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Commentary on Capital Punishment: Is There Any Habeas Left in This Corpus?

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Commentary

Ronald J. Tabak*

I. INTRODUCTION

On April 24, 1996, President Clinton signed into law "anti-terrorism" legislation containing provisions that will significantly curtail the availability of habeas corpus for state and federal prisoners whose convictions or death sentences were secured in violation of the United States Constitution. Just a month earlier, the White House had publicly recognized that several of the legislation's habeas corpus provisions might be unconstitutional.¹ [*Please note that the legislation which was enacted in April 1996 is identical to the 1995 Senate-passed habeas provisions discussed in detail below by Professor Larry Yackle. Publication deadlines did not permit changes to the remainder of this Commentary or the Capital Punishment Panel Discussion, which refer to the new statute as "proposed" legislation or a "proposal."*] The present Congress previously eliminated federal funding for the post-conviction capital defender organizations ("PCDOs"), which had handled numerous habeas corpus proceedings for death row inmates and advised relatively inexperienced attorneys on other capital habeas cases.² At the same time, Congress heightened its efforts to expand the use of the death penalty, and to shorten the amount of time between conviction and execution.³ As these congressional activities occur, however, doubts about the fairness of our capital punishment system continue to grow—and for good reason. In 1995, the South African Supreme Court unanimously held the death penalty unconstitutional—in large part because the Justices deplored the unfairness that permeates the capital punishment system in the United States.⁴ Meanwhile, Pope John Paul II issued an encyclical that placed the Catholic Church more clearly in opposition to the implementation of the death penalty in our modern society.⁵

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1. Alison Mitchell, *Clinton Signs Measure on Terrorism and Death Penalty Appeals*, N.Y. TIMES, Apr. 25, 1996, at A18; Stephen Labaton, *Senate Easily Passes Counterterrorism Bill*, N.Y. TIMES, Apr. 18, 1996, at B7.

2. See Eric Zorn, *Cutting Subsidy for Death Appeals to Cost Time, Funds*, CHI. TRIB., Feb. 21, 1996, § 2, at 1.

3. See Comments by Professor Larry Yackle, *infra*, at 561-68.

4. See *infra* notes 275-80 and accompanying text.

5. See Comments by Reverend Michael Place, *infra*, at 611-14.

In an effort to put these developments in perspective, the American Bar Association ("ABA") sponsored a program in August 1995, entitled "Capital Punishment: Is There Any Habeas Left In This Corpus?" An edited transcript of that program follows. This Commentary highlights some of the issues discussed at the program, and attempts to examine those issues within a wider context.

In recently discussing the subjects of capital punishment and habeas corpus with numerous otherwise well-informed people, I learned that most do not really understand habeas corpus, why it is particularly important in capital cases, and why the PCDOs' role is vital in these cases. Accordingly, before considering whether there is "any habeas left in this corpus," one must answer a more basic question: Why should anyone care about the viability of habeas corpus proceedings for death row inmates?

This Commentary first explains what habeas corpus is and why it must be preserved.⁶ Next, it will address why state courts frequently fail to rectify serious constitutional violations.⁷ It will then discuss Congress' recent attacks on habeas corpus, including the habeas corpus "reform" legislation and the recent defunding of PCDOs.⁸ This Commentary will proceed to explain why writs of habeas corpus are so endangered⁹ and to address the overall context in which habeas corpus curtailment is occurring.¹⁰ This Commentary will then point out that current United States policy on executions runs counter to worldwide trends.¹¹ This Commentary concludes by advocating that bar organizations inform the public that America's current capital punishment system is so fundamentally unfair that its continued operation, at least in its present form, cannot be tolerated.¹²

II. HABEAS CORPUS AND WHY ITS PRESERVATION IS VITAL

In a habeas corpus proceeding, a state prisoner may secure relief from a federal court if his or her federal constitutional rights have been so seriously violated as to constitute harmful error.¹³ It is difficult for a prisoner to get a claim considered in habeas corpus, and even more difficult to secure relief. For instance, a prisoner cannot secure habeas

6. See *infra* part II.

7. See *infra* part III.

8. See *infra* part IV.

9. See *infra* part V.

10. See *infra* part VI.

11. See *infra* part VII.

12. See *infra* part VIII.

13. See *infra* note 286.

relief if he or she runs afoul of any of the various procedural barriers to consideration of his claim.¹⁴ The prisoner must have asserted the constitutional claim in state court on every occasion required by state law, and must then raise the claim in his first federal habeas petition.¹⁵ Further, the claim must not (except in highly unusual circumstances) seek to create "new" federal constitutional law, because even if the claim seeks a logical extension of existing Supreme Court precedent, its consideration may be barred under the Court's anti-retroactivity principles.¹⁶

Despite all these barriers,¹⁷ death row inmates secured relief in about forty-seven percent of habeas cases decided between 1976 and 1991.¹⁸ In contrast, other convicted felons prevailed in only a small percentage of non-capital cases.¹⁹

What kinds of federal constitutional violations have led to such a high success rate in capital habeas cases? The following are examples of capital habeas cases in which federal courts granted habeas relief:²⁰

- A mentally deficient man gave the police two vastly different statements during forty-two hours of uncounselled questioning.²¹ The latter of the two confessions contained words beyond the defendant's capability and, unlike the first confession, distinctly recited facts that qualified the defendant for the death penalty.²² In addition, the second statement was given in a suggestive environment, rendering the statement involuntary.²³
- The grand jury that indicted the defendant was selected in a process that systematically excluded African Americans.²⁴
- The prosecution knowingly presented misleading evidence by using an expert witness to testify that the defendant must

14. See *infra* note 318 and accompanying text.

15. See generally *infra* note 318 and accompanying text (discussing procedural default).

16. See *Teague v. Lane*, 489 U.S. 288, 294-96 (1989) (adopting an extremely restrictive doctrine regarding the retroactivity of constitutional law).

17. Some of these barriers have come into existence, or have become more severe, only in the last 5-10 years. See *infra* note 333 and accompanying text.

18. See 1 JAMES S. LIEBMAN & RANDY HERTZ, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* 17 & n.21 (2d ed. 1994).

19. See *id.*

20. See *id.* § 11.2c, at 303-26 for a more extensive list (including the cases discussed in the text accompanying notes 21-45) of successful habeas corpus claims.

21. *Jurek v. Estelle*, 623 F.2d 929, 932-35 (5th Cir. 1980) (en banc), *cert. denied*, 450 U.S. 1001 (1981).

22. *Id.* at 934-35, 938.

23. *Id.* at 940-41.

24. *Vasquez v. Hillery*, 474 U.S. 254, 264 (1986).

have been the sole triggerman, even though that same expert had previously testified at a codefendant's trial that the codefendant must have been the sole triggerman.²⁵

- The prosecutor withheld investigative reports which contained substantial evidence indicating that someone other than the defendant may have committed the murder.²⁶
- The prosecutor (1) deliberately withheld the fact that his chief witness had received a deal for his trial testimony, and (2) improperly misled the jury by stating in his closing argument that the absence of such a deal favorably reflected upon the veracity of the witness.²⁷
- The prosecution suppressed evidence showing that the defendant did not commit the killing.²⁸
- The defendant was insane at the time of the trial and thus was not competent to assist his attorney.²⁹ The defendant was acquitted of the murder charge after the federal court ordered a retrial and the defendant was restored to sanity.³⁰
- The district attorney devised a secret scheme by which he persuaded the jury commissioners to under-represent African Americans and women.³¹
- Massive pretrial publicity in a small town compromised nearly all of the jurors, many of whom had attended the victims' funerals.³²
- The local sheriff handpicked the jury in a case involving the murder of a police officer.³³
- The prosecutor argued to the jury that the main piece of evidence, a pair of shorts, was stained with blood, even though he knew that the stain actually consisted of paint.³⁴
- The judge's charge to the jury unconstitutionally placed the

25. Troedel v. Wainwright, 667 F. Supp. 1456, 1458-60 (S.D. Fla. 1986), *aff'd per curiam*, 828 F.2d 670 (11th Cir. 1987).

26. Bowen v. Maynard, 799 F.2d 593, 613 (10th Cir.), *cert. denied*, 479 U.S. 962 (1986).

27. Brown v. Wainwright, 785 F.2d 1457, 1458 (11th Cir. 1986).

28. Chaney v. Brown, 730 F.2d 1334, 1357 (10th Cir.), *cert. denied*, 469 U.S. 1090 (1984).

29. Wallace v. Kemp, 757 F.2d 1102, 1112 (11th Cir. 1985).

30. Wallace v. State, 371 S.E.2d 914, 915 n.1, 916 (Ga. Ct. App. 1988).

31. Amadeo v. Zant, 486 U.S. 214, 226 (1988).

32. Coleman v. Kemp, 778 F.2d 1487, 1539-40 (11th Cir. 1985), *cert. denied*, 476 U.S. 1164 (1986); Isaacs v. Kemp, 778 F.2d 1482, 1486-87 (11th Cir. 1985), *cert. denied*, 476 U.S. 1164 (1986).

33. Thompson v. White, 680 F.2d 1173, 1174 (8th Cir. 1982), *cert. denied*, 459 U.S. 1177 (1983).

34. Miller v. Pate, 386 U.S. 1, 3-6 (1967).

burden of proof on the defendant regarding a key element of the alleged crime.³⁵

- The prosecutor based his argument in favor of a death sentence on prior felony convictions that, although stipulated to by defense counsel, the prosecutor knew did not exist.³⁶
- The defendant was sentenced to death by a jury unconstitutionally instructed that it could not consider as mitigating factors his brain damage, his full cooperation with the police, or his favorable prospect for rehabilitation.³⁷
- The jury was unconstitutionally instructed in a way that prevented it from considering the defendant's mental retardation as a factor that would support a sentence other than death.³⁸
- The prosecutor inaccurately told the jury that a verdict of death would not be final because the appellate court would correct any mistakes it made.³⁹
- The defendant's attorney failed to inform the jury, which convicted and sentenced the defendant to death, that the state's only witness—the admitted killer, who testified in return for a lesser sentence—did not link the defendant to the murder in his detailed confession to police.⁴⁰
- Defense counsel filed no pretrial motions, did not try to locate any defense witnesses, did not interview the defendant's family or the State's witnesses, did not visit the crime scene, failed to use possibly exculpatory evidence available from the State's scientific tests, and failed to seek a new trial when evidence emerged that the victims were alive after the last time that the defendant could have been in contact with them.⁴¹
- Defense counsel failed to present the jury with significant evidence concerning the defendant's retardation, limited education, and "poverty-stricken socioeconomic background"—evidence that might have persuaded the jury to impose a sentence other than death.⁴²

35. *Francis v. Franklin*, 471 U.S. 307, 326 (1985).

36. *Lewis v. Lane*, 832 F.2d 1446, 1457 (7th Cir. 1987), *cert. denied*, 488 U.S. 829 (1988).

37. *Hitchcock v. Dugger*, 481 U.S. 393, 397-99 (1987).

38. *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989).

39. *Wheat v. Thigpen*, 793 F.2d 621, 624-29 (5th Cir. 1986), *cert. denied*, 480 U.S. 930 (1987).

40. *Smith v. Wainwright*, 799 F.2d 1442, 1443-44 (11th Cir. 1986).

41. *House v. Balkcom*, 725 F.2d 608, 611-12 (11th Cir.), *cert. denied*, 469 U.S. 870 (1984).

42. *Cunningham v. Zant*, 928 F.2d 1006, 1018-19 (11th Cir. 1991).

- Neither of the two defense lawyers conducted any investigation for evidence that might persuade the jury not to impose the death sentence, because “[e]ach lawyer . . . believed . . . the other was responsible for preparing the penalty phase.”⁴³
- Defense counsel did not investigate or otherwise prepare for the capital sentencing hearing because he was confident that he could negotiate a sentence other than death.⁴⁴
- Defense counsel failed to bring to the jury’s attention evidence relating to the defendant’s mental retardation, the fact that his I.Q. was below forty-one, or that he was only seven years old at the time of the crime and was not proven to have had any part in the homicide.⁴⁵

Even though many death row inmates have obtained relief in federal habeas proceedings because of constitutional violations that occurred in state courts, state death row populations continue to increase.⁴⁶ At the same time, influenced by intense political pressures, state courts have not rectified numerous violations of capital defendants’ constitutional rights.⁴⁷

III. WHY STATE COURTS FREQUENTLY FAIL TO RECTIFY SERIOUS CONSTITUTIONAL VIOLATIONS

Why is it that our legal system has had to rely on federal habeas corpus proceedings to rectify serious constitutional violations? Speakers at our program identified several underlying reasons: the politicization and timidity of elected state court judges,⁴⁸ the ineffectiveness of counsel appointed by state judges to represent indigent capital defendants,⁴⁹ and state judges’ frequent unwillingness to rectify the

43. *Harris v. Dugger*, 874 F.2d 756, 763 (11th Cir.), *cert. denied*, 493 U.S. 1011 (1990).

44. *Osborn v. Shillinger*, 861 F.2d 612, 624-30 (10th Cir. 1988).

45. *Jones v. Thigpen*, 788 F.2d 1101, 1103 (5th Cir. 1986), *cert. denied*, 479 U.S. 1087 (1987).

46. COMMITTEE ON DEFENDER SERVICES, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE SUBCOMMITTEE ON DEATH PENALTY REPRESENTATION 1 (June 1995) [hereinafter DEFENDER SERVICES] (noting that in 1982 “1137 inmates occupied the nation’s death rows. By 1994, that number had grown to 2710”) (footnote omitted). As of January 1996, the total number of death row inmates was 3061. NAACP LEGAL DEFENSE & EDUCATION FUND, DEATH ROW USA 1 (Winter 1995) [hereinafter DEATH ROW USA].

47. *See infra* part III.

48. *See infra* part III.A.

49. *See infra* part III.B.

unconstitutional conduct of prosecutors and other law enforcement personnel.⁵⁰

A. *Politicized and Timid State Judges*

Stephen Bright discussed the fact that, unlike federal judges, who are appointed to life terms, state court judges in thirty-two of the thirty-eight states permitting capital punishment must periodically face the electorate in seeking re-election or retention.⁵¹ Significantly, numerous incumbent judges have lost bids for re-election because of past decisions in death penalty cases.⁵² Further, some states' attorneys general continue to attack sitting judges, and threaten to seek their defeat because of their decisions in some capital cases.⁵³ Bright also pointed to a growing trend in judicial elections: the use of simplistic, "tough on crime" campaign slogans, which in some instances have led to the election of extremely unqualified judges.⁵⁴

At an ABA program in 1993, James Exum, former Chief Justice of the North Carolina Supreme Court, noted that when he ran for Chief Justice as an incumbent:

Some of the campaign debate got really grizzly. My opponents would bring up all the times I had dissented in cases involving the imposition of the death penalty, and I had to come back and demonstrate all the times I had concurred in cases sustaining the death penalty. So, it emerged into a battle of statistics.⁵⁵

Chief Justice Exum also noted that state judiciaries face increased attacks—even from otherwise responsible editorial writers—for upholding well-established constitutional principles in capital cases.⁵⁶ He warned that as these attacks continue to mount, "the less likely it is going to be that the state judges will be able to survive if they some-

50. See *infra* part III.C.

51. See *infra* note 344 and accompanying text.

52. See Comments by Stephen B. Bright, *infra*, at 572 (describing three California Supreme Court justices who lost their re-election bids because of their decisions on death penalty cases).

53. See *infra* notes 358-62 and accompanying text. See also *infra* note 446 and accompanying text (discussing the election for Wisconsin Attorney General in 1994).

54. See *infra* notes 352-57, 378-95, and accompanying text. For example, one Alabama circuit judge's re-election ads read: "Some complain that *he's too tough on criminals*, AND HE IS . . ." See *infra* note 380 and accompanying text.

55. James Exum, in *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 11 FORDHAM URB. L.J. 239, 271 (1994).

56. *Id.* at 272-73.

times overturn death sentences I plan to resign. I'm glad I will not have to run again."⁵⁷

A statistical analysis published in 1987 supports Bright's point about the impact of judicial elections on the decision-making of state court judges in death penalty cases.⁵⁸ The study showed that, among Louisiana state supreme court justices who frequently voted in favor of criminal defendants' claims, those who were less likely to vote in favor of capital defendants were justices who were determined to be re-elected in upcoming elections by constituents whom they perceived to be generally more conservative on crime issues than they.⁵⁹ One justice interviewed for that study candidly stated that he was reluctant to dissent from the denial of capital defendants' claims because of a fear of adverse publicity that could harm his re-election prospects.⁶⁰

Bright also mentioned various ways in which the capital punishment cases affect, or are affected by, state judicial elections. For example, in Alabama, one judge received a special designation to handle a well-publicized capital case shortly before a judicial election, in an apparent effort to aid his electoral prospects.⁶¹ Also, following the defeat in 1986 of three incumbent justices who were attacked for their decisions in favor of capital defendants, the California Supreme Court has had an extremely high affirmance rate in capital cases.⁶² In addition, in states that permit judges to override jury sentencing verdicts, elected judges frequently override jury sentences of life imprisonment in order to impose the death penalty.⁶³ Finally, elected state judges are generally responsible for the appointment and funding of counsel for indigent defendants.⁶⁴ It is not in these judges' political interests to appoint counsel who will mount vigorous, and possibly successful, defenses for unpopular capital defendants.⁶⁵

57. *Id.* at 273.

58. See Melinda G. Hall, *Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study*, 49 J. POL. 1117, 1122-23 (1987).

59. *Id.* at 1123.

60. *Id.* at 1120.

61. See *infra* text accompanying notes 372-77.

62. See *infra* notes 345-51 and accompanying text. While one of the Justices, Chief Justice Rose Bird cast 61 reversal votes in 61 capital cases, her two defeated colleagues, Justices Cruz Reynoso and Joseph Grodin, had voted to affirm in a substantial percentage of capital cases. See Frank Clifford, *Voters Repudiate 3 of Court's Liberal Justices*, L.A. TIMES, Nov. 5, 1986, at A8. Nevertheless, the three were linked together in campaign ads, which proclaimed that "all three justices needed to lose if the death penalty is to be enforced." *Id.*

63. See *infra* notes 392-95 and accompanying text.

64. See Comments by Stephen B. Bright, *infra*, at 576-77.

65. See *infra* notes 382-86 and accompanying text.

Washington Supreme Court Justice Robert Utter acted in a manner substantially more principled than that displayed by the judges described by Bright. In March 1995, Justice Utter resigned after twenty-four years on the court, stating that he believed that the legal system is flawed because capital punishment is unevenly applied, and that there is no assurance that innocent people will not be executed.⁶⁶ Justice Utter began his career "convinced of the death penalty," and helped seek it as a prosecutor.⁶⁷ Upon resigning, however, he stated:

I've reached the point where I can no longer participate in a legal system that intentionally takes human life in capital punishment cases. We continue to demonstrate no human is wise enough to decide who should die [D]espite our efforts to treat everyone equally, there are still people condemned for crimes they didn't commit.⁶⁸

B. Ineffective Trial Lawyers

Several of the speakers at the program discussed the poor representation frequently provided by capital defense counsel, who in most instances are appointed by state judges.⁶⁹ Sadly, as the speakers indicated, egregious ineffectiveness of counsel in capital cases is not limited to the "death belt" in the South.⁷⁰ It permeates some of our large, industrialized northern states as well.⁷¹

Scharlette Holdman described numerous cases of inadequate representation, including those where a trial attorney lied about fluency in Spanish, which assertedly enabled him to communicate with his Hispanic client; where an attorney was arrested for driving under the influence while on his way to the courthouse during jury selection; where a lawyer failed to interview a single witness before trial; where defense counsel called his own client a "wetback"; and where a defense attorney asked the jury, in closing argument, to give his African American client the death penalty.⁷²

66. See Jim Muhlstein, *Act of Conscience: Justice Utter Resigns, Says Death Penalty Fatally Flawed*, THE HERALD (Everett, Wash.), Mar. 30, 1995, at A1.

67. *Id.* at A10.

68. *Id.* at A1, A10.

69. See Comments by Stephen B. Bright, *infra*, at 576-77; Comments by Susan Getzendanner, *infra*, at 593; Comments by Scharlette Holdman, *infra*, at 585-86.

70. See Comments by Scharlette Holdman, *infra*, at 585-86 (discussing western states).

71. See Comments by Scharlette Holdman, *infra*, at 583-86; see also Comments by Susan Getzendanner, *infra*, at 593 (discussing Illinois).

72. See Comments by Scharlette Holdman, *infra*, at 583-86.

Andrea Lyon stated, based on her long experience with capital cases in Illinois, that many attorneys give the appearance, but not the reality, of representation.⁷³ Former United States district court Judge Susan Getzendanner supported this view.⁷⁴ From the habeas corpus hearings that she conducted, Judge Getzendanner learned:

The horror stories that you sometimes hear are sometimes true. The lawyers did terrible jobs in some of these cases. The defendants were not represented. The lawyers were young, asleep, drunk. . . . More often than not, lawyers would come in and testify, for the defendant, that they in fact had performed incompetently. It would be unjust to deny any defendant his one clear shot to federal review.⁷⁵

Stephen Bright discussed the fact that in Philadelphia, Pennsylvania, counsel in capital cases were traditionally appointed through a judicially operated patronage system.⁷⁶ This system led to horrendous representation by attorneys, which was finally exposed in 1992 by the *Philadelphia Inquirer*.⁷⁷ While the city has since enacted some reforms, these reforms do not help the scores of death row inmates from Philadelphia who received miserable representation under the patronage system. Sadly, Pennsylvania is now aggressively moving to execute many of these people. Yet, Pennsylvania's then-Attorney General, Ernest Preate, acknowledged at several ABA programs that many capital cases have been characterized by ineffective assistance of counsel on both sides: ineffectual defense lawyers and poorly trained prosecutors, whose combined actions violated the defendants' constitutional rights.⁷⁸

Stephen Bright mentioned several examples of the pervasive capital representation problems in the South.⁷⁹ One example concerns a lawyer in Houston, Texas who sometimes sleeps during trials, but is nonetheless often appointed to represent defendants charged with capital crimes.⁸⁰ One Houston judge dismissed a defendant's complaint

73. See Comments by Andrea Lyon, *infra*, at 587-91.

74. See Comments by Susan Getzendanner, *infra*, at 593.

75. See Comments by Susan Getzendanner, *infra*, at 593.

76. See *infra* notes 401-03 and accompanying text.

77. See *infra* notes 401-03 and accompanying text.

78. See e.g., Ernest Preate, Jr., in *The Death of Fairness? Counsel Competency & Due Process in Death Penalty Cases*, 31 HOUS. L. REV. 1105, 1120-21 (1994) (noting that ineffective counsel on both sides is most clearly demonstrated when "[t]he prosecutor [does] something he or she shouldn't have done and the defense counsel fail[s] to object or fail[s] to take advantage of it").

79. See *infra* notes 383-86 and accompanying text.

80. See *infra* notes 383-85 and accompanying text.

that his lawyer was sleeping, stating that the Constitution "doesn't say the lawyer has to be awake."⁸¹

*C. Egregious Misconduct by Prosecutors and Others
in Law Enforcement*

Violations of a defendant's constitutional rights in capital cases do not always result from incompetent defense attorneys. Prosecutors and other law enforcement personnel have also committed unconstitutional acts in capital cases.⁸² For example, Ricardo Aldape Guerra was convicted and sentenced to death in Houston, Texas, as a result of highly improper identification procedures, the omission of crucial exculpatory information from witnesses' statements, the intimidation and manipulation of witnesses, and the knowing use of false testimony.⁸³ After serving twelve years on death row, Guerra sought a writ of habeas corpus in federal court, which granted the writ and ordered that he be retried.⁸⁴ He secured the retrial in a federal court ruling in 1994 with the assistance of the now-defunct Texas Appellate Practice and Educational Resource Center, which enlisted *pro bono* representation for Guerra from the large Vinson & Elkins law firm.⁸⁵ Federal district Judge Kenneth Hoyt, a Reagan appointee, stated in his decision that "[t]here is no doubt in this court's mind that the verdict would have been different had the trial been properly conducted."⁸⁶

How can innocent men come so close to being executed? A recent article noted the effects of high-profile cases, which draw intense scrutiny from the public, and which increase pressures on local prosecutors.⁸⁷ The article quoted Robert A. Loeb, a former Cook County assistant state's attorney.⁸⁸ He stated that elections of prosecutors by fearful, angry voters "creates a mood or ethic within the incumbent

81. See *infra* note 385 and accompanying text.

82. See Comments by Jeffrey Urdangen, *infra*, at 606-10 (discussing the Rolando Cruz and Alejandro Hernandez cases and the politically inspired decisions by the prosecutor—now Illinois' Attorney General—to repeatedly retry them even after evidence of their innocence became overwhelming). See also Darryl Van Duch, *Recants: Accused Killer, Once on Death Row, Freed in 3d Trial*, NAT'L L.J., Nov. 20, 1995, at A6 (discussing the same case).

83. See Nicholas Varchaver, *9 mm Away From Death*, AM. LAW., Mar. 1995, at 81, 81-82.

84. *Id.*

85. *Id.* at 81.

86. *Id.* at 87.

87. Darryl Van Duch, *Media Fever Scorches Chicago Prosecutions: Prosecutors Trip Over High-Profile Cases that Draw Intense Scrutiny, Win Convictions on Thin Evidence*, NAT'L L.J., Nov. 13, 1995, at A1.

88. *Id.* at A26.

prosecutor's office in which prosecutors are scared to reject [border-line] high-profile cases[,] and the effect can snowball."⁸⁹

Does the release of death row inmates wrongly convicted mean that we can count on state judicial systems to work? Jeffrey Urdangen, a lawyer for Alejandro Hernandez, an innocent former death row inmate who was recently freed from an Illinois prison, believes that the Hernandez case shows the contrary.⁹⁰ He stated:

[F]ederal courts need to be involved. Very rarely can the innocent condemned person have the benefit of the public support, the uncompensated resources, and the time and effort of lawyers throughout the community like these defendants did. Very rarely is it so obvious that the wrong men have been convicted. There are many cases such as this which are still buried in the system.⁹¹

Far too many prosecutors and law enforcement officers are more concerned about "winning" high profile death penalty cases than serving justice. As Andrea Lyon pointed out, their lack of concern for justice is illustrated by the fact that a group of prosecutors calls itself "The Fryers Club."⁹²

Of course, many in law enforcement do try to do the right thing. But even *they* are confronted by political pressures. Montgomery County, Maryland State's Attorney Andrew Sonner said that a prosecutor who does not seek the death penalty in a high-profile case will likely have problems being re-elected.⁹³ Sonner added that if he did not already have a six-term record, he would have been easily defeated in his very sophisticated county, because he rarely seeks the death penalty.⁹⁴ In the political arena, he noted, "the death penalty is the symbolic, get-tough approach to crime."⁹⁵ Moreover, Sonner noted that he is often confronted by families of victims, who say that if he does not seek the death penalty he is placing no value on the victims' lives.⁹⁶

In New York, where the legislature re-enacted capital punishment in 1995, prosecutors who personally opposed the death penalty reacted to the new law in strikingly different ways. After the new law was enacted, Bronx District Attorney Robert Johnson said that he would

89. *Id.*

90. See Comments by Jeffrey Urdangen, *infra*, at 606-10.

91. See Comments by Jeffrey Urdangen, *infra*, at 610.

92. See *infra* note 428 and accompanying text.

93. See Comments by Andrew L. Sonner, *infra*, at 602-05.

94. See *id.* at 604.

95. See *id.*

96. See *id.* at 605.

never seek the death penalty.⁹⁷ Although he was harshly attacked by Mayor Rudolph Giuliani and the local tabloid newspapers, and even by the Chair of the Ethics Committee of the Association of the Bar of the City of New York (writing in his personal capacity), District Attorney Johnson was overwhelmingly re-elected in November 1995.⁹⁸ Manhattan District Attorney Robert Morgenthau, who had forcefully opposed enactment of the death penalty statute, later stated that his office would consider whether to seek the death penalty on a case-by-case basis.⁹⁹ In contrast, Brooklyn District Attorney Charles Hynes, although continuing to express his personal opposition to the death penalty, began creating a special capital punishment unit even before the death penalty legislation was introduced; publicly stated that he would personally argue before the jury in favor of the death penalty when his office seeks capital punishment for the first time; and urged that the scope of the death penalty statute be expanded.¹⁰⁰

District Attorney Hynes's headline-grabbing conduct is materially different from the actions of Wisconsin prosecutors, many of whom are personally opposed to the death penalty.¹⁰¹ Milwaukee District Attorney Michael McCann pointed out that when Wisconsin faced the possible enactment of a capital punishment statute, the state-wide assistant district attorneys' "union is pursuing a provision in the collective bargaining agreement that assistant district attorneys will not be put in jeopardy if they refuse to participate in the prosecution of capital punishment cases."¹⁰²

On March 19, 1996, after coming under pressure from Governor Pataki and other politicians to ask for the death penalty in the murder of a police officer, Bronx District Attorney Robert Johnson stated that his position against seeking the death penalty applied "in general" but that "[n]othing in life is absolute" and that he would exercise his discretion in deciding whether or not to seek the death penalty against the suspects in that case.¹⁰³ On the very next day, however, long before the time for District Attorney Johnson's 120-day period to exercise his discretion would have ended, Governor George Pataki took what he acknowledged to be an extraordinary action: he removed Johnson

97. See *infra* note 480 and accompanying text.

98. Ian Fisher, *Election 1995: The Overview*, N.Y. TIMES, Nov. 8, 1995, at B1.

99. See *infra* notes 482-83 and accompanying text.

100. Andrea Peyser, *DA Who Hates Death Penalty May Be First to Enforce It*, N.Y. POST, Sept. 8, 1995, at 18.

101. See Comments by E. Michael McCann, *infra*, at 597-98, 600.

102. See Comments by E. Michael McCann, *infra*, at 598.

103. Jan Hoffman, *Prosecutor in Bronx, Under Fire, Softens Stand Against Executions*, N.Y. TIMES, Mar. 20, 1996, at A1, B5.

from the case and replaced him with New York Attorney General Dennis Vacco.¹⁰⁴ The Governor, who was flanked at a press conference by the victim's brother, partner, and the police union president, said he acted because he felt District Attorney Johnson would not objectively consider seeking capital punishment.¹⁰⁵ The Governor's decision was criticized by several district attorneys in New York, one of whom, the Republican District Attorney of Ulster County, said Johnson's removal "sets a precedent which I believe the Governor is going to regret. . . . I believe [this] is a decision for the elected District Attorney and not the Governor."¹⁰⁶ The Governor's action was also criticized by many bar leaders¹⁰⁷ and legal ethics experts.¹⁰⁸ The *New York Times* pointed out editorially that "State Attorney General Dennis Vacco's vehement commitment to the death penalty makes him an especially poor choice as Mr. Johnson's substitute."¹⁰⁹ In a similar vein, the *Daily News* ran a cartoon showing the Governor wearing a campaign button and standing next to a hooded executioner and saying, "AND YOU CAN REST ASSURED MY PROSECUTOR WILL MAKE A SOUND AND FAIR JUDGMENT IN THIS CASE."¹¹⁰

IV. CONGRESSIONAL ASSAULTS ON HABEAS CORPUS

As Stephen Bright stated, the Supreme Court has greatly increased the obstacles to securing habeas corpus relief for prisoners whose constitutional rights have been violated in a manner that constitutes harmful error.¹¹¹ Congress, moreover, may soon enact legislation that would make it even more difficult for federal courts to overturn state court judgments in habeas corpus proceedings.¹¹² In fact, by moving to defund the PCDOs, Congress has already made it significantly more difficult for death row inmates to seek relief through the habeas corpus process.¹¹³ Meanwhile, the growing politicization of every facet of the

104. Rachel L. Swarns, *In Clash on Death Penalty Case, Pataki Removes Bronx Prosecutor*, N.Y. TIMES, Mar. 22, 1996, at A1, A16.

105. *Id.*

106. Edward Adams & Matthew Goldstein, *Prosecutors Bar Critical of Pataki Move*, Mar. 22, 1996, N.Y. L.J., at 4 (quoting Michael Kavanagh).

107. *Id.* at 1, 4.

108. See Swarns, *supra* note 104, at A16 (quoting N.Y.U. Law Professor Stephen Gillers); Monroe H. Freedman, *Bronx DA Has Morality, Law on His Side*, NEWSDAY, Mar. 20, 1996, at A39.

109. *Mr. Pataki Intervenes, Unwisely*, N.Y. TIMES, Mar. 22, 1996, at A14 (Nat'l Ed.).

110. Mickey Hackman, DAILY NEWS, Mar. 25, 1996, at 20.

111. See *infra* note 333 and accompanying text.

112. See Comments by Professor Larry Yackle, *infra*, at 561-68. See *supra* text accompanying note 1 for the current status of the habeas corpus legislation.

113. See *infra* note 337 and accompanying text. See also Comments by Andrea

capital punishment system may also be infecting the Senate's consideration of federal judicial appointments.¹¹⁴

A. *The Habeas Corpus Legislation*

Professor Larry Yackle described the habeas corpus "reform" legislation that passed the Senate in 1995.¹¹⁵ That Senate-passed legislation has now also passed the House and is likely to be enacted in 1996.¹¹⁶

As Professor Yackle noted, the habeas bill's supporters suggested that the principal impact of the "reform" legislation would be to deter the filing of multiple, successive habeas corpus petitions.¹¹⁷ Indeed, much of the press coverage proceeded on that basis.¹¹⁸ The Supreme Court, however, has already rendered multiple, successive petitions completely ineffective in most cases.¹¹⁹ By focusing the press' and the public's attention on those "white elephants," the proponents of the habeas legislation have largely succeeded in obscuring the most significant part of the proposed bill: the provision concerning the deference to be given to state court decisions that find constitutional that which the federal courts would find unconstitutional.¹²⁰ The federal courts currently are allowed to consider federal constitutional issues *de novo* in habeas corpus proceedings, without giving any special degree of deference to the state court holdings in those cases.¹²¹ Under the habeas "reform" legislation, however, a federal court would have to presume the validity of state court holdings, with three exceptions which Professor Yackle examined.¹²²

Lyon, *infra*, at 587-91 (discussing the impact of PCDOs).

114. See *infra* part IV.C.

115. See Comments by Professor Larry Yackle, *infra*, at 561-68.

116. See *supra* text accompanying note 1 for the current status of the habeas corpus legislation.

117. See Comments by Professor Larry Yackle, *infra*, at 564.

118. See, e.g., Helen Dewar, *Senate Approves Anti-Terrorism Bill*, WASH. POST, June 8, 1995, at A1, A15; Jerry Gray, *Senate Approves Anti-Terror Bill by a 91-To-8-Vote*, N.Y. TIMES, June 8, 1995, at A1.

119. Such successive petitions are still possible in those rare cases in which the death row inmate not only has a meritorious constitutional claim but also can show a likelihood "that no reasonable juror would have convicted him in light of the new evidence." *Schlup v. Delo*, 115 S. Ct. 851, 867 (1995). As noted in the text below discussing *Schlup*'s case, the habeas "reform" legislation would bar relief in some instances in which relief is currently possible under *Schlup*. See *infra* notes 154-63 and accompanying text.

120. S. 735, 104th Cong., 1st Sess. § 604(3) (1995) (amending 28 U.S.C. § 2254(d)).

121. 28 U.S.C. § 2243 (1994).

122. S. 735 § 604(3). See also *infra* notes 329-31 and accompanying text (listing the exceptions).

How great an impact would this deference provision have? Professor Yackle stated that he is not sure.¹²³ Nor can anyone else be sure, because the three exceptions are articulated in language that can be interpreted in several ways.¹²⁴ What is clear, however, is that under this legislation there would be at least some situations in which the federal courts could no longer grant habeas corpus relief, because they would have to give deference to state court constitutional decisions. I fear, along with Professor Yackle, that a majority of the current Rehnquist Court would construe the legislation as significantly curtailing the federal courts' power to grant habeas corpus relief. As a result, federal courts would likely deny relief in many situations in which they find a constitutional violation and conclude that the violation resulted in harmful error.

As Professor Yackle also stated, the habeas "reform" legislation would eliminate current safeguards regarding the manner in which state courts arrive at findings of fact.¹²⁵ For example, the "reform" legislation would make it far more difficult to secure a federal evidentiary hearing, even where crucial facts were not developed in state court through no fault of the death row inmate.¹²⁶

The legislation would also establish filing deadlines for habeas corpus petitions, which, as Professor Yackle pointed out, would be nearly impossible to meet.¹²⁷ Particularly in the absence of resource centers, it will be extremely difficult and often impossible for attorneys to complete the preparation needed for filing post-conviction and habeas corpus petitions within the one-year or six-month time frames set forth in the proposed statute.¹²⁸ What most advocates of such deadlines fail to recognize is that proper preparation for such a proceeding requires, among other things, a complete reinvestigation of the entire case, which includes a review of the crime itself and factors not presented at trial that might have led to a non-death sentence.

Although the bill's backers maintain that this legislation would speed up the capital punishment process, former federal district court Judge Getzendanner is undoubtedly correct that at least at the outset, the new law will slow down the process.¹²⁹ It will take many years of litigation to determine how the statute should be interpreted, and

123. See Comments by Professor Larry Yackle, *infra*, at 567-68.

124. See S. 735 § 604(3) for the exact language of the proposed statute.

125. See Comments by Professor Larry Yackle, *infra*, at 564-65.

126. See Comments by Professor Larry Yackle, *infra*, at 564-65.

127. See Comments by Professor Larry Yackle, *infra*, at 562-63.

128. See Comments by Professor Larry Yackle, *infra*, at 563.

129. See Comments by Susan Getzendanner, *infra*, at 592.

whether, as construed, the statute is constitutional.¹³⁰ As former Judge Getzendanner suggested, it would be much simpler, and speedier, for Congress to simply provide that each prisoner gets one clear shot at habeas corpus relief.¹³¹ Sadly, while the press typically reports that the legislation would do just that, the reality is that in many cases there will be *no* clear shot at habeas relief. Furthermore, it may take many years to determine that no shot will be allowed.

District Attorney McCann noted that some supporters of the habeas "reform" legislation claim that the proposed new law would make the capital punishment system less expensive than the current alternative punishment, life without parole.¹³² The major reason why the death penalty system is considerably more expensive than the alternative, however, is that a far higher percentage of cases go to trial when the death penalty is sought than otherwise,¹³³ and those trials are far more expensive than non-capital trials.¹³⁴ These expensive trials then often end in life sentences.¹³⁵ Moreover, despite the intense political pressure applied to state judges, a substantial percentage of the death sentences that are imposed are reversed by the state appellate courts, leading either to expensive retrials or to life sentences.¹³⁶

Thus, even without habeas corpus, the death penalty system would remain considerably more expensive than the alternative. It would also be substantially more unfair than at present, because many more death row inmates—including those who would likely never have been convicted or sentenced to death if the Constitution had been faithfully applied—will be executed.

B. Defunding of the Post-Conviction Capital Defender Organizations

During 1995, it became clear that Congress would eliminate funding for the PCDOs. These resource centers located and/or guided counsel from private law firms in many state post-conviction and federal

130. See Comments by Susan Getzendanner, *infra*, at 592; Comments by Professor Larry Yackle, *infra*, at 565-66.

131. See Comments by Susan Getzendanner, *infra*, at 592.

132. See Comments by E. Michael McCann, *infra*, at 596-97.

133. See 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, 133 (1989).

134. See Robert Spangenberg & Elizabeth R. Walsh, *Capital Punishment or Life Imprisonment? Some Cost Considerations*, 23 LOY. L.A. L. REV. 45, 47 (1989).

135. RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 83 (1994) (citation omitted).

136. See generally Bob Egelko, *High Court Won't Rubber-Stamp Death Penalties*, L.A. TIMES, Feb. 26, 1989, at A3 (noting that "[t]he average for death sentence reversals by all state courts is about 41% since 1976") (citation omitted).

habeas cases,¹³⁷ and represented many death row inmates.¹³⁸ Many of the PCDOs closed during 1995. Others now limp along with extremely limited staff, with no prospect of any federal funding.

Stephen Bright ascribed this defunding to opposition generated by states' attorneys general, who exhibited greater concern for "winning" cases than for securing justice.¹³⁹ In contrast, Bright pointed to a subcommittee of federal judges, which recommended that the PCDOs continue to receive funding.¹⁴⁰ The subcommittee concluded that at a federal cost of \$ 20 million per year, the PCDOs were cost-effective and improved the quality of representation in capital cases.¹⁴¹ Andrea Lyon quoted from the subcommittee's report:

Private lawyers who communicated with the Subcommittee almost uniformly expressed the view that they would not willingly represent a death-sentenced inmate without the assistance of a PCDO or similar organization. State and federal judges agreed that PCDO assistance was critical to the recruitment of private attorneys to represent death-sentenced inmates.¹⁴²

In the absence of PCDOs, some way must be found to locate attorneys for death-sentenced inmates, particularly because they have a statutory right to federal habeas counsel. As Bright stated, however, it is questionable whether other competent attorneys will somehow decide to get involved in these cases.¹⁴³ If independent attorneys do get involved, they will probably be entitled to greater federal payments than either the PCDO attorneys or many private attorneys guided by the PCDOs.

As for state post-conviction proceedings, there is a heightened danger that without PCDOs or any other mechanism to locate or meaning-

137. See Ronald J. Tabak, in *The Death of Fairness? Counsel Competency & Due Process in Death Penalty Cases*, 31 HOUS. L. REV. 1105, 1113-14 (1994) (discussing *Martinez-Macias v. Collins*, 979 F.2d 1067 (5th Cir. 1992), which affirmed the district court's judgment granting a writ of habeas corpus to a defendant, represented by an attorney from the ABA post-conviction death penalty project, after being denied the right to adequate counsel in a capital case).

138. See Mark Hansen, *The Murder Case That Unraveled*, A.B.A. J., June 1993, at 30-31 (noting that Walter McMillan, who was represented by the Alabama Capital Representation Resource Center, was freed after spending almost six years on death row for a murder he did not commit).

139. See Comments by Stephen B. Bright, *infra*, at 569-70.

140. See *infra* note 336 and accompanying text. See also Comments by Andrea Lyon, *infra*, at 587-91 (stating that the opponents of PCDOs felt the PCDOs were too effective, since they performed thorough investigations and uncovered unconstitutional actions, including prosecutors' improper, undisclosed deals with state witnesses).

141. See *infra* note 420 and accompanying text.

142. See *infra* note 420 and accompanying text.

143. See Comments by Stephen B. Bright, *infra*, at 570-71.

fully compensate counsel, meritorious constitutional claims will not be raised at all, or will not be adequately developed.¹⁴⁴ If that occurs, unraised claims will likely be barred in federal court and, under the habeas “reform” legislation, inadequately developed claims would likely fail without any federal evidentiary hearing. It is possible that under such circumstances, Justice Kennedy may conclude that the factual underpinnings of his concurrence in *Murray v. Giarratano*¹⁴⁵ no longer exist. Accordingly, the Court may hold that there is a federal constitutional right to counsel in state post-conviction proceedings. Hopefully, the Court will not allow states to appoint unqualified lawyers to handle post-conviction proceedings at “token fees.”¹⁴⁶

There is also a growing danger that inadequate counsel, or, for many years, no counsel at all, will be found to handle the first appeal in state court, where the Constitution does mandate a right to counsel.¹⁴⁷ In California, several years after the California Supreme Court took over responsibility for appointing direct appeals lawyers in capital cases from the State’s PCDO, 128 men and 6 women on death row have no lawyers to handle their direct appeals.¹⁴⁸ As the *Los Angeles Times* reported in April 1996, “California is condemning people to death faster than it can find lawyers to represent them.”¹⁴⁹ While Texas does not have the same problem, that is “because court appointment standards are so low that nearly anyone can apply—including lawyers with little or no death penalty experience.”¹⁵⁰ In Pennsylvania, where half of the 196 death row inmates have no lawyers, “the state’s standards are so low that they attract death penalty novices,” including “a divorce lawyer” and “a recent law school graduate.”¹⁵¹ So, while politicians such as California’s Attorney General Dan Lungren bemoan the delays in executions, they have done little or nothing to deal with the growing crisis in appellate representation.¹⁵²

144. Even in states in which they received no state funding, PCDOs often were able to recruit private attorneys to handle state post-conviction proceedings by offering guidance and pointing to the prospect of federal payments for habeas work.

145. 492 U.S. 1, 14 (1989) (Kennedy, J., concurring) (stating that under Virginia’s system, “no prisoner on death row in Virginia has been unable to obtain counsel to represent him in post-conviction proceedings”).

146. See Comments by Stephen B. Bright, *infra*, at 571 (discussing the possibility that states will assign cases to unqualified lawyers who will be paid a token fee).

147. See *Douglas v. California*, 372 U.S. 353, 358 (1968).

148. Mack Reed, *An Even Longer Wait on Death Row*, L.A. TIMES, Apr. 3, 1996, at A1.

149. *Id.* at A14.

150. *Id.*

151. *Id.*

152. *Id.* at A14-A15.

Indeed, they have added to the problem by successfully advocating expansion of death penalty laws to cover additional crimes and by spearheading efforts to eliminate funding for the PCDOs—some of which formerly helped find lawyers to handle direct appeals and provided them with guidance.

In any event, the defunding of the PCDOs will surely lead to “decentralization, fragmentation, and less quality representation overall,” as individual attorneys flail along on their own.¹⁵³ It will also lead to very different outcomes in cases such as that of Lloyd Schlup.¹⁵⁴ In the *Schlup* case, a Missouri PCDO took his case and began a thorough investigation, something none of the various court-appointed attorneys who previously represented Schlup had done.¹⁵⁵ The PCDO identified more than twenty witnesses willing to come forward and swear to Schlup’s innocence.¹⁵⁶ Despite this overwhelming evidence, Schlup still did not secure relief from the lower federal courts.¹⁵⁷ Missouri Governor Carnahan, troubled by the overwhelming evidence of innocence, issued a stay eight hours before Schlup’s execution.¹⁵⁸

In January 1995, the Supreme Court held that Schlup might secure relief if he satisfied a demanding “miscarriage of justice” standard.¹⁵⁹ On remand in federal district court, Chief Judge Jean Hamilton, a Bush appointee, held that the evidence presented by the Missouri PCDO was so credible and substantial that “it is more likely than not that no reasonable juror would have convicted [Schlup] in light of the new evidence.”¹⁶⁰ In January 1996, Chief Judge Hamilton considered the merits of Schlup’s constitutional claims: that his trial lawyer’s in-

153. See Comments by Andrea Lyon, *infra*, at 590.

154. *Schlup v. Delo*, 115 S. Ct. 851 (1995).

155. See generally *id.* at 860 (describing an Eleventh Circuit dissenting opinion criticizing Schlup’s trial counsel for failure to conduct individual interviews with any of the witnesses).

156. See *Schlup v. Delo*, 912 F. Supp. 448, 451-54 (E.D. Mo. 1995), for a list of some of the witnesses willing to come forward and swear to Schlup’s innocence. Two of the witnesses cast serious doubt on the possibility that Schlup participated in the murder. *Schlup*, 115 S. Ct. at 869. They stated, under oath, that Schlup arrived in the dining room 65 seconds before the distress call sounded. *Id.* A videotape in the dining room confirmed their accounts. *Id.* at 855.

157. See, e.g., *Schlup v. Armontrout*, 945 F.2d 1062 (8th Cir. 1991), *cert. denied*, 503 U.S. 909 (1992); *Schlup v. Delo*, 11 F.3d 738 (8th Cir. 1993), *vacated*, 115 S. Ct. 851 (1995).

158. Stuart Taylor, Jr., *He Didn’t Do It*, AM. LAW., Dec. 1994, at 69, 78.

159. *Schlup*, 115 S. Ct. at 864 (requiring the habeas petitioner to show that “a constitutional violation has probably resulted in the conviction of one who is actually innocent”).

160. *Schlup*, 912 F. Supp. at 455 (quoting *Schlup*, 115 S. Ct. at 867).

effective representation and the State's suppression of exculpatory evidence deprived him of a fundamentally fair trial.¹⁶¹

With the demise of the PCDOs, it is likely that when another case like Schlup's comes along, the inmate will be executed because no one will be there to perform the burdensome work necessary to uncover and prove the inmate's innocence. Unfortunately, even if the next Lloyd Schlup does manage to secure dedicated counsel able to conduct a proper investigation, he may still be executed if the habeas "reform" legislation is enacted. Ironically, the anti-successor petition provision of that legislation—which requires the inmate to show his innocence by "clear and convincing evidence"¹⁶²—could *require* the execution of innocent death row inmates in situations like Schlup's. Indeed, while Chief Judge Hamilton held that no reasonable juror would have convicted Schlup, she maintained that he had not affirmatively proven his innocence in the demanding way required by the legislation.¹⁶³ If the habeas "reform" legislation is enacted and construed to apply retroactively to prisoners with pending claims, Schlup himself could be a fatality of the habeas "reform" legislation.

C. Past Decisions Used Against Federal Judicial Nominees

A final threat to habeas corpus now emerges from the confirmation process for federal judicial appointees. The Republicans on the Senate Judiciary Committee "have seized on their own touchstone, the death penalty."¹⁶⁴ Senator Orrin Hatch, who is now the chairman of the committee, stated in late 1993 (when the Republicans were in the minority) that while the death penalty is not a "litmus test," he would oppose judges who he believes would look for excuses not to implement it.¹⁶⁵ In 1993-94, Hatch and many other conservatives opposed the nominations of Martha Craig Daughtrey and Rosemary Barkett to federal circuit courts.¹⁶⁶ Both Daughtrey and Barkett were accused of softness on the death penalty, even though they did not outright oppose death sentences as members of state supreme courts.¹⁶⁷ Although Daughtrey and Barkett were confirmed by the then Democratic-con-

161. *Police/Courts (Crime) Column*, ST. LOUIS POST-DISPATCH, Jan. 27, 1996, at 2B. Judge Hamilton gave both sides until February 5, 1996 to file additional briefs. *Id.* Judge Hamilton had not rendered a decision on this case as of April 15, 1996.

162. S. 735 § 606 (b).

163. *Schlup*, 912 F. Supp. at 455.

164. See Henry J. Reske, *Liberal Detectors: Judicial Nominees Sized up Based on Death-Penalty Stance*, A.B.A. J., Jan. 1994, at 14.

165. *Id.*

166. *Id.*

167. *Id.*

trolled Senate, Chairman Hatch later stated that now that the Republicans control the Senate, "even nominees like Barkett . . . might not pass."¹⁶⁸

Some Republican Senate candidates in 1994 used their opponents' votes on judicial nominations as a way to fuel the death penalty/soft on crime issue. As Stephen Bright noted, Senator Bill Frist used such a campaign to defeat incumbent Senator Jim Sasser.¹⁶⁹ The Frist campaign criticized Sasser for voting to confirm Judge Barkett and for recommending the appointment of a federal district court judge who granted habeas relief to a woman convicted of murder.¹⁷⁰

Federal judicial appointments have already become a political football in the 1996 presidential election campaign. After Judge Harold Baer, Jr. issued an unpopular ruling in a drug case (a ruling he later reversed), President Clinton initially responded by having his press secretary decline to rule out the possibility of seeking Judge Baer's resignation.¹⁷¹ Senator Robert Dole, the presumptive Republican presidential nominee, said Judge Baer "ought to be impeached instead of reprimanded" if he did not resign, and attacked the President for appointing "liberal judges."¹⁷² The Clinton administration responded to this and other Republican criticism by attacking some judicial appointees of Republican presidents as soft on crime, "in a kind of 'your judges are softer on crime than our judges' tit for tat."¹⁷³ As part of this flurry of judge-bashing, Senator Hatch complained about Third Circuit Judge H. Lee Sarokin and Eleventh Circuit Judge Rosemary Barkett for their decisions in some death penalty cases and federal district Judge James A. Beatty, Jr. (who has been nominated to the Fourth Circuit) for voting to overturn a murder conviction.¹⁷⁴

The injection of death penalty decisions into the federal judicial confirmation process poses several dangers to habeas corpus, and to due process generally. First, it decreases the likelihood that judges who would seriously consider habeas corpus claims in high-profile cases will be confirmed. Second, it decreases the likelihood that federal dis-

168. See Joan Biskupic, *Facing Fights on Court Nominees, Clinton Yields*, WASH. POST, Feb. 13, 1995, at A1.

169. See *infra* notes 368-70 and accompanying text.

170. See *infra* notes 368-70 and accompanying text.

171. Linda Greenhouse, *Judges as Political Issues*, N.Y. TIMES, Mar. 23, 1996, at A1, (Nat'l Ed.).

172. Katharine Q. Seelye, *Dole Tours Death Chamber in San Quentin and Calls for Speedier Executions*, N.Y. TIMES, Mar. 24, 1996, at A14 (Nat'l Ed.).

173. Greenhouse, *supra* note 171, at A10.

174. Eric Schmitt, *Senator Renews Attack on Clinton's Judges*, N.Y. TIMES, Mar. 26, 1996, at B9.

strict or circuit court judges with hopes of being appointed to a higher court will grant relief in controversial habeas corpus cases. Finally, it decreases the likelihood that state court judges who aspire to the federal bench will grant relief to death row inmates even when they believe relief is warranted. In short, the politicization of the federal judicial nomination process based on death penalty decisions threatens to (1) inject into the federal judiciary some of the same problems that have afflicted state courts, and (2) intensify the political pressures on state court judges.

V. WHY WRITS OF HABEAS CORPUS ARE SO ENDANGERED

Politics is the principal reason why habeas corpus is in such danger. Politics is why Senator Frist attacked former Senator Sasser for his judicial confirmation votes. Politics drives the other developments that make unconstitutional executions—even of innocent people—considerably more likely and why the supposed softness on crime of federal judicial appointees has already become a political football in the 1996 presidential race. As Professor Yackle noted, conservative politics is not the only reason why habeas corpus is in such precarious shape.¹⁷⁵ Other reasons for the attack on habeas corpus include a desire to encourage increased executions in the various states and hostility towards the Supreme Court's commitment to constitutional rights.¹⁷⁶

One might have thought that a President who once taught constitutional law and whose wife once represented a death row inmate would veto legislation that substantially curtails habeas corpus. However, President Clinton stated on *Larry King Live* that the habeas corpus provisions should be kept in the anti-terrorism legislation.¹⁷⁷ Clinton's position, in effect, "pulled the rug out" from under those in Congress who were trying to remove or change the habeas corpus provisions in the Senate bill.

District Attorney McCann noted that President Clinton ran commercials in the summer of 1995 that advocated expanding the death

175. See Comments by Professor Larry Yackle, *infra*, at 562.

176. See Comments by Professor Larry Yackle, *infra*, at 562.

177. See *A Hasty Response to Terrorism*, N.Y. TIMES, June 9, 1995, at A28 (criticizing President Clinton because "[a]fter resisting Republican attempts to smuggle into the terrorism bill a pet proposal to limit death row appeals in Federal courts, he surrendered Monday night on a television talk show and embraced this so-called 'habeas corpus reform'"); Anthony Lewis, *Mr. Clinton's Betrayal*, N.Y. TIMES, July 7, 1995, at A25 (criticizing President Clinton for stating on *Larry King Live* that the "reform 'ought to be done in the context of this terrorism legislation'").

penalty.¹⁷⁸ As a Democrat, he was shocked.¹⁷⁹ He recognized that Clinton's position would harm efforts to prevent enactment of the death penalty in Wisconsin.¹⁸⁰

How can President Clinton's acquiescence in habeas corpus "reform" legislation be explained? State's Attorney Sonner, also a Democrat, was on target when he said that "the Democrats [are] trying to trump the Republicans on this issue. When Democrats simply come out in favor of the death penalty, there is not a Willie Horton-type of issue to define the difference between the Democrats and the Republicans."¹⁸¹

Meanwhile, Republicans are trying to outmaneuver the President so they can accuse him of coddling death row inmates by opposing habeas corpus "reform" legislation. Knowing that the President would veto a bill to temporarily keep the government open during budget negotiations in November 1995, the Republicans included the habeas corpus provisions in that bill.¹⁸² The Republicans were undoubtedly gratified when *USA Today* reported, inaccurately, that the inclusion of the habeas corpus legislation was one of the reasons why the President vetoed that bill.¹⁸³ Senator Robert Dole, the presumptive Republican nominee for President, asserted during a March 1996 trip to California's death chamber, that President Clinton had vetoed habeas limits for death row inmates three times.¹⁸⁴ The White House responded by saying that the President supported speeding the process up and had vetoed the habeas measure only once, and only because it was part of other legislation which he opposed.¹⁸⁵

What underlies all of this partisan maneuvering, in which support for habeas corpus is equated with opposition to the death penalty and weakness on crime? Politicians want to show that they "hear" the public's outrage over high crime levels. They increasingly believe that the two best ways to express their position on crime are to support the

178. See Comments by E. Michael McCann, *infra*, at 600.

179. See Comments by E. Michael McCann, *infra*, at 600.

180. See Comments by E. Michael McCann, *infra*, at 600.

181. See Comments by Andrew L. Sonner, *infra*, at 604.

182. See William M. Welch, *Tangled Lines of Budget Politics End in a Knot*, USA TODAY, Nov. 13, 1995, at 5A.

183. William M. Welch, *Resignation Settles in as Clock Winds Down*, USA TODAY, Nov. 14, 1995, at 7A (noting that on November 13, 1995 President Clinton vetoed a resolution to extend the nation's ability to borrow money because he objected to Congress' budget demands and "[he] also dislikes . . . limiting appeals in death penalty cases").

184. Seelye, *supra* note 172, at A14.

185. *Id.*

death penalty and to advocate measures that purportedly will make executions occur more quickly, thereby supposedly deterring the commission of future crimes.

Ironically, the ineffectiveness of our death penalty system in reducing crime fuels the frustration on which such politicians feed. The uselessness of capital punishment as a crime fighting measure is detailed in a recent book by David Von Drehle, who studied the death penalty's implementation in Florida.¹⁸⁶ One of the book's most telling quotations comes from Ray Marky, who helped write the Florida death penalty statute while working in the Florida Attorney General's office, and who spent years fighting to uphold and enforce it. He told the author:

"If we had deliberately set out to create a chaotic system, we couldn't have come up with anything worse. It's a merry-go-round, it's ridiculous; it's so clogged up only an arbitrary few ever get it

. . . I don't get any damn pleasure out of the death penalty and I never have [F]rankly, if they abolished it tomorrow, I'd go get drunk in celebration."¹⁸⁷

Marky is not unique among law enforcement officials in this assessment. A national poll of the nation's police chiefs in 1995 showed that police chiefs rank the death penalty at the bottom of the list of measures to reduce violent crime. Only one percent said it is the best way to deal with violent crime.¹⁸⁸ Two-thirds stated it does not significantly reduce the number of murders, and most said it is not an effective law enforcement tool.¹⁸⁹ State's Attorney Sonner agreed, stating:

There is absolutely no value to the prosecution of having the death penalty. There is an absolutely huge cost in the administration of it. As conscientiously as I try to do it, I must confess that I do not know how to do it and achieve fairness

[I]t is chaos now, and it is also false promises.¹⁹⁰

Furthermore, in 1995, Judge Alex Kozinski, a conservative Reagan appointee to the Ninth Circuit Court of Appeals, stated that death penalty statutes are far too broad.¹⁹¹ He believes that the death penalty

186. DAVID VON DREHLE, *AMONG THE LOWEST OF THE DEAD* (1995).

187. *Id.* at 409.

188. See Patrick Murphy, *Death Penalty Useless*, USA TODAY, Feb. 23, 1995, at 11A.

189. *Id.*

190. See Comments by Andrew L. Sonner, *infra*, at 602. See also Comments by E. Michael McCann, *infra*, at 600 (noting that a slight majority of Wisconsin district attorneys oppose the death penalty).

191. Stuart Taylor, Jr., *For the Record*, AM. LAW., Oct. 1995, at 69, 72 (interview of

laws should be overhauled, and that the death penalty should be imposed only in the most egregious cases.¹⁹²

Thus far, Judge Kozinski's suggestions have been ignored by state and federal legislators. Instead, in state after state, and in Congress, politicians react to each widely publicized crime by advocating a wider scope for the death penalty. Executions increased to over fifty in 1995, the largest number since executions resumed in the late 1970s.¹⁹³ The accelerating pace of executions has had no evident impact on crime, however. In New York City, when there was no death penalty, the murder rate dropped so greatly in the first half of 1995 that on July 8, 1995, the front-page lead headline of the *New York Times*

Judge Alex Kozinski). Specifically, Judge Kozinski stated:

I am concerned that we—particularly in the federal courts—are going to drown in a sea of death penalty cases in the next few years. We have only seen the tip of the iceberg

They involve a complexity and intensity of purpose on both sides that you don't see in other cases. And I think this is taking a major toll on the resources we have to administer justice.

. . . .

. . . These are issues that are unique to death cases, and this results in a very complicated process, one that very few lawyers are capable of handling.

So we now have 100 cases or more in California alone for which they can't find lawyers to handle the appeals. They're kind of stuck.

. . . .

. . . I think there's little likelihood we're going to do away with it altogether, but I think we can do a better job of administering it. My suggestion is that we limit it to the most egregious cases, that we narrow the category of aggravating circumstances, that we put on death row only individuals guilty of such heinous conduct, such depravity, that the death penalty is really appropriate. And then concentrate on pushing those cases through the system.

. . . There are not that many people who are actually involved in administering the death penalty. A lot of people are willing to say they're for it But you don't really know how you feel about it until you've been involved in it, and actually been there, and lived through a case where the defendant is put to death.

Even for somebody like me, who generally has no qualms about the death penalty, thinks it's appropriate in certain circumstances, and has no constitutional problems with it. . . .

But still and all, I find it hard. I find it hard, going through these cases. Maybe if we had 30 at a time, I'd get numb to the discomfort I feel at having to participate in taking away human life. But I hope that that point will never come.

Id. at 71 (quoting Judge Alex Kozinski).

192. *Id.*

193. Tony Mauro, *Pace of Executions Likely to Increase*, USA TODAY, Dec. 29, 1995, at 3A (stating that "[t]he 56 executions in 1995 were the most since capital punishment was reinstated in 1976"); see also DEATH ROW USA, *supra* note 46, at 8-9 (individually listing each person executed in the United States in 1995).

was "Murder Rate Plunges in New York City; A 25-Year Low in First Half this Year."¹⁹⁴ Nevertheless, on September 1, 1995, the death penalty returned to New York.¹⁹⁵ Andrea Lyon gave the most succinct explanation for the current trends in death penalty laws: "rather than try to understand the causes, we simply want to kill the effects."¹⁹⁶

VI. THE OVERALL CONTEXT IN WHICH HABEAS CORPUS CURTAILMENT IS OCCURRING

A. *Innocent People Still Face Execution*

In 1995, evidence that innocent people are sentenced to death and face execution continued to mount.¹⁹⁷ For example, on June 1, 1995, after serving more than fourteen years on Arizona's death row, Robert Charles Cruz was acquitted at his retrial and released from prison.¹⁹⁸ Jurors said that the main reason for their acquittal of Cruz was the lack of credibility of some key State witnesses, particularly one whom the foreman described as "a proven liar."¹⁹⁹ The foreman of the jury also cited the lack of a motive for Cruz, and the lack of physical evidence linking Cruz directly to the killings.²⁰⁰

194. Clifford Krauss, *Murder Rate Plunges in New York City; A 25-Year Low in First Half this Year*, N.Y. TIMES, July 8, 1995, at A1.

195. The death penalty was reinstated in New York following the defeat in 1994 of Governor Mario Cuomo. James Dao, *Death Penalty In New York Reinstated After 18 Years; Pataki Sees Justice Served*, N.Y. TIMES, Mar. 8, 1995, at A1. I do not believe that Cuomo's opposition to the death penalty was a significant factor in his defeat. But he did lose support by refusing to send Thomas Grasso, an Oklahoma death row inmate who wanted to be executed, back to Oklahoma while time remained on his New York criminal sentence. See Kevin Sack, *Pataki, Backing Executions, Assails Cuomo at Murder Site*, N.Y. TIMES, Nov. 5, 1994, at 1, 28. New York's new governor did send Grasso back. See Russell Baker, *Pataki Takes the Hood*, N.Y. TIMES, Jan. 14, 1995, at 23. Just before his execution, Grasso wrote: "Mario Cuomo is wright [sic]. . . . Life without parole is much worse than the death penalty." John Kifner, *Grasso's Farewell: 'Life Without Parole' Worse than Death*, N.Y. TIMES, Mar. 21, 1995, at B6. In cases such as Grasso's, our legal system is assisting what amounts to suicides of people who refuse to mount any defense at trial, who ask that the death penalty be imposed, and who waive all appeals.

196. See Comments by Andrea Lyon, *infra*, at 589.

197. See Comments by Jeffrey Urdangen, *infra*, at 606-10 (discussing the Rolando Cruz and Alejandro Hernandez cases); *supra* notes 83-86 and accompanying text (discussing the Ricardo Aldape Guerra case); *supra* notes 154-61 and accompanying text (discussing the Lloyd Schlup case). See also Comments by E. Michael McCann, *infra*, at 595-96 (pointing out that even prosecutors who act professionally sometimes secure murder convictions of innocent people).

198. Brent Whiting & Pamela Manson, *5th Trial Clears Man in 2 Murders; He Walks Free from Death Row's Shadow*, ARIZ. REPUB., June 2, 1995, at A1.

199. *Id.*

200. *Id.*

Similarly, on April 5, 1995, Adolph Munson was acquitted at his retrial, after serving ten years on Oklahoma's death row.²⁰¹ At the trial in which Munson was convicted, the police withheld hundreds of pages of exculpatory reports and photographs, which suggested that a white individual, rather than the African American Munson, committed the crime.²⁰² Further, the judge in the original trial denied funds to the court-appointed defense lawyers for independent forensic tests because "the county could not afford [them]."²⁰³

Furthermore, Joseph Spaziano recently won the right to a new trial after spending almost twenty years on Florida's death row.²⁰⁴ In the Spaziano case, the State's key witness recently recanted his testimony.²⁰⁵ That testimony was the product of police investigators hypnotizing and giving inducements to the witness.²⁰⁶ Spaziano's trial occurred before Florida banned the use of hypnotically induced testimony.²⁰⁷

Meanwhile, executions are continuously carried out despite serious questions about the defendants' guilt. Numerous examples illustrate this serious problem. The impending execution of Jesse Dewayne Jacobs in January 1995 led the conservative *Washington Times* to run this headline: "Justices Vote 6-3 To Let Wrong Killer Die".²⁰⁸ After securing Jacobs's confession, conviction and death sentence, Texas prosecutors used Jacobs as their star witness in the trial of his sister, who was convicted of committing the same shooting.²⁰⁹ Indeed, prosecutors stated that Jacobs's confession was a fabrication and that he had no idea his sister was going to shoot the victim.²¹⁰ Nonetheless, the State still executed Jacobs on January 4, 1995.²¹¹

201. See Richard L. Fricker, *State Falters in Retrial of Escaped Con*, A.B.A. J., June 1995, at 38.

202. *Id.*

203. *Id.*

204. State v. Spaziano, No. 75-430-CFA, slip op. at 8 (Seminole County Ct., Jan. 22, 1996).

205. *Id.* at 1.

206. *Id.* at 5.

207. See David Von Drehle, *A Hypnotized Witness*, WASH. POST, Sept. 15, 1995, at A25.

208. Frank J. Murray, *Justices Vote 6-3 To Let Wrong Killer Die*, WASH. TIMES, Jan. 4, 1995, at A4. At Jacobs's trial, the prosecution stated: "The simple fact of the matter is that Jesse Jacobs and Jesse Jacobs alone killed Etta Ann Urdiales." *Id.*

209. *Id.* At Jacobs's sister's trial, that same prosecutor's office stated: "I'm convinced that Jesse Jacobs is telling the truth when he says that Bobbie Hogan is the one that pulled the trigger," and that Jacobs did not know of his sister's homicidal intent. *Id.*

210. *Id.*

211. *Texas Killer Executed Despite Confusion; Question of Role in 1986 Murder Still*

Barry Lee Fairchild, a poor, probably retarded African American, was convicted and sentenced to death for killing a young white woman in Arkansas.²¹² Police arrested and abusively questioned thirteen other African American men as suspects in connection with the same crime.²¹³ Three policemen later testified that Fairchild too was abusively questioned and otherwise subjected to a coercive investigation.²¹⁴ On his videotaped confession, Fairchild's head was banded, due to an attack by a police dog.²¹⁵ At Fairchild's trial, the jury was probably impressed by testimony that the police had retrieved the victim's black watch from Fairchild's sister.²¹⁶ However, Fairchild's lawyers later found a previously undisclosed police file showing that the victim had actually worn a shiny metallic watch, not a black one, on the day in question.²¹⁷ Nonetheless, the State executed Fairchild on August 31, 1995.²¹⁸

Don Paradis faces execution in Idaho despite "an abundance of evidence" supporting Paradis's innocence, including several witnesses who say he was not present when the victim was killed.²¹⁹ An article about Paradis's case in the *New Yorker* asked: "A reinvestigation of the night's events reveals that Paradis may not have been the murderer—so why is he about to be executed?"²²⁰

Joseph R. O'Dell 3d continues to face execution in Virginia, because the Virginia courts precluded him from introducing "a sophisticated DNA test showing that the blood on his clothing could not have been the murder victim's."²²¹ His federal habeas corpus appeal is currently pending in the Fourth Circuit.²²²

Paris Carriger faces execution in Arizona despite the fact that his inexperienced lawyer spent only eleven hours preparing for his trial.²²³

Unresolved, ARIZ. REPUB., Jan. 5, 1995, at A13.

212. See Lynne Duke, *A Matter of Law and Death*, WASH. POST NAT'L WEEKLY ED., Jan. 31-Feb. 6, 1994, at 6.

213. *Id.* at 6.

214. *Id.* at 8.

215. *Id.* at 6.

216. *Id.* at 7.

217. *Id.*

218. *Man with Low I.Q. Executed for Murder*, CHI. TRIB., Sept. 1, 1995, § 1, at 10.

219. Alec Wilkinson, *A Night at the Beast House*, THE NEW YORKER, Feb. 13, 1995, at 52, 68 (giving an extensive report on Paradis's conviction and death sentence).

220. *Id.* at 52.

221. See Kenneth B. Noble, *As Executions Increase, Appeals Go to the Public*, N.Y. TIMES, Dec. 2, 1995, at A1, A10.

222. *Id.* at A10.

223. *Id.* Commenting on the case, Professor Samuel Gross of the University of Michigan Law School stated:

The defense failed to cross-examine the prosecution's star witness, a convicted felon with a violent criminal history who had turned police informer.²²⁴ Later, that same witness—believing that he was going to die—twice confessed to committing the murder and framing Carriger.²²⁵ He recanted his first confession after recovering, but he never recanted the second confession before dying.²²⁶ On December 1, 1995, the federal appeals court agreed to stay Carriger's execution in light of the recent Supreme Court decision in *Schlup*²²⁷ that enables federal habeas courts to re-evaluate cases such as this.²²⁸

B. *Mentally Retarded and Severely Mentally Ill People Are Executed*

Mentally retarded and severely mentally ill people continued to be executed in 1995. One was Barry Lee Fairchild, who, as previously discussed²²⁹ was executed on August 31, 1995. Another was Mario Marquez, who was executed in Texas on January 18, 1995.²³⁰ Marquez's jury never learned that he suffered from mental retardation—with an I.Q. of sixty-five—and was horse-whipped by his father before being abandoned at age twelve.²³¹

In addition, Sylvester Adams was executed in South Carolina on August 18, 1995.²³² His defense counsel, who was later disbarred and was serving time in federal prison at the time of Adams's execution,²³³ presented no mitigating evidence.²³⁴ As a result, the jury never

Everyone acknowledges that Dunbar lied at Paris Carriger's trial. What they're demanding now is that he prove to the satisfaction of the court that he's innocent. That's not how our system is designed to run, and if we keep doing that, we're going to make a lot of terrible mistakes.

Id.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Schlup v. Delo*, 115 S. Ct. 851 (1995). See *supra* note 159 and accompanying text.

228. Noble, *supra* note 221, at A1, A10.

229. See *supra* notes 212-18 and accompanying text.

230. Nat Hentoff, *Executing the Retarded in Our Name*, THE VILLAGE VOICE (New York City), Feb. 21, 1995, at 30-31.

231. *Id.* at 30.

232. David W. MacDougal, *Adams Dies Proclaiming His Faith*, THE POST AND COURIER (Charleston, S.C.), Aug. 19, 1995, at A17.

233. John Heilpren, *Crowd Holds Vigil to Plead for Killer's Life; Governor's Mercy Sought: The State Supreme Court Refused to Stay the Aug. 18 Execution*, THE POST AND COURIER (Charleston, S.C.), Aug. 12, 1995, at A17.

234. Suzanne Mortimer, *Crime, Punishment and South Carolina; Obituary: Sylvester Adams*, THE GUARDIAN (Manchester, England), Aug. 26, 1995, at 30.

learned of Adams's mental illness and mental retardation.²³⁵ One juror later stated that she would have never voted for the death penalty had she known of Adams's retardation.²³⁶ Her vote for life would have been sufficient under South Carolina law to save Adams's life.²³⁷

Pennsylvania executed Leon Moser on August 16, 1995.²³⁸ Earlier that day, the federal district court ordered a competency hearing because there was a serious question about Moser's mental competency.²³⁹ The judge stayed Moser's execution pending that hearing.²⁴⁰ At 7:40 p.m. that evening, the Supreme Court denied the State's appeal of the order scheduling the competency hearing.²⁴¹ Then, at 11:09 p.m., the Supreme Court granted, by a five-to-four vote, the State's motion to vacate the temporary stay of Moser's execution.²⁴²

Soon after, the federal district judge's law clerk called the prison and asked if the prison had a cellular phone that could be used to conduct the competency hearing.²⁴³ A State lawyer responded that there were no cellular phones there, but failed to add that Moser was a few feet away from an open phone line.²⁴⁴ Pennsylvania Governor Ridge's chief counsel, who was present, later said that he did not inform the clerk about the other phone because: "[T]here was no need to. The judge's clerk asked a question about a cell phone. I did not feel it was my place, nor is it my job, to anticipate what the judge might be thinking."²⁴⁵ Fifteen minutes later, the judge's clerk called again to say that if Moser was still living the judge might want to talk with him.²⁴⁶ Moser had already been given a lethal injection.²⁴⁷

On May 12, 1995, Varnall Weeks was executed in Alabama.²⁴⁸ He was so severely mentally ill that shortly before his execution, a judge found that he was insane according to "the dictionary generic definition

235. *Id.*

236. *Id.*

237. S.C. CODE ANN. § 16-3-20(c) (1995 Supp. Lawyer's Co-op. 1995).

238. See David Cole, *A State Determined to Kill*, WASH. POST, Sept. 15, 1995, at A25.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. Rick Bragg, *Killer Racked by Delusions Is Put to Death in Alabama*, N.Y. TIMES, May 13, 1995, at 8 (Nat'l Ed.).

of insanity.”²⁴⁹ The major mental health groups in Alabama pleaded unsuccessfully for commutation of his sentence.²⁵⁰

C. *Inmates Are Medically Saved Only To Be Executed*

In two of the executions in 1995, people were given emergency medical treatment, saved, and then quickly put to death. The first instance occurred on August 11, 1995, and involved Oklahoma death row inmate Robert Brecheen.²⁵¹ Brecheen’s execution was delayed when guards had difficulty waking him in his holding cell from “a self-induced drug stupor.”²⁵² Prison officials took him to the hospital, where his stomach was pumped.²⁵³ Brecheen then returned to the State penitentiary where he was executed “with state-approved drugs” two hours after the original execution time.²⁵⁴ The victim’s survivor praised prison officials, saying that “[i]t wasn’t his job to take his [own] life.”²⁵⁵ Reverend Bryan Brooks, however, observed: “This shows the absurdity of the situation. . . . The idea that they’re going to stabilize him and bring him back to be executed is plainly outrageous.”²⁵⁶

Finally, on November 22, 1995, Illinois executed George Del Vecchio.²⁵⁷ He suffered a heart attack in late October and underwent heart surgery early in November.²⁵⁸ The authorities waited until he recovered somewhat from the heart surgery and then put him to death.²⁵⁹

Evidently, Senator Robert Dole, the presumptive Republican presidential nominee, would have expressed great disappointment if Mr. Brecheen or Mr. Del Vecchio had died of natural causes rather than being given medical treatment which enabled them to recover and be executed. During his March 1996 trip to California’s death chamber, Senator Dole asked for a comparison of the number of California death row inmates who had died of natural causes during the last twenty-five

249. Colman McCarthy, *Insane and on Death Row*, WASH. POST, May 6, 1995, at A15.

250. *Alabama Set to Execute Killer Despite His Insanity*, THE PLAIN DEALER (Cleveland), May 12, 1995, at 1A.

251. *See A Doomed Inmate Drugs Himself, Is Revived and Then Executed*, N.Y. TIMES, Aug. 12, 1995, at 6 (Nat’l Ed.).

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Man Who Had Heart Surgery Is Executed*, N.Y. TIMES, Nov. 23, 1995, at A22.

258. *Id.*

259. *Id.*

years and the number who had been executed.²⁶⁰ When told that eight more had died of natural causes, Senator Dole asked “[i]s that justice?” and indicated that this was an additional reason to enact habeas-limiting legislation.²⁶¹

*D. Pervasive Racial Discrimination Exists in
Our Capital Punishment System*

One of the many misleading impressions left by the O.J. Simpson trial is that being African American is an advantage for a criminal defendant. That trial, however, in which the prosecution did not seek the death penalty and deliberately selected a venue in which it was extremely likely that African Americans would be a majority of the jurors, is the exception, not the rule.²⁶² Racial discrimination continues to pervade the prosecution of death penalty cases.²⁶³ Indeed, as Scharlette Holdman explained, the O.J. Simpson jury selection was extremely aberrational even for Los Angeles.²⁶⁴ Indigent African American and Latino capital defendants in Los Angeles County “are often tried by all-white juries.”²⁶⁵ Holdman noted that this same phenomenon exists elsewhere in California.²⁶⁶

District Attorney McCann pointed out that racism can infect the criminal justice system even in very liberal counties.²⁶⁷ A study of two such counties—Milwaukee and Dane—in Wisconsin, found that racism played a role in sentencing for two types of crime.²⁶⁸

Maryland State’s Attorney Sonner regretfully acknowledged that despite his office’s best efforts to be racially neutral, eleven of the thirteen people for whom his office has sought the death penalty have been African Americans, even though African Americans are only

260. Seelye, *supra* note 172, at A14.

261. *Id.*

262. See Comments by Scharlette Holdman, *infra*, at 584; see also Michael G. Millman, in *The O.J. Simpson Case and Capital Punishment*, 38 How. L.J. 247, 250-61 (1995) (discussing the L.A. County District Attorney’s decision not to seek the death penalty and the choice of venue in the Simpson case).

263. For an earlier analysis of this issue, see Ronald J. Tabak, *Is Racism Irrelevant? Or Should the Fairness in Death Sentencing Act Be Enacted to Substantially Diminish Racial Discrimination in Capital Sentencing?*, 18 N.Y.U. REV. L. & SOC. CHANGE 777 (1990-91).

264. See Comments by Scharlette Holdman, *infra*, at 584.

265. See Comments by Scharlette Holdman, *infra*, at 585.

266. See Comments by Scharlette Holdman, *infra*, at 583-85.

267. See Comments by E. Michael McCann, *infra*, at 597.

268. See Comments by E. Michael McCann, *infra*, at 597.

eight to ten percent of his county's population.²⁶⁹ He lamented that "racism is very much an ugly part of the American character today."²⁷⁰

As District Attorney McCann noted, the Supreme Court, in *McCleskey v. Kemp*,²⁷¹ invited legislative action to deal with racial discrimination in our capital punishment system.²⁷² The leading legislative proposal in that regard, most commonly referred to as the Racial Justice Act,²⁷³ has not been enacted, although it has passed the House of Representatives on two occasions. As a result, there is no effective means in most jurisdictions to combat racial discrimination in capital sentencing.²⁷⁴

VII. CURRENT UNITED STATES POLICY ON EXECUTIONS COUNTERS WORLDWIDE TRENDS

Most industrialized Western democracies repealed their death penalty laws long before 1995. Indeed, in 1995, as the United States executed people at an accelerated pace, South Africa's highest court held the death penalty to be unconstitutional,²⁷⁵ and Ukraine announced in November 1995 that within three years it would abolish capital punishment.²⁷⁶

In the various opinions supporting its unanimous holding, Justices of the Constitutional Court of the Republic of South Africa relied heavily on the egregious unfairness of capital punishment in the United States.²⁷⁷ Justice after Justice cited the dissents of Justices Blackmun, Marshall, and Brennan, all of whom concluded that capital punishment could never be constitutional. The most-often cited of these was

269. See Comments by Andrew L. Sonner, *infra*, at 604.

270. See Comments by Andrew L. Sonner, *infra*, at 604.

271. 481 U.S. 279 (1987).

272. *Id.* at 319; see Comments by E. Michael McCann, *infra*, at 594-95.

273. Racial Justice Act, H.R. 3315, 103d Cong., 2d Sess. §§ 601-11 (1994); see Comments by E. Michael McCann, *infra*, at 594-97. For an analysis of an earlier version of the Racial Justice Act, see Tabak, *supra* note 263.

274. New York's new capital punishment statute does provide a means to challenge racially discriminatory death sentences. N.Y. Correction Law § 27 (McKinney Supp. 1996) (amending N.Y. Criminal Procedure Law § 470.30 (McKinney 1994)). But it remains to be seen how effectively that portion of the statute will be implemented by the New York courts.

275. Judgment of June 6, 1995, (*State v. Makwanyane*), Constitutional Court, No. CCT/3/94, slip op. at 72 (Rep. S. Afr.) (opinion on file with the *Loyola University Chicago Law Journal*).

276. *Ukraine, Macedonia Join Europe Council*, SAN DIEGO UNION-TRIB., Nov. 10, 1995, at A18. Ukraine agreed to abolish capital punishment within three years after joining the Council of Europe. *Id.*

277. See, e.g., Judgment of June 6, 1995, (*State v. Makwanyane*), slip op. at 22.

Justice Blackmun's 1994 dissent in *Callins v. Collins*.²⁷⁸ After having voted to uphold the constitutionality of the death penalty in 1972 and 1976,²⁷⁹ Justice Blackmun concluded in *Callins* that our capital punishment system is so unfairly implemented that he could no longer take part in "the machinery of death."²⁸⁰

Reverend Michael Place discussed a "rather significant development" that recently took place within the Catholic Church.²⁸¹ Pope John Paul II's latest encyclical reversed the Church's historical view on capital punishment, a view from which the Church had already been moving, but never before in such a definitive way.²⁸² The encyclical stated that the death penalty should be carried out only if the government has no other alternative way to protect innocent people against crime.²⁸³ The Pope added that in today's world, such situations rarely, if ever, exist.²⁸⁴ Indeed, the Bishops of the United States have concluded that such situations never exist in the United States.²⁸⁵

VIII. CONCLUSION

It is increasingly difficult for anyone who studies the current structure of our death penalty system to assert that the process even remotely approaches a modicum of fairness. The demise of the PCDOs, and the grave threats to the future of habeas corpus proceedings, make the situation worse than ever.

The organized bar has a unique perspective on this situation, because attorneys are intimately involved in every stage of the capital punishment process. It is high time that bar organizations inform the public that our capital punishment system has become so fundamentally unfair that its continued operation, at least in anything resembling its current form, cannot be countenanced. That conclusion inexorably flows not from any philosophical view about the death penalty in the

278. 114 S. Ct. 1127, 1128 (1994) (Blackmun, J., dissenting).

279. *Furman v. Georgia*, 408 U.S. 238, 405-414 (1972) (Blackmun, J., dissenting) (dissenting from holding that the death penalty, as imposed by the then-existing Georgia scheme, was unconstitutional); *Gregg v. Georgia*, 428 U.S. 153, 227 (1976) (Blackmun, J., concurring) (concurring with the judgment that the death penalty was not per se unconstitutional) (citing the dissenting opinions, including his own, from *Furman*).

280. *Callins*, 114 S. Ct. at 1130 (Blackmun, J., dissenting).

281. See Comments by Reverend Michael Place, *infra*, at 611-14.

282. See Comments by Reverend Michael Place, *infra*, at 612.

283. See Comments by Reverend Michael Place, *infra*, at 611-14.

284. See Comments by Reverend Michael Place, *infra*, at 612-14.

285. See Comments by Reverend Michael Place, *infra*, at 612-14.

abstract, but rather from respect for our Constitution and Bill of Rights.