

426. Sawyer v. Whitley, 112 S. Ct. 2514, 2515 (1992). In *Wainwright v. Sykes*, the Court expressly noted that the "cause and prejudice" standard did not "prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication [would] be the victim of a miscarriage of justice." 433 U.S. 72, 91 (1977).

"he has a colorable claim of factual innocence."[427] Further, the Court has drastically restricted a petitioner's opportunity to present evidence supporting a claim of factual innocence in federal court[428] and has foreclosed altogether the use of the "miscarriage of justice" exception in cases in which death row inmates wish to challenge errors that occurred during the penalty phases of their trials.[429]

For indigents sentenced to death after a trial in which they were denied a meaningful defense because of resource deprivation, these developments in habeas corpus law have serious practical consequences. Under the Court's current habeas jurisprudence, defense attorneys are expected to adhere to labyrinthine procedural rules, identify and present all claims of error early and often, and anticipate "new rules" in a highly volatile area of the law. There are innumerable occasions for unprepared or unseasoned defense attorneys to forfeit even vital rights guaranteed their clients, particularly during the penalty phase, and experience teaches that such forfeitures regularly occur. The sorts of attorney errors most frequently associated with the underfunding of defense services—those caused by a lack of familiarity with the procedural and substantive rules applicable in capital cases or those associated with the failure to properly prepare for the penalty phase—will not excuse the procedural forfeiture of claims. The only recourse for the condemned in such cases is a claim that the attorney was ineffective within the meaning of the Sixth Amend-

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427. Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) ("miscarriage of justice" standard as applied to successive claims); *see also* Murray v. Carrier, 477 U.S. 478, 496 (1986) ("miscarriage of justice" standard as applied to procedurally defaulted claims).

428. Keeney v. Tamayo-Reyes, 112 S. Ct. 1715, 1719 (1992) (indicating that in order to claim right to opportunity to present new evidence supporting a constitutional claim in federal court, petitioner must show "cause and prejudice" to excuse failure to present evidentiary basis for claim in state-court proceedings). The Court has held petitioners presenting new evidence of actual innocence to an "extraordinarily high" burden of proof. Herrera v. Collins, 113 S. Ct. 853, 869 (1993) (stating that if the claim is one of actual innocence, and the evidence supporting that claim has not been presented before, the evidence of innocence must be "truly persuasive," and the burden placed on the petitioner to show that the newly-discovered evidence establishes the petitioner's innocence is "extraordinarily high"). Although the Court did not ultimately resolve the question, there is substantial language in *Herrera* suggesting that a claim that newly-discovered evidence of the petitioner's innocence cannot be raised in federal habeas proceedings at all. *See id.* at 859-69.

429. For those sentenced to death, "to show 'actual innocence' one must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Keeney*, 112 S. Ct. at 2517. Courts can only look to the petitioner's *eligibility* for the death penalty; federal courts cannot consider "additional mitigating evidence which was prevented from being introduced as a result of a claimed constitutional error." *Id.* at 2523; *see also id.* at 2531-33.

ment. As is explained in the next section, even in cases of the most egregious errors of counsel, ineffective assistance claims promise little hope for those facing execution.

2. *The Ineffective Assistance of Counsel Standard and the Shift in the Burden of Proof.* Stephen B. Bright, the director of the Southern Prisoners Defense Committee, has observed that "[e]veryone always thinks errors are going to be reversed for ineffective assistance of counsel. What people don't realize is that the standard has come down, down, down . . . ."[430] This trend accelerated after 1984, when the Supreme Court articulated its test for determining whether a criminal defendant has received effective assistance of counsel, as required by the Sixth Amendment.[431] In *Strickland v. Washington*,[432] the Court held that errors of a defendant's attorney rise to the level of a constitutional deprivation only if the defendant establishes that (1) the attorney's performance was constitutionally "deficient," and (2) this deficient performance resulted in "prejudice."[433] Even serious errors will not render a lawyer's performance constitutionally deficient unless they undermine the reliability of the outcome of the trial.[434] Moreover, the courts apply a strong presumption of competency,[435] with

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430. Lavelle & Coyle, *supra* note 401, at 42.

431. The Court has long recognized that a criminal defendant's Sixth Amendment right to counsel subsumes within it a right to "effective assistance" of counsel at all critical stages of a criminal proceeding. *See, e.g.*, McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). The Court has reasoned that the purpose of the Sixth Amendment is "to protect the fundamental right to a fair trial," Strickland v. Washington, 466 U.S. 668, 684 (1984), and that this purpose is served if the prosecution's case has been tested by a truly adversarial trial. *Id.* at 684-87; *see also* Kimmelman v. Morrison, 477 U.S. 365, 374 (1986) (explaining that "[t]he essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect"); United States v. Cronic, 466 U.S. 648, 655-57 (1984) (stating that the test for determining whether defendant has received constitutionally acceptable legal representation is designed to assure that defendant's trial retains "its character as a confrontation between adversaries"). For a summary of the evolution of the Supreme Court's right to counsel jurisprudence, see Kendrick, *supra* note 325, at 390-93 and Mounts, *Public Defender Programs*, *supra* note 213, at 476-81.

432. 466 U.S. 668 (1984).

433. *Id.* at 687; *see also* Lockhart v. Fretwell, 113 S. Ct. 838, 842 (1993).

434. *See Cronic*, 466 U.S. at 656 (holding that the Sixth Amendment is not violated if "a true adversarial criminal trial has been conducted," even if defense attorney makes "demonstrable errors").

435. *Strickland*, 466 U.S. at 696. Under this prong of the *Strickland* test, a defense lawyer's errors will not rise to the level of a violation of the right to counsel unless the lawyer's performance as a whole falls outside the "wide range of reasonable professional assistance." *Id.* at 689. *Strickland* requires courts to "judge . . . counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690.

an attorney's "strategic decisions" entitled to substantial deference.[436] If the petitioner can overcome this presumption, he must establish that he was prejudiced; that is, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,"[437] *and* that this fact rendered the proceeding fundamentally unfair.[438]

In practice, this has been a difficult test to satisfy,[439] as is suggested by an examination of the cases of inmates who have been executed despite absurd errors by their attorneys at trial or the complete failure of their attorneys to investigate wide categories of mitigating evidence.[440] Data show a substantial drop in findings of ineffective assistance of counsel in capital cases over the past decade.[441] Lower courts have applied the *Strickland* standard much more restrictively than the language of the case necessarily requires, attributing critical errors to counsel's trial "strategy" and finding "strategic decisions" to be virtually unassailable.[442] The ex-

436. *Id.* at 689.

437. *Id.* at 694. *Strickland* indicates that counsel's errors must undermine confidence in the outcome of the trial. *Id.* Language in a recent Supreme Court decision has suggested that a court's prejudice inquiry should go beyond *Strickland*'s focus on outcome determination, seemingly requiring the defendant to "point to some *additional* indicia" that the result of the defendant's trial was fundamentally unfair or unreliable. *Lockhart*, 113 S. Ct. at 848 (Stevens, J., dissenting). In *Lockhart*, the Supreme Court refused to set aside a conviction and sentence of death under the Sixth Amendment notwithstanding the state's concession that defense counsel's performance was deficient, and the defendant's demonstration that if not for counsel's deficient performance, "the outcome would have been different." *Id.* at 842 & n.1. In that case, the defense attorney had failed to raise a challenge to the applicability of a statutory aggravating circumstance that would have been successful under the controlling authority of the Eighth Circuit at the time of the defendant's trial. The reasoning underlying these Eighth Circuit cases was subsequently rejected by the Supreme Court, *see* Lowenfield v. Phelps, 484 U.S. 231 (1988), after the defendant's trial but before the defendant raised an ineffectiveness claim during habeas. The Court held that in determining whether the defendant was "prejudiced" within the meaning of *Strickland*, the reviewing court "may not consider the effect of an objection it knows to be wholly meritless under current governing law, even if the objection might have been considered meritorious at the time of its omission." *Lockhart*, 113 S. Ct. at 845 (O'Connor, J., concurring).

438. *Lockhart*, 113 S. Ct. at 841.

439. *See, e.g.*, Goodpaster, *Adversary System*, *supra* note 103, at 78 (arguing that in order to obtain relief from a death sentence, defendant must prove that but for failure to present mitigation in the first place, he would not have been sentenced to death, a "burden [that] can be insurmountable, even in the most meritorious of cases," in light of "the strong presumptions in favor of attorney competence and the reliability of trial results"); Stone, *supra* note 215, at 208-09 (stating that the *Strickland* standard "has proved to be extremely difficult to meet, particularly for indigent defendants").

440. *See supra* notes 338-52, 361-72 and accompanying text.

441. *See supra* notes 405-08 and accompanying text.

442. *See* Bright, *Counsel for the Poor*, *supra* note 10, at 1858; Fong, *supra* note 103, at 475-80. An all-too-typical example of this approach is Romero v. Lynaugh, 884 F.2d 871 (5th Cir. 1989), where the defense attorney failed to introduce any mitigating evidence at the

treme deference afforded the decisions of defense counsel is captured in an oft-quoted remark of the vice-president of the Georgia Trial Lawyers Association, who described the standard for competence in Georgia as the "mirror test": "You put a mirror under the court-appointed attorney's nose, and if the mirror clouds up, that's adequate counsel."[443] Courts have been loathe to find even the most appalling attorney errors to be the basis for a new trial for several reasons: concern that a finding of ineffectiveness would result in a disciplinary action against the defense attorney, even though the attorney's errors are often the result of the unreasonable burdens placed upon him or her by the justice system;[444] fear that members of the bar would refuse appointments if their representation were subject to close scrutiny;[445] and concern for the finality of criminal judgments.[446]

For indigent defendants charged with capital crimes, the *Strickland* decision has been particularly disastrous. Language in the *Strickland* opinion suggests that the deprivation of resources necessary to prepare a meaningful defense is a factor mitigating *against* a finding that the defendant was afforded ineffective assistance of counsel. In judging the performance of defense attorneys, courts are instructed to take into account "[l]imitations of time and money . . . [which] may force early strategic choices, often based solely on conversations with the defendant and a review of the prosecutor's evidence."[447] *Strickland* seems to take the "circumstantial constraints of time, money, and clients' initial stories as givens which the defense attorney has neither the responsibility nor the capacity to change."[448] Moreover, in applying the *Strickland* test, lower courts have tended to focus their attention on er-

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penalty phase of his client's trial and offered a 29-word closing argument. *Id.* at 875. The Fifth Circuit characterized the attorney's approach as a "dramatic ploy," and found that the attorney's performance was not constitutionally deficient. *Id.* at 877; Klein, *Emperor* Gideon, *supra* note 213, at 634.

443. Stephen B. Bright et al., *Keeping* Gideon *From Being Blown Away: Prospective Challenges to Inadequate Representation May Be Our Best Hope*, 4 CRIM. JUST., Winter 1990, at 10, 11.

444. *See* Richard Klein, *Legal Malpractice, Professional Discipline, and Representation of the Indigent Defendant*, 61 TEMP. L. REV. 1171, 1174-90 (1988) [hereinafter Klein, *Legal Malpractice*].

445. *See* Stone, *supra* note 215, at 209.

446. *See id.*

447. Strickland v. Washington, 466 U.S. 668, 681 (1984); *see also* Rogers v. Zant, 13 F.3d 384, 386-88 (11th Cir.) (maintaining that " 'strategy' can include a decision not to investigate," and "[o]nce we conclude that declining to investigate further was a reasonable act, we do not look to see what a further investigation would have produced"), *cert. denied*, 115 S. Ct. 255 (1994).

448. Goodpaster, *Adversary System*, *supra* note 103, at 77-78.

rors of commission rather than errors of omission,[449] largely because it is difficult for reviewing courts to discern the prejudicial effects of errors of omission.[450] When defense attorneys are not provided sufficient resources or sufficient time to properly prepare for a capital case, however, "the defects in representation are more likely to be in what is *not* done rather than what *is* done."[451]

The *nature* of the sentencing decision in a capital case is not easily susceptible to after-the-fact prejudice analysis. The most common deficiency of defense attorneys in death cases is the failure to adequately investigate and present mitigating evidence and rebut aggravating evidence. During post-conviction proceedings, courts are often presented with substantial evidence that could have been offered at trial and asked to determine whether the proffered evidence would have changed a jury's "reasoned moral response" to the defendant and the circumstances surrounding his crime.[452] Yet such a question is not susceptible to resolution by some divine formula. There is no way to know what weight the jury accorded the evidence of aggravation and mitigation it heard at trial, much less to know how that calculus might have been affected if the balance of evidence presented during the penalty phase had been different.[453] Determining whether the jury might have found additional evidence sufficient to shift the balance away

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449. *See, e.g.*, Citron, *supra* note 215, at 487 (stating that "[b]y requiring the defendant to demonstrate that the ineffectiveness of counsel was prejudicial, the *Strickland* criteria tend to focus on errors of commission"); Stone, *supra* note 215, at 208-09 (stating that "the failure of defense counsel to conduct an investigation into plausible lines of defense may not be reflected as prejudice").

450. *See* Holloway v. Arkansas, 435 U.S. 475, 490 (1978) (referring to difficulty of proving prejudice when "the evil . . . is in what the advocate finds himself compelled to refrain from doing"); State v. Smith, 681 P.2d 1374, 1381 (Ariz. 1984) (noting that "[t]he insidiousness of overburdening defense counsel is that it can result in concealing from the courts, and particularly the appellate courts, the nature and extent of damage that is done to defendants by their attorneys' excessive caseloads"); Mounts, *The Right to Counsel*, *supra* note 287, at 234 (pointing out that "[w]hen errors are of omission rather than commission, it is often difficult for courts to see the effect").

451. Mounts, *The Right to Counsel*, *supra* note 287, at 222; *see also* Citron, *supra* note 215, at 487 (stating that "especially with overworked defense attorneys, ineffective assistance more often results from an attorney's errors of omission").

452. Goodpaster, *Adversary System*, *supra* note 103, at 83-84. To establish prejudice during the penalty phase of a capital trial, the petitioner must show "a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland v. Washington, 466 U.S. 668, 695 (1984).

453. *See* Gredd, *supra* note 88, at 1567; Lavelle & Coyle, *supra* note 401, at 42 (stating that "it is difficult to distinguish whether a jury reached a verdict because of its reaction to the heinous circumstances of a capital murder or because defense counsel failed to do his or her job").

from death and toward a life sentence is a highly speculative enterprise.[454]

Moreover, a jury's "reasoned moral response" to evidence is not strictly logical: "The decision may turn as much, or more, on the emotional, moral, or sympathetic content of evidence and argument" than on the factual content of the information provided to the jury.[455] *Strickland*'s prejudice test undervalues such intangible considerations,[456] however, and habeas courts must ponder the effect that a change in the balance of mitigating and aggravating evidence might have had on the jury's life and death decision in the context of a legal proceeding that is "disengaged from the living context of the capital trial."[457] The Supreme Court itself has acknowledged as much:

> Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record. This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed "[those] compassionate or mitigating factors stemming from the diverse frailties of humankind." When we held that a defendant has a constitutional right to the consideration of such factors, we clearly envisioned that that consideration would occur among sentencers who were present to hear the evidence and arguments and see the witnesses.[458]

This vision has been lost in a system that withholds the resources necessary to develop and present relevant mitigating evidence at trial, and devalues the importance of such evidence under an inef-

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454. *See* Fong, *supra* note 103, at 487 (stating that "[a]s the *Strickland* progeny demonstrate, . . . the prejudice standard requires a reviewing court to speculate as to whether the sentencer might have found the available evidence sufficient to mitigate a sentence of death"); Gredd, *supra* note 88, at 1567-68 ("The result of the balancing is known to the reviewing court but not the particular means by which that result was achieved. Consequently, any attempt to determine the likelihood that additional elements would have altered that balance necessarily is speculative." (footnote omitted)).

455. Goodpaster, *Adversary System*, *supra* note 103, at 84.

456. *Id.* (arguing that "[t]he prejudice test undervalues these intangible but important factors in capital sentencing and thereby misses the significance of certain possible attorney derelictions in capital cases").

457. *Id.*; *see also* Gredd, *supra* note 88, at 1568:

> The task [faced by a habeas court] is made all the more speculative by the nature of the evidence to be evaluated. The determination of the weight to be given to character, background, emotional state, or "expressions of sincerity" involve subtle assessments of credibility that are likely to hinge on the particular amount and mix of evidence presented. Identifying the effect that a change in the mix would have had cannot be easy. The risk of error is great.

Id. (footnotes omitted).

458. Caldwell v. Mississippi, 472 U.S. 320, 330-31 (1985) (alteration in original) (citations omitted).

fective assistance of counsel test that "focus[es] on the intellectual content of the mitigating evidence and not the emotional and psychological responses stimulated by live witnesses, which incline a sentencer's decision one way or another."[459]

Finally, and perhaps most fundamentally, the combination of resource deprivation at trial and *Strickland*'s prejudice requirement in post-conviction proceedings has had the effect of shifting the burden of proof on the most important issues of the trial from the state to the defendant. For example, all capital punishment schemes place upon the prosecution the evidentiary burden of showing that the balance of aggravating and mitigating factors justifies imposition of the death penalty. Because of resource deprivation, however, the defense attorney virtually disappears during the penalty phase, immeasurably lightening the state's burden of establishing the propriety of a death sentence.[460] For countless defendants, the first time significant mitigating evidence is presented is during habeas proceedings, in the context of an ineffective assistance of counsel claim. At this stage, the onus is on the defendant to show that this evidence would have caused the jury to "conclude[] that the balance of aggravating and mitigating circumstances did not warrant death."[461] Effectively, the burden of proof regarding the appropriate sentence shifts from the state to the defendant, with the presumption favoring a life sentence becoming a presumption of death.[462]

In sum, several legal developments of the past decade have largely removed the federal courts from active supervision of the operation of the death penalty in the United States.[463] Case by

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459. Goodpaster, *Adversary System*, *supra* note 103, at 84.

460. The state's burden is most substantially eased by the failure of the defense attorney to provide the jury with significant mitigating evidence to weigh against the evidence of aggravation offered by the state. Less obviously, resource limitations can affect the ability of the defense to challenge the state's evidence of aggravation. Moreover, the greater the degree to which a defense attorney is unfamiliar with the substantive and procedural rules governing penalty trials (also a consequence of resource deprivation), the greater the chances that the state will benefit from a legal ruling or the wording of a jury instruction that it would not have won if a fully prepared attorney was representing the defendant.

461. Strickland v. Washington, 466 U.S. 668, 695 (1984).

462. *See* Tabak, *Death of Fairness*, *supra* note 4, at 842 (stating that the *Strickland* prejudice test "places on the defendant, rather than the State, the burden of proving the effect of the unconstitutionality"); *see also* Goodpaster, *The Trial for Life*, *supra* note 103, at 346 (requiring an ineffective assistance claimant to show that a constitutional error was harmful shifts a burden ordinarily placed on the government to the claimant).

463. This retreat from active federal overview of capital punishment appears to have been an important factor in Justice Blackmun's ultimate conclusion that the death penalty could not be administered fairly and reliably. *See* Callins v. Collins, 114 S. Ct. 1127, 1129 (1994) (Blackmun, J., dissenting). Two terms before his dissent in *Callins*, Justice Black-

case habeas review cannot be counted on as a safety valve for the injustices that result from inadequately funded capital defense systems.

B. *Pro Bono Obligations and Ethical Dilemmas*

Until recently, most legal challenges to inadequately funded indigent defense systems were rejected on the theory that defending the poor for little or no pay was a professional obligation of the bar. As "officers of the court," the argument goes, attorneys have an obligation to render service to the poor when called upon to do so by the courts.[464] Moreover, attorneys accept their licenses to

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mun observed that "[m]y ability . . . to enforce, notwithstanding my own deep moral reservations, a legislature's considered judgment that capital punishment is an appropriate sanction, has always rested on an understanding that certain procedural safeguards . . . would ensure that death sentences are fairly imposed." Sawyer v. Whitley, 112 S. Ct. 2514, 2529 (1992) (Blackmun, J., concurring in the judgment).

> As I review the state of this Court's capital jurisprudence, I thus am left to wonder how the ever-shrinking authority of the federal courts to reach and redress constitutional errors affects the legitimacy of the death penalty itself. Since *Gregg v. Georgia*, the Court has upheld the constitutionality of the death penalty where sufficient procedural safeguards exist to ensure that the State's administration of the penalty is neither arbitrary nor capricious. At the time those decisions issued, federal courts possessed much broader authority than they do today to address claims of constitutional error on habeas review and, therefore, to examine the adequacy of a State's capital scheme and the fairness and reliability of its decision to impose the death penalty in a particular case. The more the Court constrains the federal courts' power to reach the constitutional claims of those sentenced to death, the more the Court undermines the very legitimacy of capital punishment itself.

Id. at 2529-30 (citations omitted).

464. *See, e.g.*, Makemson v. Martin County, 479 U.S. 1043, 1045 (1987) (White, J., dissenting from denial of certiorari) ("I discern nothing in the Sixth Amendment that would prohibit a State from requiring its lawyers to represent indigent criminal defendants without *any* compensation for their services at all."); Powell v. Alabama, 287 U.S. 45, 73 (1932) ("Attorneys are officers of the court, and are bound to render service when required by such appointment." (dictum)); People *ex rel.* Karlin v. Culkin, 162 N.E. 487, 489 (N.Y. 1928) (Cardozo, C.J.) (" 'Membership in the bar is a privilege burdened with conditions' . . . . [The attorney] became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice." (citation omitted)); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 334 (2d ed. 1871) (stating that the "humanity of the law" has provided for the public appointment of counsel for indigent defendants and "it is a duty which counsel so designated owes to his profession, . . . and to the cause of humanity and justice, not to withhold nor spare his best exertions"); *see also* Jackson v. State, 413 P.2d 488 (Alaska 1966), *overruled in part by* De Lisio v. Alaska Superior Ct., 740 P.2d 437 (1987); Weiner v. Fulton County, 148 S.E.2d 143 (Ga. Ct. App.), *cert. denied*, 385 U.S. 958 (1966); Madden v. Township of Delran, 601 A.2d 211 (N.J. 1992); State v. Rush, 217 A.2d 441 (N.J. 1966), *superceded by statute*; State v. Lynch, 796 P.2d 1150, 1173-74 (Okla. 1990) (Simms J., dissenting); Kendrick, *supra* note 325, at 395. In the past, courts have found support for

practice law with the knowledge that they may be asked to represent the indigent without pay, and impliedly consent to do so if asked.[465] Under this view, states may permissibly ask the legal profession to effectively fund most of the cost of indigent representation in criminal cases by requiring individual attorneys to render services at artificially low levels of compensation.[466] Any shortcomings in the quality of indigent defense are attributed not to the actions of the states in failing to adequately fund defense services but rather to the failure of attorneys to meet their ethical responsibilities. Courts were unwilling to acknowledge that the resources available to a defense lawyer could affect the quality of representation rendered, regarding any such suggestion as "offensive to professional ideals."[467]

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imposing this obligation on the bar from the traditions of the English barristry. *See, e.g.*, Sparks v. Parker, 368 So. 2d 528, 532 (Ala.), *appeal dismissed*, 444 U.S. 803 (1979). The historical basis for imposing this obligation has been effectively debunked. *See generally* Arnold v. Kemp, 813 S.W.2d 770, 773 (Ark. 1991), *appeal after remand*, State v. Independence County, 850 S.W.2d 842 (Ark. 1993); David L. Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735 (1980). Nonetheless, while one can question the historical pedigree of this tradition, the image of the unpaid lawyer defending the poor has become an integral part of the folklore of the American legal profession, taking on a life independent of any imagined historical antecedent.

465. Kendrick, *supra* note 325, at 395-96; *see also* Dolan v. United States, 351 F.2d 671 (5th Cir. 1965); United States v. Dillon, 346 F.2d 633, 635 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966); *In re* Nine Applications for Appointment of Counsel, 475 F. Supp. 87 (N.D. Ala. 1979), *vacated*, 646 F.2d 203 (5th Cir. 1981); Warner v. State, 400 S.W.2d 209, 211 (Ky.), *cert. denied*, 385 U.S. 858 (1966); State v. Clifton, 172 So. 2d 657, 667 (La. 1965); Brown v. Board of County Comm'rs, 451 P.2d 708, 709 (Nev. 1969); Scott v. State, 392 S.W.2d 681 (Tenn. 1965).

466. *See generally* Anderson, *supra* note 217 (rejecting constitutional challenges to underfunded indigent defense systems and arguing that legal profession should address problem of indigent representation by increasing its pro bono commitment).

467. Richard J. Wilson, *Litigative Approaches to Enforcing the Right to Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 203, 206 (1986); *see also Sparks*, 368 So. 2d at 530 (an attorney's "sense of duty and . . . pride" will assure that defendant will receive adequate representation); State v. Rush, 217 A.2d 441, 444-45 (N.J. 1966) (same).

The government has not been so quick to downplay the "commercial" character of an attorney's work and stress the "service" attributes of the legal profession when it has not suited its purposes. A prime example is the government's response to the efforts of the Superior Court Trial Lawyers Association (SCTLA) of Washington. D.C. to improve the system of compensation for indigent defense work in the District of Columbia. In 1983, the attorneys most frequently appointed to do indigent criminal defense work in Washington, D.C. (most of whom were members of SCTLA) "went on strike," refusing to accept new appointments in protest of statutory hourly rates of $30 per hour for in-court time and $20 per hour for out-of-court work and fee caps that only went as high as $1000 for felony cases. *See* Klein, *The Eleventh Commandment*, *supra* note 217, at 375-89. The strike resulted in the authorization of higher fees by the District of Columbia City Council, but also attracted the attention of the Federal Trade Commission (FTC), which filed an antitrust lawsuit

The first thing one notices about this argument is that it is most frequently made by judges and law professors who have steady jobs and comfortable salaries, and who are unlikely to be called upon to defend capital cases. No doubt, the legal profession should encourage its members to provide indigents with free representation.[468] But requiring an attorney to work hundreds or thousands of hours without pay and to subsidize the cost of expert assistance "is beyond the wildest dreams of even the most impassioned advocates of pro bono service."[469] It is unrealistic to expect individual practitioners to expend the resources necessary to properly defend a death penalty case, and it should be no surprise to find that they rarely commit the time and resources necessary to assure that their clients' rights are respected.[470]

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against SCTLA, charging illegal price fixing. *Id.* at 379-89. The FTC claimed that the attorneys were sellers of a product (their representation of indigent defendants) who acted to coerce the buyer (the government of the District of Columbia) to pay higher prices for their services. *Id.* at 380-81. In justifying its action, the Commissioners emphasized the commercial (as opposed to "professional") aspect of the attorneys' work: "A lawyer who provides legal representation for an indigent defendant also provides a service, and the exchange of this service for money is also commerce." *In re* Superior Court Trial Lawyers Ass'n, 107 F.T.C. 510, 574 (1986); *see* Klein, *The Eleventh Commandment*, *supra* note 217, at 382. Ultimately, the Supreme Court validated the FTC's position, finding that SCTLA's "strike" was an economic boycott that violated the antitrust laws. FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 426, 436 (1990). Thus, when it served the government's interest—in this case, limiting the amount paid for indigent defense services—the "professional" attributes of the legal profession were deemphasized and the "commercial" character of the work of attorneys became paramount. When necessary to justify efforts to shift the financial burden of indigent defense to individual members of the bar, however, the "professional" obligations of the bar are invoked. Klein, *Eleventh Commandment*, *supra* note 217, at 386-89.

468. Both the American Bar Association's Model Rules of Professional Conduct and Code of Professional Responsibility indicate that attorneys have a professional obligation to accept court appointments to represent the poor. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-29 (1980).

469. Vreeland, *supra* note 33, at 653.

470. In recent years, courts have been more willing to acknowledge this. *See, e.g.*, White v. Board of County Comm'rs, 537 So. 2d 1376, 1380 (Fla. 1989) (stating that "[t]he relationship between an attorney's compensation and the quality of representation can not be ignored"); Jewell v. Maynard, 383 S.E.2d 536, 544 (W. Va. 1989) (recognizing that "[i]t is unrealistic to expect *all* appointed counsel with office bills to pay and families to support to remain insulated from the economic reality of losing money each hour they work"); *see also* Martínez-Macías v. Collins, 979 F.2d 1067, 1067 (5th Cir. 1992) ("The state paid defense counsel $11.84 per hour. Unfortunately, the justice system got only what it paid for."); *cf.* Ferri v. Ackerman, 444 U.S. 193, 199 (1979) (noting that federal government provided compensation for appointed counsel through Criminal Justice Act of 1964 "[i]n response to evidence that unpaid appointed counsel were sometimes less diligent or less thorough than retained counsel"). Reliance on romantic notions of volunteerism is particularly absurd given that the burden of capital representation falls on a relatively small percentage of the bar. The workload typically falls on a small class of criminal defense lawyers from sole practices or from small law firms with limited economic resources. *See, e.g.*, Anderson, *supra*

Further, the invocation of the bar's pro bono obligation as a justification for inadequate funding for defense services confuses the rights of defendants with the ethical obligations of attorneys,[471] and it tends to obscure the fact that providing adequate defense services is ultimately the obligation of the states, not the bar.[472] Adequately funded indigent defense is part of the price of a just and efficient criminal justice system, "a cost properly borne by the society that created it and benefits from it."[473] Often, rhetorical reliance on the pro bono traditions of the legal profession is little more than a disguised effort to shift primary responsibility for indigent defense away from state and local governments to a small segment of the criminal defense bar.[474]

One of the ironies of this reliance on the ethical obligations of the bar is that forcing a defense lawyer to work without adequate resources in developing a meaningful defense in a capital case actually forces that lawyer to violate other ethical tenets governing the legal profession.[475] As compelling as an attorney's pro bono obligation is the duty to refuse to represent a client in a matter unless the attorney possesses the "knowledge, skill, thoroughness and preparation necessary for the representation."[476] Moreover, an at-

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note 217, at 505; LEFSTEIN, CRIMINAL DEFENSE SERVICES, *supra* note 213, at 18; *see also* Vreeland, *supra* note 33, at 653 (stating that "[c]ompelled criminal pro bono service would either conscript unqualified counsel or impose an overwhelming burden on a small segment of the bar").

471. Wilson, *supra* note 467, at 206.

472. *See, e.g.*, State *ex rel.* Stephan v. Smith, 747 P.2d 816, 835-37, 841-42 (Kan. 1987) (noting that, notwithstanding attorneys' ethical obligations, the legal obligation to provide effective assistance of counsel rests with the state); Wilson v. State, 574 So. 2d 1338, 1342 (Miss. 1990) (Robertson, J., concurring) (same); State v. Robinson, 465 A.2d 1214, 1217 (N.H. 1983) (noting that the public has responsibility to pay for administration of criminal justice, and that responsibility cannot be shifted to the bar); Jewell v. Maynard, 383 S.E.2d 536, 544 (W. Va. 1989) (same); *see also* Vreeland, *supra* note 33, at 653 (asserting that "[t]he state, not the bar, ultimately owes the criminally accused meaningful assistance of counsel").

473. Vreeland, *supra* note 33, at 651.

474. One could argue that while it is unfair to burden a small segment of the legal profession with the cost of indigent defense in capital cases, if that cost were borne equally by the entire profession, the states' practice of passing the cost of indigent defense onto the bar would be more defensible. *Cf.* Klein, *Emperor* Gideon, *supra* note 213, at 681-89 (suggesting that the legal profession raise money, through lawyer registration fees or other means, to fund improvements in indigent defense system). Accepting the premise (which would be disputed by many) that it is reasonable to impose the cost of a service that benefits society as a whole on a discrete segment of that society (the legal profession), it bears noting that if the bar did assume responsibility for funding indigent defense, it would require a revenue-raising effort by bar organizations unprecedented in this country.

475. For a discussion of the ethical dilemmas frequently faced by attorneys assigned to represent the poor, see generally Klein, *Legal Malpractice*, *supra* note 444.

476. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983).

torney is ethically obliged to provide his or her client with diligent representation,[477] a duty impossible to discharge unless the attorney is able to prepare adequately. An attorney is not to accept a case if an unreasonable financial burden will likely result,[478] and is not to take on a caseload so excessive that the attorney's capacity to give the client effective representation is compromised.[479] These ethical duties are breached in the vast majority of death penalty cases tried in this country, and the fault lies not with the lawyers asked to perform impossible tasks, but with indigent defense systems that are financed in a way that prevents defense attorneys from fulfilling their obligations.[480]

In short, underfunded indigent defense systems create seemingly unresolvable ethical dilemmas for attorneys called upon to defend capital cases. They effectively preclude defense attorneys from providing the type of defense contemplated by the Supreme Court's Eighth Amendment jurisprudence. Indeed, the tension between the attorney's financial interests and the cost requirements of capital defense creates nothing less than a conflict of interest between the attorney and his or her client.[481] Yet if an attorney were to admit that resource deprivation affected the quality of his or her work, that admission could result in disciplinary sanctions for the attorney.[482]

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477. *Id.* Rule 1.3; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101 (1980).

478. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2(b) (1983).

479. AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE Standard 4-1.2(d) (2d ed. 1980) ("A lawyer should not accept more employment than the lawyer can discharge within the spirit of the constitutional mandate for speedy trial and the limits of the lawyer's capacity to give each client effective representation."); *id.* Standard 5-4.3 (stating that an attorney should not accept caseload so excessive that it "will lead to the furnishing of representation lacking in quality or to the breach of professional obligations").

480. In most jurisdictions using public defenders, the head of the defender office is a political appointee who may fear reprisal if he or she made vigorous efforts to improve the caseloads for the attorneys he or she supervises, and thus few concerted legal challenges to excessive caseloads have been made by public defenders. *See* Klein, *The Eleventh Commandment*, *supra* note 217, at 419-22.

481. The economic disincentives for the lawyer to invest the time and resources necessary to develop the client's case are overwhelming. For example, in jurisdictions that have fee caps (whether set by statute or by judges exercising their discretion), "[o]nce counsel has spent the number of hours on a case that warrants the maximum compensation, it will be to the attorney's financial detriment to continue to vigorously represent the client's best interest." *Id.* at 374. The same conflict arises for lawyers working in grossly underfunded public defender offices. Professor Mounts has argued that a showing that resource deprivation results in excessive caseloads for attorneys, requiring them to pursue the interests of one client at the expense of another, "actually constitutes a showing of conflict of interest." Mounts, *The Right to Counsel*, *supra* note 287, at 234.

482. Klein, *Legal Malpractice*, *supra* note 444, at 1174-90. An admission of ineffectiveness might also be used against the attorney in a subsequent malpractice suit. *See id.* at

While the pro bono justification for resource deprivation continues to have resonance with some courts, others have begun to acknowledge its shortcomings.[483] Courts have been more willing in recent years to entertain legal challenges to underfunded indigent defense systems. Unfortunately, even these courts have been unwilling to go very far in using judicial power to solve the problems caused by resource deprivation.

V. CHALLENGES TO THE STATUS QUO

A. *Judicial Responses to Resource Deprivation*

Until the late 1980s, American courts were almost universally unreceptive to arguments that underfunded indigent defense services and the conscription of uncompensated or under-compensated defense attorneys implicated constitutional concerns.[484] In

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1205-06. It is not surprising that defense attorneys have been unwilling to admit that they did not provide effective assistance to a death-sentenced inmate, even when inadequate compensation schemes prevented them from doing so. When the constitutional adequacy of an attorney's representation is challenged in post-conviction proceedings, the experience of Vivian Berger, who has represented many death row inmates in habeas proceedings, is typical:

> [The habeas petitioner's trial attorney] protected himself by simply answering "yes" to the state attorney's suggestions, on a very friendly cross-examination, that he had had excellent strategic reasons for failing to investigate or adduce mitigating facts, such as the mental retardation of our client. This scenario is very common, although there are occasional exceptions: Ben Atkins was finally disbarred on account of his honest admission of fault in Jack House's habeas proceeding.

Berger, *The Chiropractor as Brain Surgeon*, *supra* note 18, at 251 (citations omitted).

483. Bailey v. State, 424 S.E.2d 503, 506 (S.C. 1992) ("[I]t would be foolish to ignore the very real possibility that a lawyer may not be capable of properly balancing the obligation to expend the proper amount of time in an appointed criminal matter where the fees involved are nominal, with his personal concerns to earn a decent living by devoting his time to matters wherein he will be reasonably compensated. *The indigent client, of course, will be the one to suffer the consequences if the balancing job is not tilted in his favor.*" (citation omitted)); *See* DeLisio v. Alaska Superior Court, 740 P.2d 437, 441 (Alaska 1987) (recognizing that an "officer of court" in England has no historical counterpart in United States); Arnold v. Kemp, 813 S.W.2d 770, 773 (Ark. 1991) (noting that the State, not the individual attorney, is ultimately responsible for assuring defendants receive effective assistance of counsel); Cunningham v. Superior Court, 222 Cal. Rptr. 44, 45-50 (Ct. App. 1986) (rejecting traditional view); State *ex rel.* Stephan v. Smith, 747 P.2d 816, 829 (Kan. 1987) (same); State *ex. rel* Scott v. Roper, 688 S.W.2d 757, 765-66 (Mo. 1985) (noting that the United States departed from the English model for legal profession, and that there was no counterpart to English "attorney" in United States); *cf.* Mallard v. District Court, 490 U.S. 296, 304 (1989) ("To justify coerced, uncompensated legal services on the basis of a firm tradition in England and the United States is to read into that tradition a story that is not there.").

484. *See, e.g.*, Williamson v. Vardeman, 674 F.2d 1211, 1214-15 (8th Cir. 1982); Dolan v.

the two decades following *Gideon v. Wainwright*, courts have rejected challenges to inadequately funded indigent defense systems based on the Thirteenth Amendment's prohibition of involuntary servitude,[485] the equal protection clause,[486] the constitutional prohibition against the uncompensated taking of property,[487] and the

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United States, 351 F.2d 671 (5th Cir. 1965); United States v. Dillon, 346 F.2d 633, 637 (9th Cir. 1965); *see also* Anderson, *supra* note 217, at 509-10; Debra T. Landis, Annotation, *Validity and Construction of State Statute or Court Rule Fixing Maximum Fees for Attorney Appointed to Represent Indigent*, 3 A.L.R.4TH 576 (1981); B. Finberg, Annotation, *Construction of State Statutes Providing for Compensation of Attorney for Services Under Appointment by Court in Defending Indigent Accused*, 18 A.L.R.3D 1074 (1968).

485. The Thirteenth Amendment provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1. The Supreme Court has indicated that the Thirteenth Amendment, standing alone, forbids deprivations of liberty "akin to African slavery," Butler v. Perry, 240 U.S. 328, 332 (1916), and empowers Congress to enact whatever legislation is necessary to "abolish[] all badges and incidents of slavery in the United State[s]." The Civil Rights Cases, 109 U.S. 3, 20 (1883). No courts have found compelled public service violative of an attorney's rights under the Thirteenth Amendment. *See, e.g., Williamson*, 674 F.2d at 1214 ("The thirteenth amendment has never been applied to forbid compulsion of traditional modes of public service even when only a limited segment of population is so compelled."); *In re* Nine Applications for Appointment of Counsel, 475 F. Supp. 87 (N.D. Ala. 1979), *vacated*, 646 F.2d 203 (5th Cir. 1981); Lindh v. O'Hara, 325 A.2d 84, 94 (Del. 1974); *Stephan*, 747 P.2d at 846-47.

486. The Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The challenges to attorney compensation systems under the equal protection clause of the federal constitution and under counterpart provisions of state constitutions have focused on the rights of appointed attorneys, not the rights of the accused. Typically, the argument is that a small segment of the citizenry—those who practice law, or those who practice criminal law—are singled out to bear the full burden of indigent defense. Until recent years, this argument was consistently rejected under the highly deferential rational basis test generally applied to economic regulations. *See, e.g.*, Sparks v. Parker, 368 So. 2d 528 (Ala.), *dismissed*, 444 U.S. 803 (1979); *Lindh*, 325 A.2d at 94; Daines v. Markoff, 555 P.2d 490, 493 (Nev. 1976); Madden v. Township of Delran, 601 A.2d 211, 215 (N.J. 1992); State v. Rush, 217 A.2d 441 (N.J. 1966); State v. Davis, 153 S.E.2d 749, 757 (N.C.), *cert. denied*, 389 U.S. 828 (1967).

487. The takings clause of the federal constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V. This principle is echoed in state constitutions, either in a parallel takings clause or as an aspect of due process. The challenge to indigent defense systems under the takings clause focuses on the rights of the attorney, not the client, and is predicated on the contention that an attorney's time, advice, counsel, and labor are property that cannot be appropriated by the state without adequate compensation. This argument was consistently rejected until very recently, usually on the theory that uncompensated service on behalf of the indigent is an implied condition of an attorney's license to practice law, and that a taking does not take place when the state merely requires the attorney to fulfill an implied commitment he or she has already made. *See, e.g., Williamson*, 674 F.2d at 1215; Tyler v. Lark, 472 F.2d 1077, 1078-79 (8th Cir.), *cert. denied*, 414 U.S. 864 (1973); *Dillon*, 346 F.2d at 635; Jackson v. State, 413 P.2d 488, 489 (Alaska 1966), *overruled in part by*, DeLisio v. Alaska Superior

Sixth Amendment right to counsel.[488]

More recently, however, challenges to attorney compensation schemes have achieved some measure of success in several jurisdictions, particularly in the context of capital representation.[489] With varying degrees of enthusiasm, some courts have begun to address the injustices caused when the state compensates defense lawyers at nominal rates.[490] Unfortunately, the judicial response to the problems caused by resource deprivation has been sporadic, and those cases in which some relief has been granted have not gone far enough to rectify the injustices traceable to underfunded capital defense services.

Most successful challenges to the inadequate funding of defense services have focused primarily on the rights of appointed attorneys rather than the rights of their clients. State courts in Oklahoma[491] and Arkansas,[492] reasoning that a lawyer's time, ad-

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Court, 740 P.2d 437 (Alaska 1987); *Pickens v. State*, 783 S.W.2d 341, 348 (Ark.), *cert. denied*, 497 U.S. 1011 (1990); State v. Ruiz, 602 S.W.2d 625, 627 (Ark. 1980); *Lindh*, 325 A.2d at 94; Warner v. Commonwealth, 400 S.W.2d 209, 211 (Ky.), *cert. denied*, 385 U.S. 858 (1966); State v. Clifton, 172 So. 2d 657, 667 (La. 1965), *overruled in part*, State v. Wigley, 624 So. 2d 425 (La. 1993); Wilson v. State, 574 So. 2d 1338, 1340 (Miss. 1990); *Madden*, 601 A.2d at 215; *Rush*, 217 A.2d at 441; Keene v. Jackson County, 474 P.2d 777, 778 (Ore. 1970); Scott v. State, 392 S.W.2d 681, 686-87 (Tenn. 1965); *Sparks*, 368 So. 2d at 532. *But see Williamson*, 674 F.2d at 1215-16 (indicating that requiring attorney to pay expenses involved in defense would constitute an unconstitutional taking); Bradshaw v. Ball, 487 S.W.2d 294, 298-99 (Ky. Ct. App. 1972) (holding that requirement that attorneys represent indigent defendants without any compensation whatsoever violated state and federal constitutions); Bias v. State, 568 P.2d 1269, 1272 (Okla. 1977) (requiring lawyer to pay out of pocket expenses or to perform extraordinary professional services constitutes a taking of property without just compensation).

488. The argument is that an indigent defendant's right to counsel is compromised when the attorney assigned to his case does not receive adequate compensation. The courts that have rejected this argument have reasoned that the Sixth Amendment does not guarantee a defendant the best possible lawyer, the outcome of few cases depend on the skill of the advocate, underpaid attorneys can provide the quality of performance guaranteed by the Constitution, the attorney's sense of duty and pride are sufficient motivation for the attorney to perform adequately, and it is not necessary that the attorney be experienced for the defendant to receive the quality of representation owed him. *See, e.g., Sparks*, 368 So. 2d at 531-32; *Pickens*, 783 S.W.2d at 348; Young v. State, 255 So. 2d 318, 320-22 (Miss. 1971); *Madden*, 601 A.2d at 211; *Rush*, 217 A.2d at 444-45.

489. For a discussion of these cases, see Bright, *Counsel for the Poor*, *supra* note 10, at 1866-70; Edward C. Monahan, *Attorneys Must Be Paid Fairly*, 5 CRIM. JUST. 16 (1990).

490. *See, e.g.*, State v. Smith, 681 P.2d 1374 (Ariz. 1984); Arnold v. Kemp, 813 S.W.2d 770 (Ark. 1991); Cunningham v. Superior Court, 222 Cal. Rptr. 44 (Ct. App. 1986); White v. Board of County Comm'rs, 537 So. 2d 1376 (Fla. 1989); Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986), *cert. denied*, 479 U.S. 1043 (1987); State *ex rel* Stephan v. Smith, 747 P.2d 816, 831 (Kan. 1987); State v. Peart, 621 So. 2d 780 (La. 1993); *Wilson*, 574 So. 2d at 1341; State v. Lynch, 796 P.2d 1150 (Okla. 1990); Bailey v. State, 424 S.E.2d 503 (S.C. 1992); Jewell v. Maynard, 383 S.E.2d 536 (W. Va. 1989).

491. In *Lynch*, 796 P.2d at 1150, the Oklahoma Supreme Court found that a statutory

vice, counsel, and labor are "property" that cannot be appropriated by the state without adequate compensation,[493] found that draconian caps on fees and expenses in capital cases violated state constitutional provisions prohibiting the uncompensated taking of property.[494] Other courts have sought to avoid finding attorney compensation schemes unconstitutional by engaging in liberal statutory construction. The Mississippi Supreme Court avoided a takings clause claim in this way;[495] the Florida Supreme Court has interpreted Florida's fee caps as "directory, not mandatory" in death cases;[496] and the Louisiana Supreme Court has indicated

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fee cap of $3200 in death cases "provide[d] an arbitrary and unreasonable rate of compensation for lawyers which may result in an unconstitutional taking of private property depending on the facts of each case," and thus violated the due process clause of the Oklahoma Constitution. *Id.* at 1153 (citing OKLA. CONST. art. II, § 7). Without rejecting the idea that "an Oklahoma lawyer has a duty to the oath of office, to the Courts, to his/her clients, and to the public at large to be more than a tradesperson," the court recognized that "[a] lawyer's skills and services are his/her only means of livelihood" and struck down the cap. *Id.* at 1156-57.

492. In *Arnold*, 813 S.W.2d at 770, the Arkansas Supreme Court relied on the "takings" component of the due process clause of the Arkansas Constitution in finding that the $1000 fee cap, as applied in a capital case, was "constitutionally unacceptable." *Id.* at 775.

493. *Arnold*, 813 S.W.2d at 774; *see also Lynch*, 796 P.2d at 1156-57. The courts not only found that appointed attorneys were asked to donate their advice and counsel without just compensation, but also were "required to donate funds out-of-pocket to subsidize a defense," a separate taking of property without compensation. *Arnold*, 813 S.W.2d at 773.

494. *Arnold*, 813 S.W.2d at 775. The Supreme Court of Kansas, which was a non-capital punishment state at the time, relied on the same theory in striking down compensation limits set by State Board of Indigents' Defense Services. *Stephan*, 747 P.2d at 842; *see also Jewell*, 383 S.E.2d at 544. The Arkansas court also found that singling out a relatively small group of attorneys to shoulder most of the burden of indigent defense violated those attorneys' right to equal protection of the laws. *Arnold*, 813 S.W.2d at 775; *see also Jewell*, 383 S.E.2d at 547 (concluding that equal protection and due process principles place "upward limit" on attorney's obligation to accept appointments to represent indigent defendants).

495. Wilson v. State, 574 So. 2d 1338 (Miss. 1990). The court interpreted a provision of the Mississippi statute allowing appointed attorneys "reimbursement for actual expenses" as authorizing the courts to award "reimbursement for all actual costs to the lawyer for the purpose of keeping his or her door open to handle the case, i.e., the lawyer will receive a pro rata share of actual overhead." *Id.* at 1340. The court established a rebuttable presumption that an appointed attorney's overhead costs amount to $25 per hour and held that attorneys were entitled to compensation at that hourly rate in addition to the $2000 maximum fee (for two attorneys) provided by statute. *Id.* at 1340-41. After interpreting the compensation statute in this way, the court rejected the takings clause challenge to the statute, reasoning that since the lawyer would not lose money under its statutory interpretation, there is no unconstitutional taking of property, and rejected the equal protection challenge by holding that as officers of court, lawyers can be singled out and asked to contribute their time and resources to indigent defense without violating their constitutional rights. *Id.* at 1341.

496. White v. Board of County Comm'rs, 537 So. 2d 1376 (Fla. 1989). The court stated that Florida's statutory compensation cap in certain cases encroached upon a sensitive area of judicial concern. *Id.* at 1379 (citing FLA. CONST. art. V, § 1; *id.* art. II, § 3). Furthermore, the statute was unconstitutional "when applied in such a manner as to curtail the court's

that in some situations courts might rely on its power to regulate the profession in finding that uncompensated representation can be "so onerous that it constitutes an abusive extension of [the appointed attorney's] professional obligations."[497]

Legal attacks on indigent defense funding predicated on the defendant's Sixth Amendment right to counsel have been less successful. The Louisiana Supreme Court has recently established a rebuttable presumption that defendants represented by a public defender office serving part of New Orleans have received ineffective assistance of counsel[498] (although the court validated that state's grossly deficient indigent defense system as it operated in the rest of the state);[499] the Arizona Supreme Court adopted a similar presumption in connection with the contract system used in that state in the mid-1980s;[500] and right to counsel concerns informed the South Carolina Supreme Court's interpretation of that state's compensation statute.[501] For the most part, however, state

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inherent power to ensure the adequate representation of the criminally accused." *Id.* at 1378 (citing Makemson v. Martin County, 491 So. 2d 1109, 1112 (Fla. 1986), *cert. denied*, 479 U.S. 1043 (1987)). To avoid invalidating the statute, the court exercised its inherent power "to interpret the statute as directory, not mandatory," and indicated that fees in excess of $3500 cap could be awarded in " 'cases involving extraordinary circumstances and unusual representation,' " and that all capital cases fall within this category. *Id.* at 1380 (quoting *Makemson*, 491 So. 2d at 1110).

497. State v. Wigley, 624 So. 2d 425, 428 (La. 1993) (quoting State v. Clifton, 172 So. 2d 657, 668 (La. 1965)). The court also indicated that compelled uncompensated representation of indigent defendants did not implicate any state or federal constitutional rights enjoyed by the attorney or the defendant. *Id.* at 427 n.1, 428.

498. State v. Peart, 621 So. 2d 780 (La. 1993). The court found that "the services being provided to indigent defendants in Section E of Orleans Criminal District Court do not in all cases meet constitutionally mandated standards for effective assistance of counsel." *Id.* at 783. The court stated that trial judges in that district could make fact-specific inquiries into the constitutional adequacy of representation before trial. *See id.* at 787-88. In doing so, trial judges were to employ "a rebuttable presumption" that indigent defendants tried in Section E "are receiving assistance of counsel not sufficiently effective to meet constitutionally required standards." *Id.* at 791.

499. In *Peart*, the court noted that Louisiana's system of funding "indigent defense through criminal violation assessments, mostly traffic tickets, '[was] an unstable and unpredictable approach,' " resulting in "wide variations in levels of funding, both between different [districts] and within the same [district] over time," and a "general pattern . . . of chronic underfunding of indigent defense programs in most areas of the state." 621 So. 2d at 789 (quoting SPANGENBERG GROUP, STUDY OF THE INDIGENT DEFENDER SYSTEM IN LOUISIANA 50 (March 1992)). Nonetheless, the court was unwilling to find that the statutory provisions governing indigent defense in Louisiana were unconstitutional or to remedy the effects of chronic underfunding in most areas of the state. *Id.* at 785-89.

500. State v. Smith, 681 P.2d 1374, 1378-84 (Ariz. 1984). For a discussion of this case, see supra note 287.

501. Bailey v. State, 424 S.E.2d 503 (S.C. 1992). In *Bailey*, attorneys who had successfully represented a defendant charged with capital murder commenced a declaratory judgment action claiming that South Carolina's compensation scheme violated their client's

courts have continued to reject facial challenges to indigent defense compensation statutes, preferring to dispose of Sixth Amendment claims under the case-by-case approach of the *Strickland* test.[502]

These sporadic efforts to alleviate the effects of resource deprivation will have only minimal impact on the quality of indigent representation in death cases. The judicial remedy provided by the Mississippi Supreme Court allows appointed attorneys to recover only $25 per hour plus an "honorarium" of $1,000 per attorney, an amount that at best might cover overhead costs, but provides no income that can be used to meet the day-to-day needs of the attorney or the attorney's family.[503] Similarly, the Louisiana Supreme Court now allows counsel appointed to defend a death penalty case to recover a fee equaling overhead costs, but the court has been unwilling to allow additional compensation that could cover the at-

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right to effective assistance of counsel and the takings clauses of the United States and South Carolina Constitutions. *Id.* at 505. The court reviewed the peculiar burdens of representation in capital case, *see id.* at 506-08, and acknowledged that grossly inadequate compensation for lawyers assigned to represent the poor implicated Sixth Amendment concerns: "Given the extraordinary time, effort, and commitment required of defense counsel in capital cases, it is unrealistic to expect that token compensation will suffice in the future to provide an indigent defendant with the quality of legal representation mandated by the United States Supreme Court." *Id.* at 508. The court refrained from striking down South Carolina's compensation scheme under the Sixth Amendment, however, by liberally interpreting its terms. The court held that "the hourly rates and cap provided . . . are not absolute allowances in capital cases, but merely limitations upon the State's funds allocated for the Defense of Indigents," and that in certain cases county governments could be required to supplement the funds provided by the state. *Id.*

In West Virginia (a non-death penalty state), the state supreme court relied on the Sixth Amendment as the primary justification for striking down statutory fee restrictions. Jewell v. Maynard, 383 S.E.2d 536, 541-44 (W. Va. 1989). In a case decided before Kansas reinstituted the death penalty, the Kansas Supreme Court seemed to rely in part on Sixth Amendment concerns in finding an inadequate compensation scheme unconstitutional. State *ex rel.* Stephan v. Smith, 747 P.2d 816, 836 (Kan. 1987).

502. *See* Wilson v. State, 574 So. 2d 1338, 1341 (Miss. 1990) ("The argument concerning the ineffective assistance of counsel is a matter that is better decided on a case by case basis . . . . [J]ust because the [compensation] limitation could have such a result is no reason to declare it unconstitutional."); *see also* Coulter v. State, 804 S.W.2d 348 (Ark.), (rejecting challenge to compensation system by defendant, because defendant could not show prejudice), *cert. denied*, 502 U.S. 829 (1991); *Stephan*, 747 P.2d at 831 ("[T]hose rare cases where counsel has been ineffective may be handled and determined individually by the appellate courts."); State v. Wigley, 624 So. 2d 425, 427 n.1 (La. 1993) (stating that attorney compensation does not implicate rights of criminal defendant); State v. Lynch, 796 P.2d 1150, 1156 (Okla. 1990) (specifically stating that decision invalidating compensation scheme not based on constitutional rights of defendant). *But see* Cunningham v. Superior Court, 222 Cal. Rptr. 44, 52-54 (Ct. App. 1986) (indicating through dicta that uncompensated representation adversely affects the indigent's right to effective assistance of counsel).

503. *See Wilson*, 574 So. 2d at 1341.

torney's living expenses,[504] and it has been reluctant to compel changes in the funding of public defender offices in most of the state.[505] In response to the criticisms of indigent capital defense by the South Carolina Supreme Court, that state's legislature capped the total compensation for two attorneys appointed to represent a capital defendant at $25,000,[506] while the Oklahoma legislature established a presumptive maximum fee of only $20,000 for capital cases.[507] While both figures represent marked improvements over the $5,000[508] and $2,500[509] fee caps that had previously existed in those states, they are far below what is necessary to assure that an indigent defendant is receiving a meaningful defense.[510]

Moreover, these cases have, for the most part, marginalized the rights of the defendants—the persons whose very lives are at stake—as a concern secondary to the rights of the attorneys who represent them. Courts have been reluctant to recognize that resource deprivation directly impacts the constitutional rights of those accused of capital crimes. Rather, they have preferred to rely on a case-by-case application of the *Strickland* test as the exclusive means of remedying the effects of inadequate legal representation caused by the gross underfunding of defense services. This approach frequently fails to detect or remedy even the most egregious mistakes and omissions committed by overburdened defense attorneys and effectively shifts the burden of proof in death penalty cases from the government to the accused.[511]

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504. *Wigley*, 624 So. 2d at 429.

505. *See, e.g.*, State v. Peart, 621 So. 2d 780, 785-89 (La. 1993).

506. S.C. CODE ANN. § 16-3-26(B) (Law. Co-op. Supp. 1993).

507. OKLA. STAT. ANN. tit. 22, § 1355.13 (West Supp. 1994).

508. S.C. CODE ANN. § 16-3-26(B) (Law. Co-op. 1985) (subsequently amended by 1993 S.C. Acts No. 164, Part II, § 45D).

509. OKLA. STAT. ANN. tit. 21, § 701.14 (West 1983) (repealed 1991).

510. *See supra* part I.C.

511. *See supra* notes 460-62 and accompanying text. Professor White has argued that if state and federal courts enforced the right to effective assistance of counsel more rigorously in capital cases—with more convictions and sentences being overturned on Sixth Amendment grounds—the systemic effects of underfunding death penalty defense would ultimately be eliminated. White, *Effective Assistance*, *supra* note 103, at 332. Once the states learn that substandard representation in capital cases will likely lead to reversals and costly retrials, they would have the economic incentive to upgrade the quality of capital representation at the early stages. *Id.* Professor White argues that the *Strickland* standard as applied in death penalty cases is evolving, and that "under current standards, the failure of a capital defense attorney to take specific actions—in particular, failure to seek and introduce certain types of mitigating evidence, to seek a favorable plea bargain that will avoid the death sentence, and to try to establish a relationship of trust with the defendant—usually should be viewed as deficient representation." *Id.* at 336. Unfortunately, while such deficiencies *should* result in findings of ineffectiveness, the fact is that with rare exceptions, they do not. Far from holding defense attorneys to higher standards in death cases, the prevailing judicial

Finally, and perhaps most importantly, the courts have not concerned themselves at all with the consequences of past resource deprivation. At best, the cases discussed above might have some small impact on the quality of capital defense provided after those cases were decided.[512] However, hundreds of death row inmates, who never received the procedural and substantive protections contemplated by the Constitution because of the lack of resources

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attitude is that the quality of representation provided by the "lowest common denominator" is the watermark for judging ineffective assistance claims. *See, e.g.*, Rogers v. Zant, 13 F.3d 384, 386 (11th Cir.), *cert. denied*, 115 S. Ct. 255 (1994) (stating that "[e]ven if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so").

512. Notwithstanding the obvious shortcomings of prospective solutions, some observers have suggested that in light of the current political climate favoring capital punishment, prospective challenges to indigent defense systems might be "the best hope of implementing the constitutional rights to counsel" promised by *Gideon v. Wainwright*. Bright et al., *supra* note 443, at 12; *see also* Citron, *supra* note 215, at 482, 497-503 (advocating a litigation approach seeking structural reform through declaratory judgment and/or injunction containing reform guidelines, and, if necessary, a remedial order requiring legislature to appropriate sufficient funds for indigent defense); Wilson, *supra* note 467, at 215-17 (advocating litigation strategy directed at obtaining declaratory relief and broad injunctive relief, as well as damages and punitive damages, as means to obtain systemic reform, and preferring theories based on takings and equal protection clauses).

Few systemic challenges to indigent defense systems have been attempted, and those few attempts have yielded only limited results. *See generally* Klein, *The Eleventh Commandment*, *supra* note 217, at 410-13, 417-18. Perhaps the best known of these efforts is the federal class action commenced in Georgia on behalf of indigent persons seeking prospective relief from "systemic delays in the appointment of counsel" that infringed upon their right to counsel at critical stages of criminal proceedings and their Eighth Amendment right to bail. Luckey v. Harris, 860 F.2d 1012, 1018 (11th Cir. 1988), *cert. denied*, 495 U.S. 957 (1990). The plaintiff class also raised right to counsel and equal protection claims arising out of the state's failure to provide resources necessary to prepare an effective defense. *Id.* The Eleventh Circuit held that substantively, the plaintiffs' complaint stated a claim upon which relief could be granted. *Id.* Subsequently, however, the case was dismissed on abstention grounds. Luckey v. Miller, 976 F.2d 673 (11th Cir. 1992). The Eleventh Circuit adopted the district court's determination that absent extraordinary circumstances, the federal courts should not interfere with state criminal proceedings, *id.* at 676 (citing Younger v. Harris, 401 U.S. 37, 43-44 (1971)), particularly when declaratory or injunctive relief is sought that would require federal judicial oversight of the operation of a state's criminal justice system. *Id.* (citing O'Shea v. Littleton, 414 U.S. 488, 500 (1974)). The Sixth Circuit also relied on the abstention doctrine in refusing to interfere with Kentucky's compensation system for attorneys assigned to death cases. Foster v. Kassulke, 898 F.2d 1144, 1145-46 (6th Cir. 1990) (refusing to entertain civil rights action brought by indigent defendant challenging limit on her attorney's compensation under due process and equal protection clauses of Fourteenth Amendment and right to counsel provision of Sixth Amendment). While these federal court decisions do not foreclose a systemic attack on indigent defense in a state court action, the success of such an action would be doubtful, since relief would be sought from the state judges who themselves often force attorneys to work with resources insufficient to properly defend a capital case.

dedicated to their defense at trial and on appeal, remain unaffected by such prospective relief and continue along a path that will end in the execution chamber.[513]

B. *The Sixth Amendment Argument*

Courts have not embraced the most compelling challenge to the legitimacy of convictions and death sentences obtained in a system in which the defense is denied adequate resources. This argument, most effectively articulated by attorney Joe Margulies,[514] centers on the Sixth Amendment right to counsel. At its core is the contention that the two-prong test outlined in *Strickland v. Washington* is inapplicable when a right to counsel claim is based not on the conduct of an individual defense attorney, but rather on the systemic effects of deficiencies in the way in which the state manages its obligation to provide counsel to the poor. In such cases, the defendant's rights under the Sixth Amendment may be violated even if the defendant cannot establish the "ineffective performance" and "prejudice" prongs of the *Strickland* test.[515]

Margulies observes that an individual's right to counsel comprises a number of distinct protections,[516] including the right to representation at all "critical stages" of the prosecution,[517] the right to freedom from governmental interference in the attorney-client relationship,[518] the right to representation by an attorney

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513. *See* Bright, *Counsel for the Poor*, *supra* note 10, at 1882 ("The death penalty will continue to be imposed and new capital statutes enacted with the continuing promise that efforts will be made to improve the quality of counsel *in the future*. But this is surely backwards. A very high quality of counsel—instead of minimal representation—should not only be the goal, but the reality *before* a jurisdiction is authorized to take life.").

514. Margulies, *supra* note 213, at 682; *see also* Citron, *supra* note 215, at 486-89; Mounts, *The Right to Counsel*, *supra* note 287, at 221-22, 224, 230-41 (arguing that in cases in which defendant establishes systemic resource deprivation, the burden should shift to the State to establish that this systemic defect did not affect the outcome of the case); Wilson, *supra* note 467, at 216.

515. Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988), *cert. denied*, 495 U.S. 957 (1990).

516. Margulies, *supra* note 213, at 682.

517. *See, e.g.*, Estelle v. Smith, 451 U.S. 454, 469 (1981) (right to assistance of counsel before pretrial interview by state psychiatrist); Coleman v. Alabama, 399 U.S. 1, 9 (1970) (right to counsel at preliminary hearing in non-capital case); United States v. Wade, 388 U.S. 218, 237 (1967) (right to counsel at post-indictment pre-trial lineup); White v. Maryland, 373 U.S. 59, 60 (1963) (right to counsel at preliminary hearing in a capital case); Hamilton v. Alabama, 368 U.S. 52, 54 (1961) (counsel cannot be denied at arraignment in a capital case).

518. *See, e.g.*, Geders v. United States, 425 U.S. 80, 91 (1976) (holding that automatic reversal is warranted when attorney-client consultation prevented during overnight recess); Herring v. New York, 422 U.S. 853, 857 (1975) (invalidating statute which gave trial judge

who is not hampered by an actual conflict of interest,[519] and the right to effective assistance of counsel.[520] At the heart of all right to counsel cases is whether the defendant received a "fair trial,"[521] but the assessment of fairness depends on the nature of the Sixth Amendment deprivation alleged. In one category are cases that are concerned with the integrity of the adversarial process itself, rather than a particular outcome produced by the process.[522] In those cases, involving what Margulies calls "system error," "fairness is perceived as a product of procedural rigor."[523] In a second category are cases which assume the fairness of the state-created procedures used in obtaining an outcome in a particular case and are concerned instead with whether the outcome was fair and just.[524] Unfair outcomes that are solely the fault of the individual shortcomings of defense attorneys—the concern of the *Strickland* line of cases—fall within this second category.[525]

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discretion to refuse to hear closing arguments on ground that right to counsel bars restrictions upon defense counsel which are not "in accord with the traditions of the adversary factfinding process").

519. *See* Holloway v. Arkansas, 435 U.S. 475, 490 (1978) ("The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters. . . . [I]n a case of joint representation of conflicting interests the evil . . . is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process.").

520. Strickland v. Washington, 466 U.S. 668, 685-86 (1984).

521. Margulies, *supra* note 213, at 682.

522. Margulies places within this category cases concerned with the denial of counsel altogether during the trial or during a critical stage of the prosecution, governmental interference in the attorney-client relationship "that impedes the ability of defense counsel to subject the state's case to adversarial testing," and representation by an attorney laboring under an actual conflict of interest. *Id.* at 698. In these cases, the Court was concerned with systemic defects which "threatened to undermine the adequacy of the fact-finding process" and the "integrity of the adversarial process," and which "operated entirely apart from the performance of individual counsel." *Id.*

523. *Id.* at 688.

524. *Id.*

525. Margulies observed that "[e]very right to counsel decision before *Strickland* presented an example of system error." *Id.* at 697. *Strickland* was the first right to counsel case considered by the Supreme Court that focused on the effect of attorney error on the reliability of the outcome rather than systemic barriers to the full benefit of the right to counsel. *Id.*; *see also id.* at 694-700 (discussing differences between *Strickland* and prior right to counsel cases decided by Supreme Court). Margulies noted that the "unarticulated concern" of the *Strickland* Court was that defense counsel would "sandbag" the prosecution and the courts:

> The fear is that defense counsel, if faced with the virtual certainty that his or her client would be convicted, would inject ineffective assistance into the case as a way to protect the client on appeal . . . . The hope is that for any number of reasons, the next trial, if one occurs, will be more hospitable.

Id. at 697. This concern helps explain why the Court adopted such a highly deferential

Margulies maintains that attorney failures attributable to the insufficient resources provided for indigent defense fall within the first category, not the second. Such failures ultimately are rooted not in the lack of diligence or competence of the individual attorney but in "systemic conditions that pervade and undermine the trial process."[526] Significantly, this characterization of the nature of the Sixth Amendment violation affects the determination of what relief is appropriate. In cases in which the violation is deemed to be the result of a systemic defect, relief is "prophylactic in the form of a per se rule mandating the removal of the 'taint,' or the condition threatening to undermine the adequacy of the adversarial process."[527] The fact-specific showing of prejudice to the outcome of an individual case mandated by *Strickland* is not required when the constitutional defect is systemic, because the prejudice resulting from a defect that pervades the entire process is not readily identifiable.[528] Therefore, defendants convicted and sentenced in a system in which public defense is chronically underfunded are entitled to automatic reversal, regardless of whether they can demonstrate prejudice.

This argument is not foreclosed by existing Supreme Court precedent. The Supreme Court has not addressed whether severe

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standard of judging attorney performance in *Strickland*, particularly when "strategic" decisions were at issue, and why lower courts have interpreted the prejudice standard so stringently. *See supra* part IV.A.2. Margulies contends that in cases in which inadequate representation is primarily the fault of the state rather than the individual defense lawyer, this concern is not present; "the rationale driving the result in *Strickland* has no place in cases involving system error." Margulies, *supra* note 213, at 697.

526. Margulies, *supra* note 213, at 724-25.

527. *Id.* at 691 (footnote omitted).

528. *See id.* at 688-89, 707 ("Because the system producing the conviction has broken down, there can be no presumption of legitimacy in the outcome. There can be, therefore, no requirement that a defendant demonstrate prejudice in the result."); Citron, *supra* note 215, at 488 (stating that resource deprivation prevents counsel from doing things that need to be done, and " '[i]t is impossible to reconstruct, much less to evaluate, what these things were' " (quoting Brief for Respondent)); *see also* Lockhart v. Fretwell, 113 S. Ct. 838, 847 (1993) (Stevens, J., dissenting) ("It is enough that the adversarial testing envisioned by the Sixth Amendment has been thwarted; the result is constitutionally unacceptable, and reversal is automatic."); Perry v. Leeke, 488 U.S. 272, 280 (1989) (recognizing that cases in which government is accused of interfering with right to counsel are not "subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective"); Satterwhite v. Texas, 486 U.S. 249, 257 (1988) (noting that automatic reversal is appropriate remedy when "the deprivation of the right to counsel affected—and contaminated—the entire criminal proceeding"); Glasser v. United States, 315 U.S. 60, 75-76 (1942) (stating that in conflict of interest cases, "[t]o determine the precise degree of prejudice sustained . . . is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial").

resource deprivation constitutes a systemic Sixth Amendment violation that so permeates criminal proceedings that relief can be obtained without a showing of prejudice.[529] In cases that concern the quality of representation provided to a criminal defendant, the Court has not looked beyond the conduct of the attorney to the quality of the system that supplied that attorney.[530] There is language in Supreme Court opinions indicating that pervasive governmental interference with the right to counsel would require reversal without any showing of prejudice,[531] since under such circumstances the adversarial process has been so compromised that it is "unlikely that any lawyer could provide effective assistance," and thus a presumption that the conviction was unreliable is warranted.[532]

While the logic of this argument is persuasive, it faces certain practical roadblocks. The facts underlying the Sixth Amendment cases of the past decade suggest that courts have a high tolerance for artificial constraints placed on appointed defense attorneys by the state. For example, in *United States v. Cronic*,[533] a case decided the same day as *Strickland*, the defendant's Sixth Amendment claim was rejected even though his lawyer had no previous criminal law experience, was given only twenty-five days to prepare for a sophisticated fraud case that government attorneys had been working on for four and one-half years, and was unable to interview several key witnesses who resided out of state.[534] Despite

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529. *See* Margulies, *supra* note 213, at 709.

530. Wilson, *supra* note 467, at 204.

531. The Court has said that "various kinds of state interference with counsel's assistance" can result in a "constructive" denial of the right to counsel requiring automatic reversal, notwithstanding the defendant's inability to show prejudice, or the state's ability to show that the error was harmless. Strickland v. Washington, 466 U.S. 668, 692 (1984); United States v. Cronic, 466 U.S. 648, 658-61 (1984).

532. *Cronic*, 466 U.S. at 661; *see also id.* at 657-62; *Lockhart*, 113 S. Ct. at 851 (Stevens, J., dissenting) ("The fact that counsel's performance constituted an abject failure to address the most important legal question at issue in his client's death penalty hearing gives rise, without more, to a powerful presumption of breakdown in the entire adversarial system[,] . . . generating a presumption of prejudice and automatic reversal."); Citron, *supra* note 215, at 486; Margulies, *supra* note 213, at 699 (arguing that *Cronic* "stands for the proposition that some attorney errors are so extraordinarily egregious that no inquiry into prejudice is required"); Mounts, *The Right to Counsel*, *supra* note 287, at 228-30.

533. 466 U.S. 648 (1984).

534. United States v. Cronic, 675 F.2d 1126, 1129 (10th Cir. 1982), *rev'd*, 466 U.S. 648 (1984). One commentator noted that "[b]y any objective yardstick, this system of assignment resulted in the constructive denial of counsel." Chester L. Mirsky, *Systemic Reform: Some Thoughts on Taking the Horse Before the Cart*, 14 N.Y.U. REV. L. & SOC. CHANGE 243, 247 (1986). Furthermore, the Tenth Circuit found a Sixth Amendment violation, notwithstanding the defendant's failure to show prejudice resulting from specifically identified attorney errors. *Cronic*, 675 F.2d at 1128. The *Cronic* case is discussed in detail in Mirsky,

state-imposed external constraints on the attorney's ability to adequately prepare for trial, the Supreme Court was unwilling to reverse the defendant's conviction absent the identification of specific errors of counsel[535] and some resultant prejudice.[536]

More fundamentally, courts will be reticent about embarking on a course that could undermine the legitimacy of the entire criminal justice system. The arguments that have been made about the constitutional inadequacies of indigent defense in capital cases can also be raised about the funding of indigent defense in general. Indeed, Margulies himself does not distinguish between capital and non-capital cases in his analysis. While the demands of capital representation are far greater than the demands of representing a defendant charged with non-capital felonies, at some point the cumulative burden of defending countless "garden variety" criminal cases will approach the burden of defending a capital case. The Supreme Court has not drawn clear distinctions between capital and non-capital cases in its Sixth Amendment cases, and courts may well fear that addressing the inequities of capital defense under a Sixth Amendment theory could open the floodgates to legal challenges potentially affecting most criminal convictions obtained in the United States. In this way, Margulies' argument is *too* persuasive; it challenges the legitimacy of every conviction obtained against indigents in jurisdictions with underfunded defense systems.[537]

Thus, while the Sixth Amendment's guarantee of the right to counsel might be the most natural place to look when seeking a constitutional footing for a legal assault on the underfunding of public defense services, both existing precedent and practical considerations present serious impediments. A legal strategy that would affect only the administration of capital punishment, however, might succeed where a Sixth Amendment challenge might fail. Courts may be more likely to redress the injustices in death cases resulting from resource deprivation if doing so does not call into question the legitimacy of the entire system of indigent defense in the United States. After all, even a complete moratorium on executions (either on the national level or in individual states)

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supra, at 246-47.

535. *Cronic*, 466 U.S. at 666.

536. *Id.* at 662 n.31 (stating, in dictum, that "[t]he fact that the accused can attribute a deficiency in his representation to a source external to trial counsel does not make it any more or less likely that he received the type of counsel envisioned by the Sixth Amendment, nor does it justify reversal of his conviction absent an actual effect on the trial process or the likelihood of such an effect").

537. *See generally* Mirsky, *supra* note 534.

would not significantly impact the day-to-day operation of the criminal justice system.[538] The most promising doctrinal source for a remedy that could be confined to capital cases is the Eighth Amendment's prohibition of cruel and unusual punishments.

VI. Resource Deprivation and the Arbitrary Application of the Death Penalty: The Eighth Amendment Argument

A. *The Eighth Amendment is the Appropriate Vehicle for Challenging the State's Failure to Adequately Fund Capital Defense Services for the Poor*

While the Eighth Amendment "is not limited in application to capital punishment,"[539] the Supreme Court's Eighth Amendment jurisprudence is informed by the "qualitative difference between death and any other permissible form of punishment."[540] This difference underlies " 'a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case,' "[541] and it justifies the greater scrutiny given capital cases to ensure that the death penalty is not administered arbitrarily.[542] Thus, the Court has frequently used the Eighth Amendment to require procedures and rules in capital cases that are unknown in other criminal proceedings.[543] Accordingly, a constitutional attack on the injustices caused by resource deprivation that is founded on the Eighth Amendment could be framed in such

538. Although approximately 23,000 homicides are committed annually in the United States, *see* Daniel S. Greenberg, *Research on Violence: Washington Perspective*, The Lancet, Nov. 28, 1992, at 1339, fewer than 250 persons have been executed since 1976, and fewer than 3000 persons sentenced to death in the twenty years following the *Furman* decision currently await execution. Death Row USA, *supra* note 1, at 1. Both before and after *Furman*, only a small fraction of convicted murderers have been sentenced to death, suggesting that despite its political importance, the death penalty does not play a central role in the day-to-day administration of justice in the United States.

539. McCleskey v. Kemp, 481 U.S. 279, 314 (1987).

540. Zant v. Stephens, 462 U.S. 862, 884 (1982); *see also supra* notes 48-52 and accompanying text.

541. *Zant*, 462 U.S. at 884 (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)).

542. *See* California v. Ramos, 463 U.S. 992, 998-99 (1983) (recognizing that "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination"); Lockett v. Ohio, 438 U.S. 586, 604 (1977) (plurality opinion) (noting that this difference "calls for a greater degree of reliability when the death sentence is imposed"); *Woodson*, 428 U.S. at 305 (plurality opinion of Stewart, Powell, and Stevens, JJ.) (recognizing that "the penalty of death is qualitatively different from a sentence of imprisonment, however long . . . [and thus] there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case").

543. *See supra* part I.A.

a way that the reach of a judicial remedy could be confined to capital cases.

The fact that the consequences of resource deprivation implicate values associated with the constitutional rights to counsel and to a fair trial does not foreclose a legal strategy based on the prohibition of cruel and unusual punishments. The Court's modern interpretation of the Eighth Amendment's limitations on capital punishment has frequently borrowed values associated with other provisions of the Bill of Rights. The mere fact that a death sentencing system that violates Eighth Amendment principles of fairness and reliability also violates other provisions of the Constitution does not mean that the Eighth Amendment inquiry is supplanted.[544] Indeed, the basic standards of rationality, fairness, and consistency against which the Court judges capital punishment schemes under the Eighth Amendment are rooted in values associated with the constitutional rights to due process and a fair trial, among others. The difference is that when the death penalty is involved, these constitutional values are more rigorously observed, primarily through the Court's reading of the Eighth Amendment's prohibition of cruel and unusual punishments.

Furman itself is the preeminent example of how the Eighth Amendment magnifies core constitutional values in the death penalty context. A year before *Furman* was decided, the unguided discretion given juries to impose death sentences was challenged in a case raising arguments that closely resembled those made in *Furman*, except that it was based on the due process clause.[545] The Supreme Court rejected this challenge.[546] In *Furman*, however, the

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544. Justice Brennan made this observation in his dissent in McCleskey v. Kemp, 481 U.S. 279 (1987), in which Georgia's capital punishment scheme was attacked as both racially discriminatory and arbitrary and capricious. *Id.* at 291-92, 299. The majority rejected equal protection and Eighth Amendment claims, in part because the petitioner had failed to prove to the Court's satisfaction that the discriminatory effects demonstrated by extensive empirical data was the result of a purposeful policy of the state. *Id.* at 292-99, 306. In disposing of the Eighth Amendment claim, the Court "decline[d] to assume that what is unexplained is invidious." *Id.* at 313. Justice Brennan noted that

> [w]hile the Equal Protection Clause forbids racial discrimination, and intent may be critical in a successful claim under that provision, the Eighth Amendment has its own distinct focus: whether punishment comports with social standards of rationality and decency. It may be, as in this case, that on occasion an influence that makes punishment arbitrary is also proscribed under another constitutional provision. That does not mean, however, that the standard for determining an Eighth Amendment violation is superseded by the standard for determining a violation under [another constitutional] provision.

Id. at 323 n.1 (Brennan, J., dissenting).

545. McGautha v. California, 402 U.S. 183 (1971), *vacated*, 408 U.S. 941 (1972).

546. The Supreme Court rejected a due process challenge to capital punishment sys-

same argument tied to an Eighth Amendment theory was successful.[547] Effectively, the Court used the Eighth Amendment to amplify the due process-like concerns raised by unguided sentencing and reached a result opposite to that reached the year before.[548] Since *Furman* and *Gregg*, the Court has adopted constitutional rules through the Eighth Amendment—the requirement of individualized sentencing being a prominent one—that are confined to death penalty cases.[549]

Thus, even if the case-by-case approach of *Strickland v. Washington* is appropriate in determining whether resource deprivation has compromised an indigent defendant's Sixth Amendment rights, this does not mean that the *Strickland* test is adequate to safeguard the defendant's Eighth Amendment rights.[550] In fact, *Strickland*'s preoccupation with identifying prejudice in specific cases runs counter to the emphasis placed on systemic concerns in the Supreme Court's modern Eighth Amendment jurisprudence. The Eighth Amendment demands, above all else, procedural fairness[551] in distinguishing "the few cases in which

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tems that gave jurors unfettered and unguided discretion in deciding whether to sentence a defendant to death, *see id.* at 197-208, and a due process challenge to the use of a unitary trial procedure that forced capital defendants to choose between a waiver of their privilege against self-incrimination before a determination of guilt and the forfeiture of their opportunity to testify as to mitigating circumstances. *Id.* at 213-17. In *Furman*, "[b]asically, the argument was that death sentences that juries imposed in only a small minority of all death-eligible cases without any guidelines or standards constituted 'cruel and unusual punishments' within the meaning of the Eighth Amendment," an argument that "closely resembled the procedural due process objections to standardless jury sentencing that the Court had rejected in *McGautha v. California*." BALDUS ET AL., *supra* note 10, at 11 (footnote omitted).

547. 408 U.S. 238, 238 (1972).

548. The outcome in *Furman* was also influenced by values borrowed from the equal protection clause. *See, e.g.*, 408 U.S. at 242 (Douglas, J., concurring) ("It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.").

549. *See supra* part I.A.

550. *See* Dow, Teague *and Death*, *supra* note 338, at 29 (stating that "whatever the merits of the *Strickland* test for safeguarding the Sixth Amendment right to effective counsel, the Eighth Amendment value is entirely distinct"); *see also* Berger, *The Chiropractor as Brain Surgeon*, *supra* note 18, at 245 (stating that "whatever may be true in ordinary cases, in the capital setting defense counsel too often deliver—and courts at all levels too often tolerate, when indeed they do not encourage—performance so shoddy as to render the law in its application a mockery of the sixth *and* eighth amendments").

551. *See supra* part I.A; *see also* McCleskey v. Kemp, 481 U.S. 279, 313 (1987); Gregg v. Georgia, 428 U.S. 153, 189-207 (1975) (plurality opinion of Stewart, Powell, and Stevens, JJ.); *Furman*, 408 U.S. at 240 (Douglas, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 310 (White, J., concurring); *cf.* Strickland v. Washington, 466 U.S. 668, 704 (1984) (Brennan, J., concurring in part and dissenting in part) (stating that "we have con-

[the death penalty] is imposed from the many cases in which it is not."[552] Beginning with *Furman* and *Gregg*, the Supreme Court has followed a process-oriented approach to its Eighth Amendment scrutiny of the administration of the death penalty[553] which focuses on whether the capital punishment *system* adopted by a state is likely to produce outcomes in particular cases that are rational, fair and consistent.[554] In general, the Court has not been concerned with the actual operation of those procedures and rules in particular cases; the Supreme Court's decisions have assumed that fair outcomes will result if the procedures are fair.[555] On the other hand, the Court will find an Eighth Amendment violation if state procedures "create a substantial risk that the [death penalty] will be inflicted in an arbitrary and capricious manner."[556]

The "super due process" promised by the Court's capital punishment cases since *Furman* is anchored in the Eighth Amendment, not in the due process clause.[557] In assessing the constitu-

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sistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding").

552. *Furman*, 408 U.S. at 313 (White, J., concurring).

553. *See* Hubbard, *supra* note 71, at 1114-15; Steiker, *supra* note 75, at 1159.

554. *See, e.g.*, California v. Ramos, 463 U.S. 992, 999 (1983); *Gregg*, 428 U.S. at 188-95, 197-98, 206-07 (plurality opinion of Stewart, Powell, and Stevens, JJ.); *id.* at 220-24 (White, J., concurring); Jurek v. Texas, 428 U.S. 262, 268-77 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.); Proffitt v. Florida, 428 U.S. 242, 247-60 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.).

555. *See, e.g., McCleskey*, 481 U.S. at 313 (recognizing that despite substantive imperfections within the criminal justice system, procedural safeguards in the determination of guilt or punishment satisfy constitutional fairness requirements); *Ramos*, 463 U.S. at 999 (explaining that "[i]n ensuring that the death penalty is not meted out arbitrarily or capriciously, the Court's principal concern has been more with the *procedure* by which the State imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death").

556. *See* Godfrey v. Georgia, 446 U.S. 420, 427 (1980) (plurality opinion of Stewart, Blackmun, Powell, and Stevens, JJ.); *see also* Caldwell v. Mississippi, 472 U.S. 320, 343 (1985) (O'Connor, J., concurring in part) (noting that the death sentence may not be imposed under circumstances that "creat[e] an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously' or through 'whim or mistake' " (citations omitted)); *Ramos*, 463 U.S. at 999; Zant v. Stephens, 462 U.S. 862, 874 (1983); *Gregg*, 428 U.S. at 203 (plurality opinion of Stewart, Powell, and Stevens, JJ.) (arguing that the inquiry is whether defendants "were sentenced under a system that does not create a substantial risk of arbitrariness or caprice"); *Furman*, 408 U.S. at 242 (Douglas, J., concurring) (stating that "[i]t would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices").

557. *See, e.g.*, Hubbard, *supra* note 71, at 1114-15 (explaining that the Court's "process model" for ensuring that the death penalty is not imposed arbitrarily is founded in Eighth Amendment, not equal protection or due process clauses of Fourteenth Amendment).

tional implications of deleterious effects as pervasive as those caused by resource deprivation, it is appropriate to look to the Eighth Amendment principles that lay at the core of the modern death penalty.

B. *Resource Deprivation Defeats the Objectives of the Supreme Court's Eighth Amendment Jurisprudence*

The Court has located certain central principles in the Eighth Amendment's prohibition of cruel and unusual punishments that are at the foundation of its death penalty jurisprudence. A state's capital punishment procedures must not operate arbitrarily or capriciously.[558] They must serve a legitimate penological objective, and the primary justification that has emerged for the death penalty is retribution.[559] They must reliably and fairly identify those offenders who most deserve having their lives extinguished.[560] Given the emphasis that retributivist theory places on the moral choices of the offender, a reliable and fair sentencing decision must be based on a full consideration of the "character and record of the individual offender and the circumstances of the particular offense."[561]

In order to achieve these goals, extensive procedural and substantive rules peculiar to the death penalty have evolved. Yet, procedural structures, no matter how well designed to assure fairness, will yield fair outcomes only if the procedures are actually carried out.[562] Primary responsibility for assuring that capital defendants enjoy the protections guaranteed by the Eighth Amendment rests with the attorneys assigned to represent them.[563] Any state-created impediment to the discharge of that responsibility undermines the integrity of the entire capital punishment system. The level of resource deprivation described in this Article is such a state-created obstacle to fairness in the death sentencing process, creating great variation in the quality of representation provided different capital

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558. *See supra* notes 61-71 and accompanying text.

559. *See supra* notes 72-74 and accompanying text.

560. *See supra* notes 75-78 and accompanying text; *see also* Spaziano v. Florida, 468 U.S. 447, 460 n.7 (1984) (stating that procedures must "minimize the risk that the penalty will be imposed in error"); *Zant*, 462 U.S. at 884-85 (stressing "need for reliability" in determining "the appropriate punishment"); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.) (same).

561. *Woodson*, 428 U.S. at 304 (plurality opinion of Stewart, Powell, and Stevens, JJ.).

562. *See, e.g.*, Hubbard, *supra* note 71, at 1117 (discussing that the Court's process-oriented approach to capital punishment can "legitimize[] the conclusion that there is a meaningful basis to execute" in individual cases only if "the process 'works'—that is, it effectively curbs both intentional and unintentional arbitrariness").

563. *See supra* part I.B.

defendants and creating a "substantial risk" that life and death decisions are made arbitrarily in most of the nation's death penalty states. Achievement of each of the objectives of the Supreme Court's modern capital punishment jurisprudence is frustrated by resource deprivation. Most fundamentally, the failure of the states to adequately fund indigent defense has perpetuated the arbitrariness in death-sentencing that was condemned in *Furman*. A system for selecting which defendants will die for their crimes can be arbitrary in two ways. First, the death-sentencing system can yield death sentences that are either "the *product* of legally irrelevant or impermissible factors" or ones that are *influenced* by such factors.[564] Second, the death-sentencing system can operate in a way that admits a substantial risk that individual sentences are the product of whim or caprice.[565] Resource deprivation injects an unacceptable level of arbitrariness into the death-sentencing process in both ways.

Resource deprivation is a primary source of arbitrariness in the first sense because it makes the socio-economic status of the defendant and the identity of his attorney among the strongest factors influencing the determination of whether a defendant is sentenced to death.[566] Under the retribution model for capital punishment that has emerged from the Supreme Court's post-*Furman* cases,[567] the decision to sentence a capital defendant to death "must be strictly a function of legally relevant characteristics of

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564. *Zant*, 462 U.S. at 885 (asserting that it is impermissible to label as "aggravating" factors that are "totally irrelevant to the sentencing process, such as . . . the race, religion, or political affiliation of the defendant"); Furman v. Georgia, 408 U.S. 238, 249-51, 257 (1971) (Douglas, J., concurring) (stating that discriminatory patterns in death-sentencing is evidence of arbitrariness); *id.* at 364-66 (Marshall, J., concurring) (same); BALDUS ET AL., *supra* note 10, at 15; *see also* GROSS & MAURO, *supra* note 24, at 8 (explaining that the system operates arbitrarily if it permits "imposition of the death penalty based on the presence or absence of a legally irrelevant factor, such as race"). If the legally irrelevant factors differ from case to case, occurring randomly, the arbitrariness is unsystematic, or "capricious;" if an extralegal factor influences death-sentencing systematically, "they may be legally irrelevant characteristics of the defendant or of the crime," such as the defendant's race or the victim's race. BOWERS, *supra* note 23, at 203.

565. *See* BALDUS ET AL., *supra* note 10, at 14-15; GROSS & MAURO, *supra* note 24, at 8; *see also* Gregg v. Georgia, 428 U.S. 153, 188 (1975) (plurality opinion of Stewart, Powell, and Stevens, JJ.); *id.* at 220-21 (White, J., concurring); *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring). "When the Supreme Court invalidates a death sentence on this ground, it is most often on the basis of the Court's intuitive determination that certain procedures applied in the case fail to minimize the risk that the death sentence may have been the product of whim or caprice." BALDUS ET AL., *supra* note 10, at 15.

566. McCleskey v. Kemp, 481 U.S. 279, 323 (1989) (Brennan, J., dissenting) (arguing that a death-sentencing system "that features a significant probability that sentencing decisions are influenced by impermissible considerations cannot be regarded as rational").

567. *See supra* notes 74-78, 85-87 and accompanying text.

the crime and of the defendant."[568] The determination of which characteristics are legally relevant is made by reference to statutory guidelines regarding the defendant's eligibility for the death penalty and the legitimate aggravating and mitigating factors that have been identified by legislatures and courts.[569] Clearly, the defendant's poverty is not a legally relevant characteristic of the defendant that should play any role in the determination of whether the defendant should die for his crime. Arbitrariness has been defined as "any departure" from a model that requires "death as punishment to be strictly a function of statutory guidelines and evolving standards of practice;"[570] under this definition, resource deprivation renders death-sentencing in most states arbitrary.

Systems in those states are arbitrary in the second sense as well. A death-sentencing scheme must allow the jury to make an informed "reasoned moral response" to the defendant and the crime.[571] The accuracy of this determination is affected by "the identity of the sentencer, the reliability of the information the sentencer receives, and the kind and quantity of that information."[572] Each of these factors can be influenced by the underfunding of indigent defense. If an indigent's attorney lacks either the experience, expertise, or necessary expert assistance to identify jurors who are likely to give full consideration of a sentence other than death if the indigent is convicted of capital murder, the accuracy of the sentencing process will be affected to the detriment of the indigent. More importantly, if a lack of resources effectively prevents the attorney from discovering and presenting evidence relevant to a jury's sentencing decision, the chances that the jury's sentencing decision is based on complete and reliable information diminish considerably, creating a substantial risk that individual sentences are the product of whim or caprice.[573]

Moreover, resource deprivation undermines confidence in the

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568. BOWERS, *supra* note 23, at 203.

569. *Id.* (stating that through consideration of the evidence supporting and negating the existence of aggravating and mitigating factors, the jury determines "the retributive appropriateness of death as punishment under the law").

570. *Id.*

571. Saffle v. Parks, 494 U.S. 484, 493 (1990); Penry v. Lynaugh, 492 U.S. 302, 326-28 (1989).

572. Stephen Gillers, *The Quality of Mercy: Constitutional Accuracy at the Selection Stage of Capital Sentencing*, 18 U.C. DAVIS L. REV. 1037, 1043 (1985).

573. If a statute that prevents a jury from giving effect to relevant mitigating evidence violates the Eighth Amendment, *see supra* notes 83-87 and accompanying text, it is difficult to see how an opposite conclusion could be reached when the state action that prevents the jury from hearing the relevant evidence is the underfunding of indigent defense services rather than a statutory directive.

utility of a state's death penalty system to meaningfully serve legitimate penological objectives. Because of the underfunding of defense services, defendants are frequently sentenced to death after their attorneys failed to develop and present evidence at the penalty phase of their trials. In such a case, a jury cannot make an intelligent assessment of whether the death penalty is an appropriate retributive judgment. In addition, resource deprivation introduces factors into the death-sentencing equation—the socio-economic status of a defendant and the resources available to the attorney who represents him—that have no relevance to the penological objectives of deterrence or retribution.

Resource deprivation is the root cause of one of the "tragic ironies"[574] of the modern death penalty: while the additional procedures, special rules, and separate penalty phase available in capital cases are intended to foster greater reliability in sentencing, the complexity of death penalty litigation and the wide disparity in the quality of capital representation caused by resource deprivation have combined to exacerbate arbitrariness in the death-sentencing process.[575] Yet the substantive and procedural rules governing the application of the death penalty were created out of constitutional necessity. Historical experience leaves little doubt that without these rules, there is no way to be certain that the ultimate penalty will be meted out in a rational, consistent, and fair manner.[576] These rules are not self-executing, however, and the defense attorney bears the primary responsibility for assuring that the promise of the Eighth Amendment's ban on cruel and unusual punishments is realized in individual cases. When a state denies counsel the means of carrying out this responsibility, it does so at the cost of the constitutional legitimacy of its entire death penalty system, no matter how fair that system may seem on paper. In the vast majority of death penalty jurisdictions, the level of funding of defense services is so low that the integrity of the process has been irredeemably compromised.[577]

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574. Berger, *Born-Again Death*, *supra* note 49, at 1309.

575. *Id.*; *see also* Denno, *supra* note 49, at 454 (stating that "one more paradox of the capital sentencing process . . . [is that] the defendant relies even more on an attorney's representation that may often be totally inadequate for the legal complexities of such litigation").

576. *See supra* notes 23-24.

577. *See* Margulies, *supra* note 213, at 724-25 ("The attorney's appointment is reduced to a mere sham, destroying the integrity of the process.").

C. *Distinguishing* McCleskey v. Kemp: *Resource Deprivation is a Systemic Defect Created by State Policy*

The constitutional violation described here is systemic, in that "it operates without regard either to particular cases or to the conduct of individual defense counsel."[578] No matter how skilled or dedicated a defense attorney may be, he or she must work under conditions that do not allow the development of a meaningful defense.[579] Resource deprivation distorts the entire adversarial process by preventing the defense attorney "from subjecting the state's case to the crucible of adversarial testing."[580]

Responsibility for this systemic defect rests squarely with the state, which creates and funds indigent defense systems. An indigent person does not have the luxury of choosing his own attorney. The poor person has an attorney assigned to him by the state, and the state ultimately determines whether it will demand that the assigned attorney possesses the experience and skills commensurate with the demands of capital representation; whether it will burden the defense attorney with a caseload so excessive that it is impossible to discharge the responsibilities associated with capital defense; and whether it will provide the money necessary to assure that the defense attorney can properly defend the case.[581] By failing to adequately fund its indigent defense system, the state creates the conditions that foreclose the development of a meaningful defense.[582] In doing so, the state interferes with defense counsel's ability to subject the prosecution's case to meaningful adversarial testing, easing the government's burden of proving guilt and the propriety of the death penalty.

It is easier to comprehend the significance of the state's direct role in creating this systemic defect—and the arbitrariness in death sentencing that results from it—by examining a case where such a direct role was arguably absent. The last major systemic challenge to the death penalty passed upon by the Supreme Court

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578. *Id.* at 691; *see also id.* at 706, 724-25.

579. *See* Mounts, *The Right to Counsel*, *supra* note 287, at 221.

580. Margulies, *supra* note 213, at 724-25; *see also id.* at 706-07.

581. *See* Bright, *Counsel for the Poor*, *supra* note 10, at 1863; *cf.* Polk County v. Dodson, 454 U.S. 312, 332 (1981) (Blackmun, J., dissenting) ("The county's control over the size of and funding for the public defender's office, as well as over the number of potential clients, effectively dictates the size of an individual attorney's caseload and influences substantially the amount of time the attorney is able to devote to each case.").

582. *See* Citron, *supra* note 215, at 488 (explaining that "the damage caused by inadequate funding results from state action at an earlier stage in the process—the legislature's failure to allocate sufficient funding for the indigent defense system").

was raised in *McCleskey v. Kemp*.[583] In that case, challenges to the operation of capital punishment in Georgia under the equal protection clause and the Eighth Amendment were based on an elaborate statistical study showing that the death penalty was imposed more frequently on black defendants and defendants who killed white victims than on white defendants and defendants killing black victims.[584] These claims were rejected because the petitioner could not establish that the discriminatory patterns revealed by the statistical study were intended by the state.[585] The Court was disinclined to interfere with the jury's discretion to refrain from sentencing a death-eligible defendant to death, even if the exercise of mercy might have been influenced by considerations of race,[586] and the Court was reluctant to hold the state answerable for the "unknown and perhaps unknowable" range of "qualities of human nature and varieties of human experience" that influence the decisions of jurors[587] when the state itself does not directly inject improper considerations into the proceedings.[588]

In a legal challenge to the arbitrariness traceable to resource deprivation, each of the points supporting the result in *McCleskey* can be distinguished. There is no question that the inadequate resources provided by the states for indigent capital defense result directly from policy decisions made by the states. Remedying the effects of resource deprivation would not interfere in any way with the discretion traditionally left with the jury to act mercifully and refrain from sentencing to death one who may "objectively" deserve it. Most importantly, resource deprivation and its effects on death sentencing remain within the control of the states. In *McCleskey*, the arbitrariness identified by the statistical study was caused by an extralegal factor—societal racism—that, in the Court's view, was largely beyond the control of the state. The Court refused to hold the state responsible for the influence of racism on sentencing decisions if the state's legal structures are con-

583. 481 U.S. 279 (1987).

584. *Id.* at 286-87. *See supra* note 395.

585. *McCleskey*, 481 U.S. at 291-99, 313.

586. *Id.* at 303-13; *see also Gregg*, 428 U.S. at 203 (plurality opinion of Stewart, Powell, and Stevens, JJ.) (concluding that isolated instances where juries show mercy in refraining from rendering death sentences do not render the death sentences of other defendants unconstitutional if defendants "were sentenced under a system that does not create a substantial risk of arbitrariness or caprice").

587. *McCleskey*, 481 U.S. at 311 (quoting Peters v. Kiff, 407 U.S. 493, 503 (1972)).

588. *Id.* at 313 (stating that despite imperfections in the administration of the death penalty, "our consistent rule has been that constitutional guarantees are met when 'the mode [for determining guilt or punishment] itself has been surrounded with safeguards to make it as fair as possible'" (quoting Singer v. United States, 380 U.S. 24, 35 (1965)).

structed to minimize the influence of extralegal factors. In contrast, the state is directly responsible for—and able to prevent—the arbitrariness caused by resource deprivation. Moreover, resource deprivation is a defect that the state can cure; the influences of societal racial attitudes may not be.

In sum, the arbitrariness in death sentencing resulting from resource deprivation is on different constitutional footing than the arbitrariness at issue in *McCleskey*. By refusing to provide adequate resources to indigent defense services, the states are directly responsible for injecting an illegitimate extralegal factor into the death-sentencing process. In order to eliminate this improper influence from the capital punishment system, the courts must act affirmatively to remedy the effects of resource deprivation.

D. *The Remedy*

In most capital punishment states, every poor person who has been sentenced to death or who awaits trial for a crime punishable by death has suffered or will suffer a violation of his Eighth Amendment rights because of inadequately funded indigent defense systems. For those who have yet to be tried, it is theoretically possible that legislatures could act to prevent this violation, but the political and economic forces that created the indigent defense crisis in the first place make legislative action unlikely.[589] It is probable that the only way that legislatures will remedy this crisis is if they are spurred to action by the judiciary.[590] Moreover, judicial action to prevent future constitutional violations will not be enough. There are hundreds of inmates on the nation's death rows who have been denied the protections promised by the Eighth Amendment. The state should not be authorized to take the life of someone who has not received a trial in which the risk of the arbitrary and capricious imposition of the death penalty has been minimized.

Ultimately, courts will need to decide at what point the funding of indigent defense becomes so deficient that the constitutional rights of indigents have been violated. Currently, this is not a close question. The funding provided in the jurisdictions discussed in this Article is so inadequate that there can be no serious doubt that the constitutional rights of every indigent facing the death penalty in those jurisdictions have been violated. If legislatures re-

589. *See supra* part II.E.

590. Most likely, judicial intervention must come from the federal bench. Popularly elected state judges face the same political and economic forces that discourage legislatures from acting on behalf of those charged with capital murder. *See supra* part II.E.

spond to judicial pressure, however, the question may become more difficult. This Article has offered a conservative estimate of what should be spent on capital defense,[591] and that estimate may serve as a guide in judging the adequacy of defense funding in individual cases. Nonetheless, the constitutional inquiry is whether the funding was adequate to assure that the defendant received the protections contemplated by the Supreme Court's capital punishment jurisprudence. Given the intense demands of capital defense, it is likely that this constitutional minimum can be achieved only by funding indigent defense under a formula similar to that used for calculating the attorneys' fees for prevailing plaintiffs in civil rights cases.[592] Under that approach, the states would be required to pay for attorneys, paralegals, and investigators at the hourly rates typically charged paying clients within the community in which the defendant is tried.[593] Compensation cannot be limited by artificial fee caps or the unreasonable exercise of discretion by local judges. In addition, the states must be required to pay for the experts needed to properly prepare a defense in a capital case.

The remedy for defendants who have been denied an adequately funded defense is straightforward. The courts must prevent the execution of any poor person sentenced to death under a system likely to produce arbitrary results.[594] The constitutional violation described in this Article can be remedied only by a per se

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591. *See supra* part I.C.

592. *See* 42 U.S.C. § 1988. Section 1983 provides that the prevailing party in a civil rights action may recover a reasonable attorney's fee, expenses, and, in certain actions, expert fees. *Id.* § 1988(b) & (c).

593. The Supreme Court has stated that a "reasonable fee" under section 1983 is usually one that is "in line with prevailing market rates." Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984). There is a strong presumption that the "lodestar"—the product derived by multiplying the number of hours reasonably expended on a case by an hourly rate typically charged by attorneys of like skill and experience in the community—is the appropriate fee. *See* Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). Paralegal time may be recovered if it is the common practice in the community to bill for such time. Missouri v. Jenkins, 491 U.S. 274, 288 (1989). Out-of-pocket expenses, including investigative fees, are also recoverable. Daly v. Hill, 790 F.2d 1071, 1082-83 (4th Cir. 1986); Bradley v. School Dist. of the City of Richmond, 53 F.R.D. 28, 44 (E.D. Va. 1971). This formula is certainly relevant in determining the compensation that should be provided to appointed attorneys in capital cases. Moreover, it should provide a benchmark for determining an adequate level of funding for public defender offices. In this regard, it is significant to note that a nonprofit legal services organization is entitled to recover fees in civil rights cases calculated at the same market rates available to private attorneys, and the same rule should apply in determining the level of funding that should be provided nonprofit defender offices. *See Blum*, 465 U.S. at 886.

594. *See* Bright, *Counsel for the Poor*, *supra* note 10, at 1883 (arguing that "[s]o long as juries and judges are deprived of critical information and the Bill of Rights is ignored in the most emotionally and politically charged cases due to deficient legal representation, the courts should not be authorized to impose the extreme and irrevocable penalty of death").

rule requiring vacation of all death sentences imposed on indigent defendants in jurisdictions that failed to provide reasonable compensation and investigative and expert support to the attorney representing that indigent at trial or on appeal.

This remedy is not compelled because everyone on death row would have avoided their fate had they been provided the sort of defense contemplated by the Supreme Court's Eighth Amendment jurisprudence.[595] Rather, it is compelled because it is impossible to identify with any reliability which outcomes were and are affected by resource deprivation. The level of resource deprivation discussed here has destroyed the adversarial character of the trials in which these death sentences were obtained. "When a criminal proceeding 'loses its character as a confrontation between adversaries,' the harm done a defendant is as certain as it is difficult to define."[596] The prejudice that results from resource deprivation permeates the entire death sentencing process. Its reach cannot be readily ascertained, and its effect cannot be isolated[597]: "The insidiousness of overburdening defense counsel is that it can result in concealing from the courts, and particularly from the appellate courts, the nature and extent of damage that is done to defendants."[598]

Under such circumstances, it is inappropriate to "allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."[599] If procedural protections break down, proof that impermissible influences actually affected the sentence in the individual case in which the challenge is raised is not required.[600] The nature of the death-sentencing process does not lend itself to after-the-fact reassessment by appellate courts. Rather, the defendant is entitled to a full trial in which the state is put to the evidentiary rigors of proving beyond reasonable doubt that the defendant committed a capital crime, and of convincing the sentencer that death is the appropriate "rational, moral response" to

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595. BALDUS ET AL., *supra* note 10, at 3 (asserting that "the system has improved since *Furman* and it is clear that even though many of the death sentences imposed since 1973 are arbitrary or racially discriminatory, all the death sentences imposed since then cannot be so characterized").

596. Lockhart v. Fretwell, 113 S. Ct. 838, 848 (1993) (Stevens, J., dissenting) (quoting United States v. Cronic, 466 U.S. 648, 656-57 (1984)).

597. *See* Margulies, *supra* note 213, at 674 n.2. *See also* Satterwhite v. Texas, 486 U.S. 249 (1988); Holloway v. Arkansas, 435 U.S. 475, 490-91 (1978).

598. State v. Smith, 681 P.2d 1374, 1381 (Ariz. 1984).

599. Glasser v. United States, 315 U.S. 60, 76 (1942) (holding that *per se* rule of reversal appropriate when Sixth Amendment violation affects entire representation of criminal defendant).

600. McCleskey v. Kemp, 481 U.S. 279, 323-24 (1986) (Brennan, J., dissenting).

the legally relevant aggravating and mitigating circumstances.

Inmates on death row who have never received the quality of defense contemplated by the Eighth Amendment should not be denied relief from that constitutional violation because of the procedural status of their cases. For example, the mere fact that habeas petitioners have failed to challenge the constitutionality of resource deprivation in earlier proceedings should not preclude relief. The Supreme Court has recognized that "cause" for a procedural defaults exists if "some objective factor external to the defense impeded" compliance with procedural rules.[601] This factor is present when "the factual or legal basis for [the] claim was not reasonably available to counsel" at the time of the default.[602] Since the courts have not previously ruled on an Eighth Amendment challenge to the effects of resource deprivation, the novel "legal basis" for the claim should be sufficient to establish "cause" for procedural defaults. Moreover, the Eighth Amendment violation described here is so integral to the integrity of the death-sentencing process that defendants who receive death sentences through that process have been denied "fundamental fairness" and were thus prejudiced by the Eighth Amendment violation.[603] While the Court has imposed significant hurdles to habeas relief when it announces "new rules" not in effect before a petitioner's direct appeal was exhausted,[604] one of the exceptions to the Court's nonretroactivity rule would be applicable. That exception applies to " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."[605] Again, the magnitude of the constitutional violation attributable to resource deprivation justifies the application of this exception.

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601. Murray v. Carrier, 477 U.S. 478, 488 (1986).

602. *Id.* at 488 (quoting Reed v. Ross, 468 U.S. 1, 16 (1984)). *See also McCleskey*, 499 U.S. at 493.

603. *See Murray*, 477 U.S. at 494. For essentially the same reason, a conviction and death sentence obtained in a system in which adequate resources are denied defense counsel should not be subject to harmless error analysis. The Supreme Court's harmless error cases distinguish between "trial" errors and "structural" errors. *See* Arizona v. Fulminante, 499 U.S. 279, 290-91 (1991). The latter, which comprise "structural defect[s] affect[ing] the framework within which the trial proceeds, rather than simply an error in the trial process itself," cannot be deemed harmless under any circumstances, because the integrity of the entire trial process is called into question. *Id.* at 291. In other words, the trial has failed to "reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Id.* at 310 (quoting Rose v. Clark, 478 U.S. 570, 577-78 (1986)).

604. *See supra* notes 421-25 and accompanying text.

605. Saffle v. Parks, 494 U.S. 484, 495 (1990) (citing Teague v. Lane, 489 U.S. 288, 311, *reh'g denied*, 490 U.S. 1031 (1989)). The Court has identified *Gideon v. Wainwright* as an example of such a landmark decision. *Id.*

CONCLUSION

There have been several efforts to compare the cost of enforcing the death penalty with the cost of imprisoning a murderer for the rest of his life. These studies have consistently concluded that "a criminal justice system with the death penalty is inordinately more expensive than a criminal justice system without the death penalty."[606] These studies have assumed, however, that the states would bear the cost of a defense that conforms with modern constitutional requirements. Yet nearly all of the states that vigorously enforce the death penalty have found a foolproof method of controlling the cost of capital punishment: they have refused to pay for a meaningful defense. This allows state governments to retain the death penalty while avoiding the political repercussions that would be associated with imposing higher taxes or sacrificing other public services in order to pay for it.

But this strategy has not been without a price. The deplorable underfunding of capital defense services that has been documented in this Article undermines the very legitimacy of the death penalty itself as it has been administered in most jurisdictions in the United States. The effects of resource deprivation pervade the entire process of determining who shall be chosen to die for their crimes, manifesting itself most dramatically in the pretrial investigation and legal research that goes undone, and in the expert assistance that is never provided. It can be said with confidence that most indigent defendants who have been sentenced to death received severely substandard representation, and that this pattern will continue unless the courts intercede.

The reluctance of courts to confront directly the injustices caused by the underfunding of the defense in capital punishment cases stems in large part from the enormity of the capital defense crisis. Tackling it would be a daunting and largely thankless task. The individuals adversely affected by this crisis—those accused of aggravated murder—are the most hated and least politically powerful in the country, and political actors, including judges, are not highly motivated to make unpopular decisions that would benefit them. Moreover, many judges no doubt fear that any substantial intervention on their part to address this crisis could threaten the entire criminal justice system in America. After all, studies documenting the effects of underfunded defense services on the quality

606. CAPITAL LOSSES, *supra* note 111, at 12. *See* COOK & SLAWSON, *supra* note 111; Garey, *supra* note 53, at 1270; Barry Nakell, *The Cost of the Death Penalty*, 14 CRIM L. BULL. 69 (1978); Spangenberg & Walsh, *supra* note 171; *see also* COMMITTEE TO STUDY THE DEATH PENALTY IN MARYLAND, *supra* note 171, at 5.

of indigent representation date virtually from the Supreme Court's decision in *Gideon v. Wainwright.*

In the end, none of this justifies acquiescence to the status quo. The enormity of an injustice simply cannot relieve us of our obligation to redress it. The political unpopularity of the victims of the injustice does not relieve us of our moral responsibility for it. And, as has been demonstrated here, avenues exist for constructing a remedy that is limited to capital cases and which would not impact the operation of the criminal justice system in non-capital cases. If we are going to have the death penalty, the states should be required to commit enough resources to the system to assure that arbitrariness in the imposition of the death penalty is minimized. Until that commitment is made, the words of Justice Brennan should continue to torment the national conscience: "[T]he way in which we choose those who will die reveals the depth of moral commitment among the living."[607]

607. McCleskey v. Kemp, 481 U.S. 279, 344 (1986) (Brennan, J., dissenting).