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

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

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## Panel Discussion

### Capital Punishment: Is There Any Habeas Left in this Corpus?

*Monday, August 7, 1995, 9:00 a.m.—Noon*  
*Hyatt Regency, Chicago, Illinois*

#### PANELISTS

<i>Stephen B. Bright</i>	Southern Center for Human Rights Atlanta, Georgia
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<i>Jeffrey Urdangen</i>	Private Practice Chicago, Illinois
<i>Professor Larry Yackle</i>	Boston University School of Law Boston, Massachusetts

#### RONALD J. TABAK

A major part of this discussion will concern what would happen to habeas corpus<sup>286</sup> under legislation that has not yet been enacted but has now passed both houses of Congress.<sup>287</sup> The discussion will also

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286. Habeas corpus is a generic term embracing a variety of writs known to common law. For purposes of this discussion, habeas corpus refers to challenges to allegedly unconstitutional restraints on personal liberty, allowing a convicted criminal to contest, on federal constitutional grounds, a state court's conduct and decisions in state criminal cases. The statute governing federal habeas corpus appears at 28 U.S.C. §§ 2241-2255 (1994).

287. H.R. 729, 104th Cong., 1st Sess. (1995); S. 735, 104th Cong., 1st Sess. §§ 601-607 (1995) (amending 28 U.S.C. §§ 2244-2255). See Comments by Professor Larry Yackle, *infra*, at 561-68. *Editor's Note:* See *supra* text accompanying note 1 for

concern (a) the election of state court judges, whose decisions will be much less subject to challenge if the habeas corpus legislation is enacted;<sup>288</sup> (b) the effectiveness or lack thereof of defense counsel;<sup>289</sup> (c) the role of federally funded capital punishment resource centers, whose funding has been eliminated;<sup>290</sup> (d) what at least some members of the federal judiciary would feel about severely restricting habeas corpus and eliminating resource center funding;<sup>291</sup> (e) the perspectives of two prosecutors who feel that the death penalty is not an effective crime fighting tool;<sup>292</sup> (f) an Illinois case in which a death row inmate, whom many believe is an innocent man, faces retrial;<sup>293</sup> and (g) Pope John Paul II's recent encyclical articulating in a new way the Catholic Church's views on capital punishment.<sup>294</sup>

We will start with a leading expert on the habeas corpus legislation, Professor Larry Yackle of Boston University School of Law, who specializes in constitutional law and the federal courts. No one has fought harder to preserve habeas corpus.

#### PROFESSOR LARRY YACKLE

I'm very glad to appear here, since the ABA has been a powerful source of help, support, and direction during the legislative battles over the writ of habeas corpus.

We've been successful for years in defeating bad habeas corpus proposals in Congress. Although no bad legislation has been enacted yet this year, it appears that habeas corpus "reform" legislation could well emerge this time.

I'm sorry to bring you bad news, but my charge is to take you briefly through some of the key provisions of the bill that seems likely to be enacted. The version the House passed earlier this year may be the vehicle.<sup>295</sup> But my guess is that the bill adopted by the Senate in

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the current status of the habeas corpus legislation.

288. See Comments by Stephen B. Bright, *infra*, at 569-80.

289. See Comments by Scharlette Holdman, *infra*, at 581-86.

290. *Editor's Note*: With respect to the status of the PCDOs as of the time of the program, see Comments by Andrea Lyon, *infra*, at 587-91; all federal funding of the PCDOs subsequently ceased. Reed, *supra* note 148 at A1.

291. See Comments by Susan Getzendanner, *infra*, at 591-93.

292. See Comments by E. Michael McCann, *infra*, at 594-601; Comments by Andrew L. Sonner, *infra*, at 602-05.

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

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

295. H.R. 729, 104th Cong., 1st Sess. (1995). *Editor's Note*: See *supra* text accompanying note 1 for a discussion of the current status of the habeas corpus bill.

June is more likely to be the basis for a new habeas law.<sup>296</sup> Accordingly, I will concentrate on the Senate bill.

Before I get into the details, let me speculate on why this is happening now. Obviously, many people in Congress see restrictions on federal habeas corpus as a way of fostering capital punishment in the various states. There's also a good deal of ideological talk about federalism and the notion that federal habeas corpus somehow intrudes upon state prerogatives. I think there may be something in that, but very little. I doubt that federalism really has much to do with it. This goes very deep into conservative politics in the country. If this bill is enacted, it will settle old scores. People have had deeply embedded ideological commitments for many years, and now, in the more conservative atmosphere in Congress, the votes are finally there to do something. This legislative attack on habeas corpus is another face of the old attack on the Warren Court, and on procedural safeguards in criminal cases in general.

I will focus on the Senate bill, which has two parts. The first part is "general" habeas corpus legislation.<sup>297</sup> Its provisions would become applicable to all habeas cases, capital and non-capital, since they would amend the various existing statutes on habeas corpus.<sup>298</sup> The second part of the bill is focused on capital cases alone.<sup>299</sup> It would establish a new chapter of the judicial code on capital litigation in habeas corpus.<sup>300</sup> It wouldn't automatically be applicable in any state, but would have to be triggered by voluntary action in a particular state.<sup>301</sup>

This special chapter on capital cases really doesn't amount to a whole lot in the Senate bill. The idea behind it is that states which use capital punishment ought to be given incentives to provide counsel in state post-conviction proceedings, i.e., state habeas corpus-like proceedings. So, a state could trigger the applicability of this new chapter on capital litigation in habeas cases by establishing a mechanism that

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296. S. 735, 104th Cong., 1st Sess. §§ 601-607 (1995).

297. S. 735 §§ 601-606.

298. If enacted, §§ 601-606 of the proposed bill would affect 28 U.S.C. §§ 2244-2255 (the existing habeas corpus statute). See S. 735 §§ 601-606.

299. S. 735 § 607 (creating 28 U.S.C. §§ 2261-2266).

300. The second part of the bill creates chapter 154, entitled "Special Habeas Corpus Procedures in Capital Cases." See S. 735 § 607.

301. S. 735 § 607 (creating 28 U.S.C. § 2261(b)). This section provides:

This chapter is applicable if a State establishes by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners . . . .

*Id.*

provides counsel in state post-conviction proceedings.<sup>302</sup> In exchange, the state would get some advantages when cases get to federal court. Two advantages would probably be most important: the filing deadline would be shorter (six months rather than a year) and there would be timetables for federal court action.<sup>303</sup> Federal district judges would have to decide cases within about six months of their being filed, and federal circuit courts would have to decide appeals in about 120 days after briefing is completed.<sup>304</sup> There are, however, some provisions for extensions.<sup>305</sup> The idea of giving states incentives to provide counsel in state post-conviction proceedings is borrowed from the *Powell Committee Report* from 1989.<sup>306</sup>

I don't know whether this part of the bill would be all that important. If there is going to be a very tight filing deadline, I'm not sure it would make much difference whether the deadline is six months or a year. Either way, it's going to be nearly impossible to comply with. And I'm not sure the timetables for federal court action would work at all.<sup>307</sup> I doubt that federal courts would put up with that. Also, I'm not sure what the systems that states might set up in exchange for these advantages would look like. Some states already provide counsel in state post-conviction proceedings, although those lawyers often don't deliver good representation.<sup>308</sup>

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302. *Id.*

303. *Id.*

304. *Id.* (creating 28 U.S.C. § 2266(b)(1)(A), § 2266(c)(1)(A)).

305. *Id.* (creating 28 U.S.C. § 2266(b)(1)(C)) (stating that the district court may delay decision on a habeas corpus application for 30 days upon a finding that the ends of justice served by such delay outweigh the interests of both the public and the applicant in a speedy resolution).

306. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT AND PROPOSAL OF THE AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES (Sept. 6, 1989) (Justice Powell chaired the ad hoc committee, which reviewed the state of habeas corpus in capital cases).

307. *See* S. 735, § 607 (creating 28 U.S.C. § 2266). The Senate bill provides that "[a] district court shall render a final determination and enter a final judgment on any application for a writ of habeas corpus . . . in a capital case not later than 180 days after the date on which the application is filed." *Id.* (creating 28 U.S.C. § 2266(b)(1)(A)). An appellate court shall render a final determination of an appeal of any order not later than 120 days after the date on which the reply brief or the answering brief is filed. *Id.* (creating 28 U.S.C. § 2266(c)(1)(A)).

Section 607 further provides with regard to both the district courts and the courts of appeals: "The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence." *Id.* (creating 28 U.S.C. § 2266(b)(4)(A), § 2266(c)(4)(A)).

308. *See generally* Stephen B. Bright, *Counsel for the Poor: The Death Sentence not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994) (describing the inadequacies of lawyers in capital cases); *The Death of Fairness? Counsel Competency & Due Process in Death Penalty Cases*, 31 HOUS. L. REV. 1105, 1178-87

I don't want to minimize the significance of these capital habeas corpus provisions, but I find more interesting the bill's first part, the "general" habeas corpus "reform" package.<sup>309</sup> Examining that part of the bill, you find what you might expect: an emphasis on speed and finality. Everywhere you look, there is another provision that expedites cases, cuts off claims, or terminates litigation. Although these provisions would control both capital and non-capital cases, it's very clear that the drafters have capital cases in mind.

For all federal habeas cases, the statute of limitations (the filing deadline) would be one year after the conclusion of direct review.<sup>310</sup> So even if a state doesn't provide post-conviction counsel, and thus, doesn't get the benefit of the six-month filing limit in the second part of the bill, the state would still get the benefit of a one-year filing deadline in every federal habeas corpus case.

There would also be extremely restrictive rules on multiple petitions from a single prisoner.<sup>311</sup> This is the subject of much rhetoric on the floor of Congress. Habeas corpus is attacked not only as generating delay, but also because of multiple petitions from the same prisoner. This is very difficult to defend in political circles. Accordingly, the Senate bill has draconian provisions regarding second and successive petitions.

All of the above I would put under the heading of speeding up, and fixing finality rules for, federal habeas litigation. Such provisions presuppose that there will be federal habeas litigation, that the federal courts will continue to have jurisdiction in these cases, and that they will, in a proper procedural posture, decide the merits of habeas petitions.

But there are *other* provisions in this general part of the Senate bill, and also in the House bill, which concern the federal courts' ability to adjudicate the merits. These are attacks on the integrity and independence of the federal courts.

I will discuss three things under this heading. First, there's a provision on what a federal court should do when a state court has made a factual finding regarding the prisoner's claim. Under existing law, federal courts are told to presume the accuracy of a state court finding

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(1994) (discussing the role of counsel in capital cases); Ira P. Robins, American Bar Association, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 70 (1990) (discussing the poor performance of lawyers handling post-conviction challenges in capital cases).

309. S. 735 §§ 601-606.

310. S. 735 § 601 (amending 28 U.S.C. § 2244(d)(1) (1994)).

311. S. 735 § 606(b) (amending 28 U.S.C. § 2244(b) (1994)).

of fact.<sup>312</sup> Although this would remain true under the Senate bill,<sup>313</sup> there are additional procedural safeguards under existing law. For instance, under existing law, federal courts don't have to accept state findings of fact unless the findings were made in the proper procedural posture, and unless there was a written statement of the findings.<sup>314</sup> These and other safeguards regarding state court fact-finding must be met before the federal court must presume that the state court's findings are accurate. The Senate bill would eliminate these procedural safeguards.<sup>315</sup>

I don't know what the federal courts would do with that. Perhaps they would read those procedural safeguards back into the mix, on the theory that a federal court ought not be required to accept a finding made by a state court without an opportunity to examine the procedural machinery the state court used. Nevertheless, the Senate bill contemplates that a federal court would have to accept findings of fact made in state court without examining the way in which the state court reached those findings.

Second, there's a provision on evidentiary hearings in federal court.<sup>316</sup> This is where most cases are won or lost. Most petitioners need an evidentiary hearing to fill out the factual record supporting their claims. Typically, if a petitioner cannot obtain an evidentiary hearing in federal court, he is not able to expose the court to the material facts of his case. This is where the action tends to be.

The drafters of this bill obviously want this provision to restrict a prisoner's ability to get an evidentiary hearing in federal court. Under existing law, a prisoner is entitled to a hearing if the prisoner's allegations, if true, would entitle the prisoner to relief.<sup>317</sup> If there's a dispute regarding those allegations of fact, a hearing is typically the only way to resolve that dispute. It's also true, though, under existing Supreme Court cases, that the usual rules regarding procedural default in state court apply and limit the right to a mandatory federal evidentiary hearing.<sup>318</sup> So, if the prisoner fails to develop the material facts when

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312. 28 U.S.C. § 2254(d) (1994).

313. S. 735 § 604(4) (amending 28 U.S.C. § 2254(d)).

314. 28 U.S.C. § 2254(d).

315. S. 735 § 604(4)(e) (amending 28 U.S.C. § 2254(d)). Section 604(4) provides: "[A] determination of a factual issue made by a State court shall be presumed to be correct." *Id.*

316. *Id.*

317. 28 U.S.C. § 2254(d).

318. Procedural default occurs when a litigant in a state proceeding fails to properly raise or preserve an issue; this failure typically bars later review of that issue in the state courts and, generally, in federal court as well. *See Wainwright v. Sykes*, 433 U.S. 72



given an opportunity to do so in state court, there often will be no opportunity to develop those material facts in federal court. The prisoner won't be able to prove the facts in federal court unless he shows "cause" for having defaulted in state court, *or* unless he can assert some serious evidence linking his claim to factual innocence.<sup>319</sup> Thus it's already pretty difficult to get an evidentiary hearing in federal court. If you fail to take the proper steps in state court, you're very likely to lose out in federal court.

The Senate habeas bill means to tighten this up considerably more. Under the bill, if a prisoner fails to develop material facts in state court, there can be no federal evidentiary hearing unless the prisoner demonstrates a very good reason for having failed to do so, *and* the prisoner links his claim with factual innocence.<sup>320</sup> If you take this provision literally, only prisoners who can show that they are actually innocent will get evidentiary hearings. Under a literal reading, a federal court would be required to rule on the merits of a federal constitutional claim in ignorance of the material facts, simply because those facts weren't developed in state court. I tend to think that, at least in some cases, this provision has to be unconstitutional in application.

Third, and most important, is the bill's so-called "deference" provision.<sup>321</sup> Those of us who worked in the Senate trying to defeat this bill in its entirety focused primary attention here. Senator Biden introduced an amendment that would have struck this provision from the bill altogether.<sup>322</sup> A good bit of work was done on that amendment, which got forty-six votes in a losing cause. The provision remains in the bill, and if we see legislation later in this Congress, I think this provision will survive—even though there was great opposition to it

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(1977). When federal courts refuse to review these cases, they do so because the state procedural default constitutes an adequate and independent state ground for the decision. *See id.* at 81-82, 84 (applying the "adequate and independent state ground" doctrine and establishing that a prisoner can typically overcome procedural default only by showing "cause" for the default and "prejudice").

319. *See, e.g., Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8 (1992) ("[A]pplication of the cause-and-prejudice standard to excuse a state prisoner's failure to develop material facts in state court will appropriately accommodate concerns of finality, comity, judicial economy, and channeling the resolution of claims into the most appropriate forum."); *see also Murray v. Carrier*, 477 U.S. 478, 488 (1986) ("[A] showing that the factual or legal basis for a claim [is] not reasonably available to counsel, or that 'some interference by officials,' made compliance impracticable, would constitute cause . . .") (citations omitted).

320. S. 735, § 604(4) (amending 28 U.S.C. § 2254(d)).

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

322. S. 735, Amendment No. 1224 to The Comprehensive Terrorism Prevention Act of 1995 (1995). *See also* 141 CONG. REC. S7840-45 (daily ed. June 7, 1995) (statement of Sen. Biden).

not only from Democrats, but also from many Republicans. Senator Cohen from Maine took time from the Republican side and made a very important speech in favor of the amendment that would have deleted this provision from the bill.<sup>323</sup>

Under current federal habeas law, federal courts must, formally at least, exercise independent judgment on the merits of federal constitutional claims that have cleared all the procedural hurdles.<sup>324</sup> The federal courts are not supposed to defer to what the state courts have done previously on the merits. That's not to suggest that the federal courts ignore state court determinations. They don't. But formally at least, federal courts are to exercise independent judgment. That's been the law at least since *Brown v. Allen* in 1953.<sup>325</sup> By the way, that was not a Warren Court holding; the principal opinion in *Brown* was written by Felix Frankfurter.<sup>326</sup>

Under this bill, there would be a general rule that federal courts cannot award relief on a claim that was previously rejected on the merits in state court.<sup>327</sup> So, the general rule under this provision would be precisely the opposite of existing law under *Brown v. Allen*.<sup>328</sup> There would be three exceptions in the Senate bill. The first exception would be that if the state court judgment was contrary to clearly established federal law, then the federal court could grant relief on the claim.<sup>329</sup> Second, a federal court could grant relief if the state court judgment constituted an unreasonable application of clearly established law to the facts of the particular case.<sup>330</sup> And third, the federal court could grant relief if the state court judgment rested on an unreasonable determination of the facts in light of the evidence.<sup>331</sup>

I don't know what all this would mean. Looking literally at the provision, I have the impression that the drafters want to restrict the ability of federal courts to award relief with respect to claims that the

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323. 141 CONG. REC. S7838-39 (daily ed. June 7, 1995) (statement of Sen. Cohen).

324. 28 U.S.C. § 2243 (1994). This section states: "The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require." *Id.* See also 28 U.S.C. §§ 2241-2242 (1994) (delineating application requirements for a writ of habeas corpus and authorizing the "Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions" to grant writs of habeas corpus).

325. *Brown v. Allen*, 344 U.S. 443, 457-60 (1953) (holding that no binding weight is to be attached to the state determination).

326. *Id.* at 446.

327. S. 735 § 604(3) (amending 28 U.S.C. § 2254).

328. *Brown*, 344 U.S. at 457-60.

329. S. 735 § 604(3) (amending 28 U.S.C. § 2254).

330. *Id.*

331. *Id.*

federal courts think are meritorious. And the drafters want the federal courts, in some fashion, to take greater account of what state courts have done on claims. Just how much account is unclear.

Many federal courts might now say that they do not grant relief unless it is pretty clear that the state courts made a serious error and, for example, acted contrary to clearly established federal law. I expect that some federal courts would say that they wouldn't grant relief even now on the basis of a claim the state courts rejected, unless there was something unreasonable about what the state courts did in the particular case.

So, it's possible to come away with the impression that this might not change things all that much. There was a lot of rhetoric to that effect on the floor of the Senate from the proponents of this. They said it wouldn't be a serious intrusion into the independence of the federal judiciary, that they don't mean to do away with federal habeas corpus, that there still would be federal examination of the merits of habeas claims, and that they just want the federal courts to lighten up a little.

But opponents saw this provision as very serious, indeed. I fear it will be taken seriously and will restrict the ability of the federal courts to determine the merits independently and to award relief on the basis of meritorious constitutional claims.

Just speculating a moment on how this provision might be read, you might think that what Congress is doing here is using its power to prescribe the jurisdiction of the federal courts and is withdrawing some of the federal habeas corpus jurisdiction. But I think that's probably *not* what this does. Taken literally, it doesn't withdraw jurisdiction at all. It leaves the existing jurisdictional statutes in place.

You might also think that it means to require that federal habeas courts somehow have to give preclusive effect to previous state court judgments. I think that's probably not the way it ought to be read, either. After all, in previous bills in other years, habeas critics have proposed that federal courts ought to be denied the power to award relief on the merits of claims if those claims have been fully and fairly adjudicated previously in state court. Although those bills used the language of preclusion, this bill doesn't use the "full and fair adjudication" standard. So I think that something *other than* preclusion is afoot.

It's anybody's guess just how much deference to the state courts the federal courts would have to give. That would just have to be litigated.

Thanks very much.

## RONALD J. TABAK

We are now going to hear from Stephen B. Bright, the Director of the Southern Center for Human Rights, in Atlanta. Steve has done trailblazing work in trial courts and habeas corpus proceedings. My law firm's fellowship program thinks so highly of his organization that three people have gotten Skadden Fellowships to work at the Southern Center for Human Rights. Steve has taught at Harvard and Yale Law Schools. He's published many law review articles, and his upcoming law review article concerns state court judges and the impact of judicial elections.<sup>332</sup> In light of what you've just heard about the deference the state court judiciary would be given under the proposed federal habeas law, his comments are particularly timely. Here is Steve Bright.

## STEPHEN B. BRIGHT

The answer to the question posed for this panel is that there is not much habeas left in this corpus. The U.S. Supreme Court under the leadership of Chief Justice Rehnquist has been whittling away at the once great writ of habeas corpus since 1977.<sup>333</sup> Now Congress is poised to finish it off.<sup>334</sup> The result is that the system by which people are condemned to die in this country has less integrity and fairness.

But the state attorneys general and some members of Congress are not satisfied to restrict the power of federal courts to protect the constitutional rights of those facing loss of liberty or life. They want to deny those facing the death penalty even the assistance of competent law-

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332. See Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 779 (1995).

333. See, e.g., *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1713-14 (1993) (reducing the harmless error standard for constitutional violations recognized in federal habeas review); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8, 11-12 (1992) (making it more difficult for petitioners to obtain an evidentiary hearing to prove a constitutional violation); *McCleskey v. Zant*, 499 U.S. 467, 490-95 (1991) (restricting when a constitutional violation may be raised in a second habeas petition); *Teague v. Lane*, 489 U.S. 288, 294-96 (1989) (adopting an extremely restrictive doctrine regarding the retroactivity of constitutional law); *Patton v. Yount*, 467 U.S. 1025, 1038-40 (1984) (requiring deference to fact finding by state court judges); *Wainwright v. Sykes*, 433 U.S. 72, 86-89 (1977) (adopting strict rules for procedural default); *Stone v. Powell*, 428 U.S. 465, 492-95 (1976) (excluding most Fourth Amendment claims from habeas corpus review).

334. See Comments by Professor Larry Yackle, *supra*, at 561-68. See also David Cole, *Destruction of the Habeas Safety Net*, LEGAL TIMES, June 19, 1995, at 30, 33 ("[F]ederal courts under the new standard will not only have to determine that the state courts erred in finding no constitutional violations, but will also have to find that the state courts' decisions were 'unreasonable' or, in the Supreme Court's words, that the courts were 'plainly incompetent.'").

yers. They are behind the removal of federal funding to the capital post-conviction defender organizations, also known as death penalty resource centers.<sup>335</sup> A committee of federal judges concluded that the post-conviction defender offices were cost effective and enhanced the quality of representation in capital cases.<sup>336</sup> This recommendation did not deter Congress from eliminating funding for the programs.<sup>337</sup> The closing of these small organizations, which have for the last eight years done a heroic job of finding lawyers for the condemned and providing direct representation to them, will be a lethal blow to what little constitutional protections remain for those facing the executioner.

The Bill of Rights means nothing without lawyers. Taking away the handful of specialists in capital post-conviction representation employed by the capital defender organizations on the theory that other lawyers will respond to the legal needs of those under death sentences is much like removing all of the doctors, nurses, and technicians from Cook County Hospital and saying that poor people will still get medical care because there are plenty of doctors in Illinois.

The removal of funding for the capital representation centers tells us that the attorneys general of many states and a majority in Congress do not care at all about fairness or about due process. A few years ago, the notion that we would allow people to be executed without legal counsel was unthinkable. But now, it may very well happen.

Who will represent the condemned in post-conviction proceedings in many states once there is no capital representation center? Our office, which receives no government support, is not able to take the cases because we are already too overextended on the cases we have. There is no mechanism in many states to provide lawyers for post-conviction proceedings. And there is little or no compensation to attract lawyers. Alabama pays a flat fee of \$600 for representation in a post-conviction capital case; Georgia, Mississippi, and many other states pay nothing at all. Only a handful of lawyers are willing to take on the *pro bono* representation of a death case. There are not enough

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335. See, e.g., Marcia Coyle, *Republicans Take Aim at Death Row Lawyers*, NAT'L. L.J., Sept. 18, 1995, at A1, A25 (describing the effort of South Carolina's Attorney General and other members of the National Association of Attorneys General to eliminate funding for the post-conviction defender organizations even though the organizations had established the innocence of at least four men condemned to die).

336. DEFENDER SERVICES, *supra* note 46, at 6.

337. See David Cole, *Too Expensive or Too Effective? The Real Reason the GOP Wants to Cut Capital-Representation Centers*, FULTON COUNTY DAILY REP. (Atlanta), Sept. 8, 1995, at 6 (pointing out that eliminating funding for the capital representation centers will actually increase the cost of providing representation, but decrease the quality).

*pro bono* lawyers for the 3,000 men, women, and children on death row across the country.<sup>338</sup>

We will soon see whether the states will execute people without any post-conviction review if no lawyer volunteers to represent them. More likely, many states will take the same approach to providing lawyers at the post-conviction stages that they take at trial: cases will be assigned to unqualified lawyers who will be paid a token fee to provide perfunctory representation.<sup>339</sup>

Habeas corpus has been restricted by the Supreme Court in large part because of interests of federalism and comity—that is, to maintain good relations between the state and federal courts.<sup>340</sup> The federal courts are already required to defer to findings of fact by the state courts.<sup>341</sup> The habeas corpus provisions passed by the Senate this summer would require deference even to the legal conclusions of state court judges.<sup>342</sup>

The argument is made that because state court judges take the same oath to uphold the Constitution of the United States as federal judges, state court judges will enforce the law.<sup>343</sup> However, in thirty-two of the thirty-eight states that have the death penalty, state court judges must stand for periodic election or retention.<sup>344</sup> For most of those

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338. DEATH ROW USA, *supra* note 46, at 1.

339. See Bright, *supra* note 308, at 1835 (describing numerous examples of poor representation in capital cases); Robins, *supra* note 308, at 16 (finding “inadequacy and inadequate compensation of counsel at trial” to be one of the “principal failings of the capital punishment review process today”).

340. See, e.g., Coleman v. Thompson, 501 U.S. 722, 726 (1991) (“This is a case about federalism. It concerns the respect that federal courts owe the States and the States’ procedural rules when reviewing the claims of state prisoners in federal habeas corpus.”).

341. 28 U.S.C. § 2254(d) (1994) (providing that a determination of a state court of competent jurisdiction “shall be presumed to be correct” unless petitioner demonstrates that those findings are erroneous).

342. See S. 735, 104th Cong., 1st Sess. § 604(3) (1995) (amending 28 U.S.C. § 2254(d)) (requiring deference by federal courts to decisions of state courts unless the decision is “contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States”).

343. E.g., Sumner v. Mata, 449 U.S. 539, 549 (1981) (“State judges as well as federal judges swear allegiance to the Constitution of the United States, and there is no reason to think that because of their frequent differences of opinions as to how that document should be interpreted, all are not doing their mortal best to discharge their oath of office.”).

344. The following states have capital punishment statutes: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. See Bright &

judges, granting relief in a death penalty case is tantamount to signing their own political death warrants.

In 1986, the governor of California, George Deukmejian, warned two justices of the state supreme court that if they did not change their votes in death penalty cases, he would oppose their retention and have them voted off the court.<sup>345</sup> He had already announced his opposition to Chief Justice Rose Bird because of her votes in capital cases.<sup>346</sup> The governor apparently concluded that the justices did not bend to this improper effort to influence them, and he carried out his threat.<sup>347</sup> All three justices were voted off the court.<sup>348</sup> Deukmejian appointed their successors in 1987.<sup>349</sup>

The voters got what they wanted in terms of results—plenty of death penalty affirmances. But it is doubtful whether they are getting justice from a court that has become a death mill. The California Supreme Court, which was once one of the great courts in this land, is now known primarily for its refinement of the harmless error doctrine.<sup>350</sup> The court is much like the soldiers who were called onto the battlefield after the battle to shoot the wounded. It has the highest affirmance rate of any state supreme court in the country in capital cases.<sup>351</sup>

What happened in California is happening in other states as well. There was an election last year for the Texas Court of Criminal

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Keenan, *supra* note 332, at 779 n.88. Of these states, Connecticut, Delaware, New Hampshire, New Jersey, South Carolina, and Virginia do not employ periodic elections for judicial selection or retention. *Id.*

345. Steve Wiegand, *Governor's Warning to 2 Justices*, S. F. CHRON., Mar. 14, 1986, at 1.

346. Leo C. Wolinsky, *Support for Two Justices Tied to Death Penalty Votes, Governor Says*, L.A. TIMES, Mar. 14, 1986, at 3 ("Bird has voted to strike down every death penalty case that has gone before the court.").

347. Henry Unger, *Will Vote Against Grodin, Reynoso, Deukmejian Says*, L.A. DAILY J., Aug. 26, 1986, at 1.

348. Frank Clifford, *Voters Repudiate 3 of Court's Liberal Justices*, L.A. TIMES, Nov. 5, 1986, at 1 (describing the results of the election and commercials in the last month of the campaign which insisted "that all three justices needed to lose if the death penalty is to be enforced").

349. *Id.*

350. See Elliot C. Kessler, *Death and Harmlessness: Application of the Harmless Error Rule by the Bird and Lucas Courts in Death Penalty Cases—A Comparison & Critique*, 26 U.S.F. L. REV. 41, 84-5, 89 (1991) (observing that the Lucas Court has "reversed every premise underlying the Bird Court's harmless error analysis," displaying an eagerness to find error harmless that reflects "jurisprudential theory" less than a "desire to carry out the death penalty").

351. Maura Dolan, *State High Court Is Strong Enforcer of Death Penalty*, L.A. TIMES, Apr. 9, 1995, at A1 ("During the past five years, the California Supreme Court has affirmed nearly 97% of the capital cases it reviewed.").

Appeals. Stephen W. Mansfield ran for a seat on the court on a three-plank platform: greater use of the death penalty, greater use of the harmless error doctrine, and fines for lawyers who file "frivolous appeals" in death penalty cases.<sup>352</sup> Mansfield challenged an incumbent, a former prosecutor, who had served for twelve years on the court.<sup>353</sup> Before the election, it was revealed that Mansfield had been a member of the Texas bar for only a couple of years, that he had been fined for practicing law without a license in Florida, and that he had almost no criminal law experience.<sup>354</sup> Nevertheless, Mansfield won the election. The *Texas Lawyer* aptly described him after his election as an "unqualified success."<sup>355</sup>

Justice James Robertson was voted off the Mississippi Supreme Court in 1992.<sup>356</sup> He was the second judge in just two years to be voted off the court for being "soft on crime."<sup>357</sup>

The attorney general of Georgia, Michael Bowers, has already served notice that the new Chief Justice of Georgia, Robert Benham, may be targeted in the election next year because of Justice Benham's votes in death penalty cases.<sup>358</sup> Chief Justice Benham is vulnerable because he is the first African American member of the Georgia Supreme Court.<sup>359</sup> But no one will talk about race; Benham will be attacked based on the death penalty.

Georgia's attorney general has asserted that the Georgia Supreme Court is the "most liberal" supreme court in the country.<sup>360</sup> If that were true it would be front page news in the *New York Times*. The

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352. Janet Elliott & Richard Connelly, *Mansfield: The Stealth Candidate; His Past Isn't What it Seems*, TEX. LAW., Oct. 3, 1994, at 1, 32.

353. *Id.*

354. *Id.*

355. Jane Elliott, *Unqualified Success: Mansfield's Mandate; Vote Makes Case for Merit Selection*, TEX. LAW., Nov. 14, 1994, at 1.

356. David W. Case, *In Search of an Independent Judiciary: Alternatives to Judicial Elections in Mississippi*, 13 MISS. C. L. REV. 1, 15-20 (1992) (demonstrating the evils of mixing politics and judicial selection by examining the downfall of Justice James Robertson).

357. Andy Kanengiser, *McRae Overwhelms Justice Joel Blass*, CLARION-LEDGER (Jackson, Miss.), June 6, 1990, at 4A.

358. See Peter Mantius, *Speaking His Mind: A Decision that Robert Behnam Wrote Last Year Could Bring Conservative Opposition at the Polls. New Chief Justice Is Prudent Pioneer but Benham Doesn't Duck Controversies*, ATLANTA CONST., July 3, 1995, at B2 (Attorney General Bowers advised that "[a]ny time you start making controversial decisions, it opens you to a greater extent" to political opposition).

359. *Id.*

360. Bill Shipp, *The State Scene: Benham and the Rare High Court Fuss*, MONROE COUNTY REC. (Ga.), Apr. 5, 1995, at 4 (opinion column syndicated in Georgia newspapers).



attorney general has also accused Chief Justice Benham of leading a campaign to abolish the death penalty in Georgia.<sup>361</sup> But Chief Justice Benham has voted to *affirm* in two-thirds of the death penalty cases. Voting to affirm in two-thirds of the cases would be a remarkable way to abolish the death penalty.<sup>362</sup> But that kind of distortion takes place in judicial campaigns.

In Mississippi, Justice James Robertson was attacked during the campaign for a concurring opinion in which he said the death penalty could not be imposed in a rape case where the victim was not killed.<sup>363</sup> In making this observation, Justice Robertson was simply following, as he was required to do, the decision of the United States Supreme Court in *Coker v. Georgia*.<sup>364</sup> Yet he was portrayed as a jurist who did not favor the death penalty for someone who had raped a minor.

Robertson's opponent also claimed that Robertson did not think the death penalty was appropriate for someone who murdered a pizza-delivery boy.<sup>365</sup> This claim was based on a dissenting opinion authored by Robertson, in which he expressed the view that an aggravating circumstance was unconstitutionally vague.<sup>366</sup> Robertson's position was later adopted by the U.S. Supreme Court, which reversed the Mississippi Supreme Court's decision.<sup>367</sup>

Not only have justices and judges been targeted for their votes, but there have been serious political consequences for their supporters as well. Bill Frist was elected to the U.S. Senate from Tennessee in part by campaigning against the federal judiciary. He criticized Senator Jim Sasser for having voted to confirm Rosemary Barkett, the Chief Justice of the Florida Supreme Court, for the U.S. Court of Appeals for the Eleventh Circuit.<sup>368</sup> The Frist campaign ran an advertisement in

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361. *Id.*

362. See Mantius, *supra* note 358, at B2 (stating that Justice Benham noted "that he has voted for the death penalty about five times for every vote he has cast against it").

363. On March 10, Vote for Judge James L. Roberts, Jr. for The Mississippi Supreme Court, campaign supplement to the N.E. MISS. DAILY J., Mar. 7, 1992, at 6 (criticizing Robertson's opinion in *Leatherwood v. State*, 548 So. 2d 389, 403-06 (Miss. 1989) (Robertson, J., concurring), as "morally repugnant").

364. 433 U.S. 584, 592 (1977) (holding the death penalty unconstitutional in rape cases where no death occurs).

365. See Case, *supra* note 356, at 18.

366. *Clemons v. State*, 535 So. 2d 1354, 1367 (Miss. 1988) (Robertson, J., dissenting) ("The *Cartwright* error is that the phrase 'especially heinous, atrocious or cruel' is unconstitutionally vague, so that a death sentence relying upon an aggravating circumstance so phrased may not stand."), *vacated sub nom.* *Clemons v. Mississippi*, 494 U.S. 738 (1990).

367. *Clemons*, 494 U.S. at 738.

368. *Political Notebook*, COM. APPEAL (Memphis), Oct. 8, 1994, at B3.

which the sister of a murder victim criticized Sasser for recommending the appointment of U.S. District Judge John Nixon, who had granted habeas corpus relief to the person convicted of killing her sister.<sup>369</sup> Frist said that Sasser's vote to confirm Barkett showed that he "still hasn't learned his lesson."<sup>370</sup>

Many state court judges come on the bench from the prosecutors' offices.<sup>371</sup> Many of them became judges by prosecuting high-profile death penalty cases, getting the publicity, getting the public attention, and then going to the bench. Unfortunately, many continue to use the death penalty for political purposes on the bench.

Bob Austin, a district court judge in Alabama, was specially designated to preside over a capital case which was to be tried two weeks before the election in which Austin was on the ballot running for a higher court, the circuit court, as the Democratic candidate against the Republican, a former United States Attorney for the Northern District of Alabama.<sup>372</sup> How fair can a judge be in those circumstances? There was a motion for a change of venue before him.<sup>373</sup> If he granted the change of venue he would be saying to the people who might vote for him in two weeks that they could not be fair. There was a motion for a continuance because the lead defense lawyer was suffering from an infection, a complication of polio.<sup>374</sup> If the judge continued the case until after the election, he would lose the daily front-page coverage which would undoubtedly help him in the election. There was a motion to suppress a statement.<sup>375</sup> What would happen if two weeks before the election the judge were to suppress a statement? Suddenly, the great political benefit of this capital trial would turn into a liability.

Needless to say, the motion for a change of venue was denied, the motion for a continuance was denied, and the statement was not suppressed.<sup>376</sup> The case went to trial, the defendant was sentenced to death and Judge Austin won the election.<sup>377</sup>

Lawyers in Louisville, Kentucky were surprised to find, when they came to court for an arraignment in a death penalty case in which an African American defendant was accused of murdering a deputy sher-

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369. *Id.*

370. *Id.*

371. Bright & Keenan, *supra* note 332, at 781-84.

372. *Id.* at 787-88.

373. *Id.* at 788 n.147.

374. *Id.* at 788.

375. *Id.* at 788 n.146.

376. *Id.* at 788 nn. 146-47.

377. *Id.* at 788-89.

iff, that a lower court judge, Jim Shake, was going to preside instead of the judge to whom the case had been assigned.<sup>378</sup> The judge to whom the case had originally been assigned explained to counsel in chambers that Shake was presiding because "Jim's on the ballot Tuesday."<sup>379</sup>

A circuit judge in Alabama campaigned for re-election to the bench by running newspaper advertisements that proclaimed: "Some complain that *he's too tough on criminals*, AND HE IS . . . . We need him now more than ever."<sup>380</sup> But the constitutional duty of a judge is "to hold the balance nice, clear and true between the State and the accused."<sup>381</sup> How can a judge who runs on a platform of being "too tough" on one group of litigants possibly be fair?

The judges who obtain office in this manner are responsible for the sad state of indigent defense in most states. Judges appoint the lawyers who defend the accused and decide whether to give the defense funds for investigative or expert assistance. There is no public defender office in many states, including most of those which sentence the most people to death.<sup>382</sup>

Judges in Houston, Texas, have repeatedly appointed a lawyer to defend capital and other criminal cases even though he occasionally sleeps during some of the trials.<sup>383</sup> Ten of his clients have been sentenced to death.<sup>384</sup> One judge in Houston, in response to a defendant's complaint that his lawyer was sleeping during the trial, said that the Constitution may guarantee a lawyer, but it "doesn't say the lawyer

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378. *Id.* at 787.

379. *Id.* (quoting Motion to Disqualify Present and Former Members of Jefferson Circuit Court and Jefferson District Court and to Obtain Appointment of a Special Judge from Outside Jefferson County 3-4, *Commonwealth v. Bard*, No. 93CR2373 (Ky. Cir. Ct. Jefferson County Nov. 9, 1993)).

380. The advertisement appeared in the BIRMINGHAM NEWS on Nov. 4, 1994, at 4C, and on Nov. 6, 1994, at 21P.

381. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). The Court held that it is a denial of due process to subject a defendant to a criminal trial where the judge has a direct, personal, and substantial interest in conviction. *Id.* at 535.

382. Bright, *supra* note 308, at 1849-52. Of the 36 states which have the death penalty, only 11 have statewide public defender offices: California, Connecticut, Delaware, Florida, Maryland, Missouri, New Hampshire, New Jersey, New Mexico, Ohio, and Wyoming. *Id.* at 1849 n.79.

383. Paul M. Barrett, *Lawyer's Fast Work on Death Cases Raises Doubts About System*, WALL ST. J., Sept. 7, 1994, at A1. The lawyer, Joe Frank Cannon, "boasts of hurrying through trials 'like greased lightning,'" without making any objections; his approach is described by others as "a mockery of the adversary process." *Id.* Not only has Mr. Cannon made legal mistakes in his defense work, but he has also been accused of falling asleep in court. *Id.* at A6.

384. *Id.*

has to be awake.”<sup>385</sup> This tells us something about how seriously some judges take their oaths.

An attorney in Georgia secured an acquittal for Robert Wallace at his retrial. Wallace had previously been convicted and sentenced to death, but the United States Court of Appeals granted habeas corpus relief because Wallace had been sentenced to death in violation of the Constitution.<sup>386</sup> The lawyer who defended Wallace successfully at the retrial told me recently that he has never been appointed to defend another indigent case by the judges in that circuit.

Judges in Alabama, Texas, and many other states routinely abdicate their judicial responsibilities and allow the attorney general's office to write the orders resolving issues in capital cases.<sup>387</sup> In one Georgia case, it was discovered that the judge had signed off on an order in a capital case which discussed the testimony of a witness who had never appeared before him in the case.<sup>388</sup> It turned out that the order came off the attorney general's word processor and described the witness who had never appeared before the judge.<sup>389</sup> The judge paid so little attention to that order that he still signed it.<sup>390</sup> Nevertheless, the Georgia Supreme Court upheld the order, even though the judge made credibility findings about a witness who never appeared.<sup>391</sup>

Justice John Paul Stevens of the United States Supreme Court has pointed out the tendency of elected judges to override jury sentences of life imprisonment and impose the death penalty in states where that practice is allowed.<sup>392</sup> Alabama judges have overridden jury sentences of life imprisonment without parole and imposed the death penalty forty-seven times, but have rejected only five sentences of death and imposed life imprisonment without parole.<sup>393</sup> Between 1972 and early

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385. John Makeig, *Asleep on the Job; Slaying Trial Boring, Lawyer Said*, HOUSTON CHRON., Aug. 14, 1992, at A35.

386. *Wallace v. Kemp*, 757 F.2d 1102, 1112 (11th Cir. 1985) (holding that because Wallace was mentally incompetent at the time of his first trial, his conviction violated due process).

387. Bright & Keenan, *supra* note 332, at 803-11.

388. *See Jefferson v. Zant*, 431 S.E.2d 110, 111-12 (Ga. 1993), *cert. denied*, 114 S. Ct. 1577 (1994).

389. *Id.* at 111-12 (noting the State's concession that it drafted the final order at the court's request and mistakenly referred to an attorney who did not testify).

390. *Id.* at 112 (noting that the judge adopted the order that was drafted by the State "as his own").

391. *Id.*

392. *Harris v. Alabama*, 115 S. Ct. 1031, 1038 (1995) (Stevens, J., dissenting) (discussing Alabama, Delaware, Florida, and Indiana, which permit a judge to override a jury's recommendation of sentence).

393. *See id.* at 1040 (Stevens, J., dissenting).

1992, Florida trial judges rejected jury sentences of life imprisonment and imposed death 134 times, but overrode only fifty-one death recommendations and imposed sentences of life imprisonment.<sup>394</sup> As Justice Stevens has observed, the only explanation for these discrepancies appears to be “a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty.”<sup>395</sup>

Most judges do not need a warning like Governor Deukmejian gave the justices in California.<sup>396</sup> Most know the political realities already. One reason there is such great admiration for courageous judges like J. Skelly Wright, Frank Johnson, and Elbert Tuttle who did not bend to the passions of the moment, is that there are so few of them.<sup>397</sup> But most judges care more about retaining their office and getting their pensions than they do about enforcing the Bill of Rights for someone who is hated by the entire community.

This means that the Constitution of the United States is not fundamental law. If its protections may be ignored by judges who are intimidated by the political winds of the moment, or may be repealed by a majority of the voters in any county by voting a judge out of office, then the Constitution is not the basic, fundamental law of our nation.

Greater deference to the rulings of state court judges and less scrutiny by life-tenured federal judges, as provided in the bill that passed the Senate,<sup>398</sup> will only lessen adherence to the rule of the law and the Constitution in capital cases. Instead of engaging in wishful thinking about the independence of elected judges and indulging in legal fictions of impartiality, Congress and the courts should be realistic about the political pressures that influence elected judges. Instead of greater deference to the fact findings and legal conclusions of state court judges, the discretion of elected judges should be restricted, and reviewing courts should not defer to their findings. It is preposterous to pretend that judges are wisely exercising their discretion or making credibility findings when it is obvious that their decisions are politically motivated.

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394. *Id.* at 1040 n.8 (Stevens, J., dissenting) (citing Michael L. Radelet & Michael Mello, *Death-to-Life Overrides: Saving the Resources of the Florida Supreme Court*, 20 FLA. ST. U. L. REV. 195, 196, 210-11 (1992)).

395. *Id.* at 1039 (Stevens, J., dissenting).

396. *See supra* notes 345-49 and accompanying text.

397. Judges Wright, Johnson and Tuttle were all federal judges who enjoyed life tenure, and thus remained in office despite the courageous and controversial decisions that they made.

398. *See supra* notes 312-31 and accompanying text.

What can be done? The increasing political pressures on the courts make imperative reforms in judicial selection systems so that judges are not forced to decide between personal political considerations and the law. But there is little likelihood of such reforms being adopted. The standing of the judiciary in many states has been substantially diminished because of unseemly and irresponsible campaigns such as I have described here, and by suspect contributions from special interest groups. Yet there has been no reform. However, so long as political pressures continue to be so prominent, judges have a duty to recuse themselves in cases where they know that a ruling could result in being voted off the bench in the next election.

*Tumey v. Ohio*<sup>399</sup> involved a mayor who presided as a judicial officer over cases in which his salary depended on the fines he collected from the people coming before him. The Supreme Court held that violated due process because “[e]very procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.”<sup>400</sup> A far greater temptation not to hold the balance “nice, clear and true” than was presented in *Tumey* exists when a judge knows that if she grants a motion to suppress, the prosecutor is going to use it to run against her in the next election.

But despite the clear constitutional duty to step aside, most judges do not do so. However, reviewing courts, including federal courts on habeas corpus review, have a duty to recognize the lack of fairness and impartiality of judges subject to political pressures.

In addition, judges should not be in the business of appointing lawyers to defend indigent persons accused of crime. In many jurisdictions, such as Philadelphia, the appointment of counsel has been a political patronage system for the judges.<sup>401</sup> A study of capital cases in Philadelphia found that “Philadelphia’s poor defendants often find themselves being represented by ward leaders, ward committeemen, failed politicians, the sons of judges and party leaders, and contributors to the judges’ election campaigns.”<sup>402</sup> Not surprisingly, “even officials in charge of the system say they wouldn’t want to be represented in Traffic Court by some of the people appointed to defend poor people accused of murder.”<sup>403</sup>

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399. 273 U.S. 510 (1927).

400. *Id.* at 532.

401. Fredric N. Tulskey, *Big-Time Trials, Small-Time Defenses*, PHILADELPHIA INQUIRER, Sept. 14, 1992, at A1, A8.

402. *Id.*

403. *Id.* at A8.

The judicial function and the defense function should be independent of each other. How can a lawyer protect the client from abuses by the judge if the lawyer's primary loyalty is to the judge in order to get future appointments? Earlier proposals to restrict habeas corpus review carried with them the requirement that states create an *independent* authority for the appointment of counsel in capital cases.<sup>404</sup>

This brings us back to the need for meaningful habeas corpus review in the federal courts. So long as state court judges must keep one eye on the next election and are under a constant temptation to wink at the Constitution, and so long as judges appoint lawyers who do not zealously and effectively represent their clients, the state criminal justice systems lack essential elements for the fair, reliable, and constitutional adjudication of cases. Even the most thorough federal habeas corpus review will not correct every injustice that occurs in such corrupt systems, but it can provide a remedy for some unjust convictions and sentences. The great need today is not for further restrictions on habeas corpus, but to restore habeas corpus to the role it once had in the vindication of the Bill of Rights.

#### RONALD J. TABAK

Thank you very much, Steve. Steve spoke, near the end of his talk, about the role of trial lawyers. You are now going to hear more about trial lawyers from Scharlette Holdman, who is legendary for her work in gathering mitigation evidence and all other kinds of evidence in capital cases, and in working with the human beings who are on our death rows. She is currently at the California Appellate Project, one of the resource centers that's facing the loss of its federal funding.

Scharlette first became involved with capital cases in Louisiana. She then was the Director of the Florida Clearinghouse for Criminal Justice. Her efforts there helped lead to the creation of the first state-funded resource center in capital cases. She went on to South Carolina before joining the California Appellate Project. She is a Ph.D. graduate in Cultural Anthropology from the University of Hawaii. She has received numerous awards but you will receive the best award because you are going to get to hear her speak. Here is Scharlette Holdman.

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404. See H.R. 4737, 101st Cong. 2d Sess., at 9-12 (1990); Robins, *supra* note 308, at 9-10, 18-19.

## SCHARLETTE HOLDMAN

I look out and recognize a few of you. You are representing some of the nation's 3,000 condemned on death row across the country,<sup>405</sup> and I thank each of you personally.

There are difficult days ahead for all of us. Habeas has been the one way that we could open the door to justice for people routinely denied justice. I fear what the coming days will bring. I fear the hours and hours of painstaking reconstruction work that we've done to develop evidence of the denial of defendants' rights will all be for naught under the new habeas legislation.<sup>406</sup> Frankly, I haven't had the courage to go to death row and talk to anyone about it, although I've been to death row twice over the last week. I just can't find in my heart the words to tell them what's happening in Congress. Remember Justice Brennan's dissent, where he talked about the attorney of a client possibly facing the death penalty who has the horrible responsibility to tell the client that none of those issues matter?<sup>407</sup> I feel that same way. I'm at a loss how to tell the people that we're working for what Congress is doing.

I first began to think about the death penalty in 1974, when I was Director of the Louisiana ACLU. One of the folks on death row there sent us a letter that said, "Would you please come and see us? We heard that the death penalty was declared unconstitutional a couple of years ago and that we shouldn't be here." So, I went up to death row with a wonderful attorney, Leonard Dreyfuss. They brought out a man, shackled, kind of trussed up like a turkey. I had never seen anyone shackled like that. I remember being embarrassed to see someone in chains. It's very much like seeing someone naked. It was very difficult for me to look at him, so I tried to pretend that he was naked and just looked in his eyes as he explained that there were no attorneys, and that the men on death row didn't know how to proceed and wanted to know if I could help them. The NAACP Legal Defense Fund sent me down some two-page forms which we typed up and took back to death row, where most of the guys "X'd" them; they couldn't read or write. We filed those *pro per* writs for the approximately eight guys on death row, and within a week their death sentences were vacated and life sentences were imposed because, in 1972,

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405. See Scott Pendleton, *Legal Aid in Lone Star State: Who Will Pay Now for Death-Row Appeals?*, CHRISTIAN SCI. MONITOR, Oct. 3, 1995, at 3.

406. See Comments by Professor Larry Yackle, *supra*, at 561-68 (describing the new habeas legislation and discussing its potential ramifications on capital and non-capital habeas cases).

407. *McCleskey v. Kemp*, 481 U.S. 279, 321 (1987) (Brennan, J., dissenting).



the death penalty had been declared unconstitutional in *Furman v. Georgia*.<sup>408</sup> We're returning to those days, where death row inmates had no counsel.

In Florida, in the late 1970s, we recruited two *pro bono* attorneys, Eleanor Jackson Piel, a wonderful attorney out of New York City, and Howardene Garrett, a local public defender who worked in her off-hours to represent two brothers on death row who ultimately were freed because they were innocent. After spending eight years on death row, Jent and Miller had a new trial ordered by the Eleventh Circuit.<sup>409</sup> After their case was sent back down, the local D.A. didn't know what to do with the case, so he agreed to allow the brothers to enter a guilty plea to second degree murder and to let them go home the same day.<sup>410</sup> So, the brothers were freed after eight years on death row. We had a small celebration at the *pro bono* attorney's home. It was a wonderful day of celebration. A reporter there asked one of the brothers, "Don't you think that this shows that justice works?" He replied, "Well, you know, it's a funny thing. Eight years ago we said we were innocent and they put us on death row. Now, yesterday, we said we were guilty and they freed us."<sup>411</sup>

As Steve Bright said last year in the *Yale Law Journal*, the death penalty is imposed not upon those who commit the worst crimes, but upon those who are represented by the worst appointed attorneys.<sup>412</sup> I want to talk to you about that, using examples from the Western states, because intolerable representation occurs not just in cases in the South where most of my work has been, but throughout the country.

I've divided into three categories the continuing role that the corruption of justice plays in the administration of death: cases where the death sentence has been imposed (1) based on race, (2) due to ineffec-

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408. 408 U.S. 238 (1972) (finding that the death penalty, as imposed by the then-existing Georgia scheme, was "cruel and unusual punishment" in violation of the Eighth and Fourteenth Amendments).

409. *Miller v. Dugger*, 820 F.2d 1135, 1137 (11th Cir. 1987) (stating that due process required a new trial in light of new information that developed, such as different versions of facts, recanted testimony, and "other questionable circumstances").

410. See *Half-Brothers Serving Murder Term Freed After Lesser Plea*, L.A. TIMES, Jan. 16, 1988, at 25 (describing the court proceedings that led to the brothers' release); Athelia Knight, *Pair Freed After Years on Death Row; Half-Brothers Once Nearing Execution*, WASH. POST, Jan. 16, 1988, at A3 (same).

411. Jan Glidewell, *Bruce Young's Blame-Free Ride Series*, ST. PETERSBURG TIMES, Feb. 15, 1995, at 2B (opining that "[t]he only time I have ever seen a justifiable case of a bogus plea was when [Jent and Miller] . . . plead guilty").

412. See Bright, *supra* note 308, at 1836 (stating that "[i]t is not the facts of the crime, but the quality of legal representation, that distinguishes . . . where the death penalty was imposed, from . . . where it was not") (footnotes omitted).

tive assistance of counsel, and (3) because of deteriorating or poor relationships between the client and the court-appointed attorney. They're all interrelated, but I'll try to separate them to give you a few examples. With one exception, the California Supreme Court has affirmed in every California case I'm going to talk about, and we are in various stages of federal court review.

I'm not going to tell you the names of clients, because we have found through the years that when we put a spotlight on a client, the client is moved to the front, and repercussions follow, and that the government system of selecting out who to kill speeds up and focuses on our client. So, I promised all of the attorneys, as I've collected these vignettes for you, that I would not reveal the name or the county. But these are cases currently pending in the Western states.

I'll start with a very simple little case, involving a man who was scheduled to be executed and was saved within hours of execution. His case is now pending in the Ninth Circuit. He is a farm worker, born to a Mexican immigrant family in Arizona. He was tried by an all-white jury. His defense attorney at trial called him a "wetback." That slur was picked up and reiterated by all the other attorneys in the case, with the excuse that the defense attorney started it.

Another case involves an African American defendant. I can mention this case's name because it's reported: *Wade v. Calderon*.<sup>413</sup> The defense attorney in closing argument asked the jury to give his client the death penalty, saying "Melvin . . . (referring to the defendant) can't live with that beast from within any longer and if in your wisdom you think the appropriate punishment is death, you may also be giving . . . the gift of life."<sup>414</sup>

Race plays a particular role in this country. It is the ugliest part of the American spirit, but it is a vital part of the American spirit, whether we are in Alabama, Mississippi, Miami, Louisiana, or South Central Los Angeles. In Los Angeles County, whose cultural diversity makes it a wonderfully exciting place to live, somehow out of the 119 people selected for death from its twelve million residents, fifty-five percent are African American.<sup>415</sup> If you add in the Latinos, seventy-five per

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413. 29 F.3d 1312, 1325 (9th Cir. 1994) (finding defendant's death sentence invalid due to defense counsel's ineffective assistance during several portions of the trial), *cert. denied*, 115 S. Ct. 923 (1995).

414. *Id.* at 1324.

415. This data was collected by the California Appellate Project in San Francisco, California.

cent of the people on California's death row from Los Angeles County are people of color.<sup>416</sup>

They are often tried by all-white juries. You will not see an O.J. Simpson-type jury for these poor black kids who are eighteen, nineteen, twenty years old and are being tried and sentenced to death. Gil Garcetti, the District Attorney for Los Angeles County, knew that every camera in the country and around the world was going to be trained on the courtroom for the O.J. Simpson trial. He guaranteed there would be African Americans on that jury because the community was watching. Therefore, he transferred O.J.'s case from Brentwood to the Central District, which is downtown; that guaranteed a majority black jury.<sup>417</sup>

Garcetti did not do that for Jim, a nineteen-year-old African American whom the police pulled over because, they said, they "could tell that he was acting crazy." Jim was tried by an all-white jury and sentenced to death for killing a police officer, whose last words were "I've got a duster"—a reference to someone high on angel dust.

A twenty-year-old African American was also sentenced to death by an all-white jury in Los Angeles County. He had met in a car with a man who'd come into the community to purchase a prostitute and drugs. They were supposed to make an exchange and a deal, but a struggle erupted and the outsider was fatally shot.

Los Angeles County has a very complex system of jury selection, called bull's eye, a targeting system. What they're trying to accomplish is that no juror travels more than twenty miles to serve. That sounds pretty good, except that it results in the African Americans who've moved away from the central city forming kind of a doughnut around the central city. In this bull's eye system, those African Americans are pulled into other cases and away from the cases where the defendants are African Americans.

We continue to find African Americans and Latinos tried by all-white juries not just in Los Angeles, but also in smaller towns, all across the State of California. A Latino was tried by an all-white jury in one of the few death penalty cases in recent years in which the California Supreme Court granted relief. However, it only ordered a new penalty phase proceeding, whereas it should have granted him a

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416. *Id.*

417. See Mark Katches & Rick Orlov, *Garcetti's Judgment Questioned; Experts Say Simpson Tried in Wrong Court*, L.A. DAILY NEWS, Oct. 9, 1995, at N1 (reporting criticism regarding District Attorney Garcetti's filing of Simpson's case in downtown Los Angeles and suggesting that the transfer from Brentwood to downtown was based on Garcetti's political concerns).

new guilt-innocence trial, too. Seventeen alibi witnesses were prevented from testifying. The defendant's trial attorney claimed he could communicate adequately with the client because the attorney had a master's in Spanish from UCLA. But when his attorneys investigated, they found that he didn't have that degree. Trial counsel then said, "I went there under an assumed name because I was working undercover for the U.S. Navy." We then checked with the Navy; he wasn't working undercover with the Navy.

In this same case, on the second day of jury selection, this trial counsel was arrested for DUI while driving to the courthouse, and had a blood alcohol content of .27. The State Supreme Court said that no prejudice bearing on the guilt phase was shown; the fact that he was drunk didn't make him a bad lawyer. So what, whether he was drunk or sober?

In a really sad, sad case, an old, mentally ill man went to evict tenants from his home. A dispute erupted and he shot the tenants, killing them. He retained an attorney to represent him. The attorney died. The attorney's partner had the mentally ill man sign a forged quitclaim deed transferring his house to the partner. The partner then proceeded to represent the client at a competency hearing. Although the client is mentally ill, is psychotic at times, has delusions, and goes without eating or bathing, the partner said the client was competent. The partner couldn't say the client was incompetent because the partner had just convinced the client to sign over his home to the partner.

As Ron[ald J. Tabak] has often said, and as those of us in this work understand, anywhere from fifty to seventy percent of our clients who are offered pleas decline to take those pleas. I want to tell you one quick example of why, from a case we won in federal district court thanks to a wonderful attorney. The client was very, very hesitant ever to trust us. He was nineteen years old, and had been living for six months on the beach in San Diego under the walkway, under the ferris wheel and the rides, living off of whatever he could scrape together out of garbage cans and whatever drugs other druggies would hand him. He had never been in serious trouble before. (He had once broken into a dry cleaner and stolen twenty dollars, which he took back home to his father to try to save the family house from foreclosure.)

This kid was arrested and jailed after he and four other kids shot an assailant one night. His father, an abuser, retained a local lawyer who had previously represented the father in divorce proceedings but was not familiar with the father's abuse history. The local lawyer decided to take the case because, in his words, "It would be a thrill," and he

was a real thrill seeker. It would be quite a challenge to get involved in a capital case, since he had never represented anyone capitally charged before. So, he accepted the appointment to handle the case. But he didn't go see his client.

In California, no bail will be set when you are assigned special circumstances in a capital case. But this lawyer didn't know that, or didn't care. He had his secretary send a form letter to the nineteen-year-old kid sitting in the local jail, telling him that once he got bail or was released on his own recognizance, to please stop by and see the attorney so that they could make future plans for how to proceed. This kid continued to get baffling letters from the attorney for a couple of months.

Finally, the attorney went to the jailed client and said, "Listen, I've got a great deal for you. Plead guilty to life, but the deal is only open until pre-trial motions are filed." The kid, having never seen his attorney—having merely received letters telling him to drop by the office once he's released on bail—declined the plea. The attorney sent his investigator in to document that the plea had been declined. But it became clear to the investigator that the kid did not understand the nature of the plea or that he had only a certain amount of time during which he could plead to life rather than go to trial and risk getting a sentence of death. The investigator did a good job documenting the client's confession. By then, the defense attorney recognized that he was in a little bit of trouble, so he sent in the abusive father to try to talk the kid into taking the plea. The kid agreed to take the plea, but the deal was no longer open. Now, a couple of million dollars and ten years later, new counsel convinced the kid to agree to a plea of a life sentence.

I don't know how to find the resources, the energy, the spirit and the community to support the work that we have to do in the coming days to protect the lives of those on death row. I look to you for your support. We have done it before. I suppose we can try and do it again. The last ten years of having funding have enabled us to save the lives of so many people whose lives otherwise wouldn't have been saved. For those of us who have buried people as well as gone to parties to celebrate the release of the innocent, I know which activity I'd rather do. But I think there is going to be a lot more of the former and far less of the latter.

RONALD J. TABAK

Thank you very much, Scharlette. As Scharlette just said, the existence of the federally funded resource centers has been a major reason

why so many people who have been sentenced to death or convicted in violation of the Constitution in what was not harmless error have not been executed. We have with us today the Director of the Illinois Capital Resource Center, Andrea Lyon. Before joining the center, Andrea spent over fourteen years in the office of the Cook County Public Defender, where she supervised a twenty-two lawyer unit and personally tried over 100 homicide cases. She has lectured on death penalty issues at the University of Michigan School of Law, where she is about to teach on a permanent basis, Harvard, the University of Chicago, and other schools. She wrote the *Illinois Death Penalty Defense Manual*<sup>418</sup> and has written extensively elsewhere. She serves on the board of directors of the Women's Bar Association of Illinois and as Vice President of the Illinois Attorneys for Criminal Justice. It will be a severe loss for the death row inmates of Illinois when she is not here on a day-to-day basis, but she is committed to continuing this work, although based in Michigan. She is here to tell you about the role of the federal resource centers in habeas corpus matters and what it will mean to have them defunded. Here is Andrea Lyon.

#### ANDREA LYON

I want to talk to you about what resource centers do and compare what collateral representation used to be like before there was an organized way of approaching it. I don't know how many of you have ever filed or seen a post-conviction petition in state court, but what they used to be like was basically this: "Dear Judge, my name is Defendant. I've been convicted and I wish I wasn't. I am sure there is something unconstitutional about it. Love, the Defendant." Often, I am sorry to report, that is what a federal habeas corpus petition looked like as well. That's because people didn't know how to litigate these things, and there was no organized way to learn how to litigate them.

The Cox Subcommittee on Death Penalty Representation presented a report regarding the beleaguered, unpopular, politically assailed resource centers at the Judicial Conference of the United States in June 1995.<sup>419</sup> The subcommittee was headed by Judge Cox, a conservative judge. This is what the subcommittee said:

PCDOs have both facilitated the provision of counsel to death-sentenced inmates and enhanced the quality of representation. The promise of expert advice and assistance from PCDO attor-

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418. ANDREA LYON, *ILLINOIS DEATH PENALTY DEFENSE MANUAL* (2d ed. 1988).

419. *DEFENDER SERVICES*, *supra* note 46.

neys has encouraged private counsel to provide representation for death-sentenced inmates. 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. Furthermore, PCDOs employ staff who have developed significant legal expertise in the fields of capital punishment and habeas corpus law. This expertise assists private appointed counsel in providing quality representation.

PCDOs can also enhance the quality of representation by providing continued continuity of counsel over the course of the case. . . .<sup>420</sup>

That report was correct, but we were nevertheless defunded because we were not supposed to win. We were just supposed to stand there next to the guy, because it's not sporting to kill someone who does not have a lawyer. But the people on death row are not supposed to have good lawyers. You are not supposed to really look into the facts and discover that, although the prosecutor said there was no deal with a witness and that she was testifying because she was a good citizen, in reality the prosecutor had offered to drop the murder charges against her if she testified against the innocent defendant.<sup>421</sup> The fact that the prosecutor lied would not have been known without an investigation.<sup>422</sup> An investigation means that you actually look at the facts and you don't *assume* that what things appear to be are the truth. This is not a very American pastime. Americans tend not to want to look behind the headline, to look behind the easy feeling you get when you say, "Go get him, Charles Bronson, Rambo" and others we admire but would convict and sentence to death in a second in court.

What has happened is that we did a little bit too good of a job.<sup>423</sup> I think it's really important to understand what it is that is being attacked here.

*Almost* everybody would say they would prefer not to see someone who is innocent killed. Not everyone would say that. I debated a

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420. *Id.* at 6.

421. *See, e.g.*, *People v. Jimerson*, 652 N.E.2d 278, 286 (Ill. 1995). In light of these facts, the Illinois Supreme Court unanimously ordered a new trial. *Id.* at 288.

422. *Id.* at 281, 283-85.

423. For example, in 1995 alone, resource centers were responsible for the successful representation of Antillio Watkins, Louis Ruiz, and Joe Burrows at the trial court level. Victories in the Illinois Supreme Court included *Jimerson*, 652 N.E.2d at 278, and *People v. Mack*, 658 N.E.2d 437 (Ill. 1995). Victories at the federal court level included *Emerson v. Gramley*, 883 F. Supp. 225 (N.D. Ill. 1995).

prosecutor who actually said that a ten percent mistake level (which, I believe, is the approximate percentage of people with firm death sentences in Illinois who are factually innocent of the crime) is an acceptable level of error. I am sure he wouldn't feel that way if his brother were on death row. The problem is not so much that, but what happens when there is a really serious investigation of a conviction or a sentence of death. What happens are things like Steve Bright spoke about, the biases of the judiciary and the lies told by prosecutors who have political ambitions and have no better way to get ahead than on the blood of a convicted murderer.<sup>424</sup> Probably the only amusing comment I ever heard from John Wayne Gacy, who's departed and not especially missed by many,<sup>425</sup> was when he was talking about the prosecutor in the case, who speaks everywhere and is a partner at a big firm.<sup>426</sup> Gacy said, "Who is Bill Kunkel? He was nothing until he met John Wayne Gacy." There is some truth in that, and that is one of the problems.

The death penalty is portrayed as a simple answer to complex questions. It is a simple way to feel like you are in control in a country where we feel out of control. We don't understand why someone would blow up the Oklahoma City Federal Building. But rather than try to understand the causes, we simply want to kill the effects.<sup>427</sup> It is easier, more palatable, and you can say it quicker.

It is hard to talk about habeas corpus. First of all, it isn't English and it isn't what we are used to. And it requires thinking a little bit, and it requires two or three sentences instead of a half of a sentence. That is a problem. It is easier and simpler and in some ways more satisfying to kill the problem.

Other kinds of answers are not so easy. We are willing to cut funds for something that we know works, like Headstart, because there is no immediate gratification. We can't see its results right now. And if we can't see the results right now, they're not real.

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424. See Comments by Stephen B. Bright, *supra*, at 569-80.

425. Gacy was convicted in 1980 for killing 33 young men and boys. See Susan Kuczka & Rob Karwath, *All Appeals Fail; Gacy is Executed, Serial Killer Dies of Lethal Injection*, CHI. TRIB., May 10, 1994, § 1, at 1. The State of Illinois executed Gacy by lethal injection on May 10, 1994. *Id.*

426. William Kunkel served as the lead prosecutor in the Gacy case. Ted Gregory & Jeffrey Bils, *Gacy's Prosecutor Enters Nicarico Case; Lawyer Is Appointed to Study Handling of Slaying Investigation*, CHI. TRIB., Nov. 18, 1995, § 1, at 5.

427. See generally Richard A. Serrano, *Death Penalty Opposed in Bombing Case*, L.A. TIMES, Nov. 21, 1995, at 19 (noting that Oklahoma City bombing defendants' attorneys argue that the death penalty is inappropriate because "the decision by the Department of Justice in Washington to seek the death penalty for the bombing was made even before . . . [the defendants] had been identified as suspects").



Resource centers meant that there was some semblance of organization. At meetings of resource center directors, there was some sense of what was going on in other places of the country, what some of the issues judges were looking at were, what some of the things prosecutors were doing were. Something which another resource center turned up was sometimes worth looking into in your case. There was some sense of camaraderie, but we can't have that, can we?

Prosecutors have what they call "The Fryers Club."<sup>428</sup> That's what the group of attorneys general who prosecute death cases call themselves. They have a T-shirt that says "hot seats, safe streets."

But we can't have an organized defense, because when we did, we were winning, particularly in the federal courts, where federal judges have had the luxury of making decisions based on the facts and the law in front of them with relatively little political pressure on them. But we weren't supposed to win. We were just supposed to be there.

So what does our demise mean? It means decentralization, fragmentation, and less quality representation overall. That is exactly what is desired by dishonest political people who know that the death penalty does not deter crime,<sup>429</sup> costs more,<sup>430</sup> and derails much more effective responses to crime and its causes.

It means that there won't be a central place to fight these cases. Instead, there will just be individuals who are out there, flailing along on their own. That is exactly what the resource centers' opponents have in mind.

What we are talking about is not a great deal of money in the overall scheme of things. The entire annual federal budget for all twenty resource centers is only twenty million dollars.<sup>431</sup> What upsets our opponents is not the money we get; it is our ability to organize the way in which these cases are handled.

What is most disturbing to me is that it seems that, as a country, we have forgotten history. We've been talking about VE Day and World War II. Yet, one of the first things that happened in Germany when the Nazis came to power was getting rid of habeas corpus. I very much fear that I'm in Germany in 1931 but just don't realize it and

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428. See David Kaplan, *The Fryers Club Convention*, NEWSWEEK, Aug. 27, 1990, at 54.

429. See generally Alan I. Bigel, *Justices William J. Brennan Jr. and Thurgood Marshall on Capital Punishment: Its Constitutionality, Morality, Deterrent Effect, and Interpretation by the Court*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11, 40-45 (1994) (discussing studies that indicate that the death penalty does not deter crime).

430. *Id.* at 49-52.

431. See generally Pendleton, *supra* note 405, at 3 (noting that Congress eliminated the \$20 million funding for the 20 legal resource centers across the country).

should be packing my bags. And I fear that what we have now is an embracing by the courts—certainly by the state courts and maybe soon by the federal courts—and the legislatures and the popular media of efficiency over efficacy, of sound bites over substance and, most of all, an embracing use and deification of the politics of fear over fundamental fairness. That's what our demise means.

#### RONALD J. TABAK

Our next speaker will present a unique perspective, that of a former member of the federal judiciary.<sup>432</sup> When we have tried in the past to get current members of the judiciary, we've always been told that they can't speak because all the things Steve Bright says would happen to them would happen to them. Fortunately, here in Chicago, at my law firm, is an exemplar of the kind of person we need to have adjudicating these cases: Susan Getzendanner, a partner in the Chicago office of Skadden, Arps, Slate, Meagher & Flom, where she specializes in litigation. A former judge in the United States District Court in the Northern District of Illinois, Susan now tries cases all over the country and maintains a steady flow of *pro bono* activities. In 1991, the *National Law Journal* identified her as one of the top ten trial lawyers in the country.<sup>433</sup> As coordinator of the firm's *pro bono* work, I am particularly pleased that she has been recognized recently for her Chairmanship of Mayor Daley's Blue Ribbon Panel that created a constitutionally sound minority set-aside program for the City of Chicago.<sup>434</sup> Here is former United States District Judge Susan Getzendanner.

#### SUSAN GETZENDANNER

Having decided many habeas cases, I do bring a unique perspective to this debate. I remember quite well my first case. The jury in the state criminal case had still been deliberating at 2 a.m. when they sent a note to the judge asking if they could go home and return the following day. The judge's reply was: "Continue deliberating." A guilty verdict

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432. Ms. Getzendanner was a United States District Court Judge for the Northern District of Illinois from 1980 to 1987.

433. See Margaret C. Fisk, *Winning: Successful Strategies from 10 Litigators Who Stand Apart from the Crowd*, NAT'L L.J., Feb. 3, 1992, at S5 (noting that "Ms. Getzendanner is perhaps the best-known woman attorney in Chicago, as well as a highly sought-after litigator nationally").

434. See generally Jan C. Greenburg, *Affirmative Action Down but not Out; Chicago Experience Shows Plans Survive with Strong Support*, CHI. TRIB., June 14, 1995, § 1, at 1 (discussing Chicago's Blue Ribbon Panel and affirmative action plans).

came back five minutes later. To me, this was unthinkable, and I easily granted the writ. I was astonished when my decision was reversed.

The reversal in that and other habeas cases showed me that reasonable, smart, fair people who have a common interest in justice have very different views of the world. They have different starting points and reach opposite results on habeas issues. The political/social biases that judges bring to the bench cannot be disregarded. There is an enormous difference between a liberal Democrat judge, which some would say I was, although I believe I was in the middle, and a conservative Republican judge. There are even degrees of difference between conservative Democrats and liberal Republicans.

Those differences will dominate the disposition of habeas cases if the proposed legislation becomes law. The proposed law creates many opportunities for judges to make decisions regarding each of numerous statutory procedural barriers. Those decisions will be driven by the political/social bias the judge brought to the courthouse, and you can't realistically expect any other result.

I was willing as a citizen to agree to some changes Congress has proposed to make habeas cases more efficient—provided there remains one clear shot on constitutional issues to the federal court. If you give a judge of any political stripe the constitutional issue to decide, she will decide that issue. This would increase the chance of a decision on the basis of law. Instead of giving the judge a number of ways to avoid the merits of the case by not allowing the case to proceed, make the judge decide that issue: was there a constitutional violation or wasn't there?

Congress really ought to go back to the drawing board. One clear shot is so simple, so well defined, that this approach would in fact produce efficiency in these cases. On the other hand, the proposed legislation<sup>435</sup> would create about twelve years' worth of litigation before lawyers and courts understand what the statute means. Congress is creating a bonanza for opportunities to litigate, and thereby delay the disposition of, habeas cases. The bill is confusing, contains many very general statements that will require interpretation, and creates many procedural barriers that will chew up the time of the court. Congress is shooting itself in the foot.

Federal courts would do a good job with one clear shot. Judges like to decide constitutional issues and they are good at that. Let judges

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435. See Comments by Professor Larry Yackle, *supra*, at 561-68.

spend their time on the merits of the claim rather than decide procedural issues on the numerous entry barriers.

Habeas is clearly needed in this country. In Chicago, most of the habeas cases in the federal court are competency of counsel cases. There is a difference between state law and federal law on attorney competence. Accordingly, if a petitioner alleges incompetency of counsel, the state court judge's finding, after a hearing, that the lawyer was competent is not binding on the federal judge.

So, I conducted several hearings judging the competency of counsel. 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. I recall one lawyer who defended his client before the jury and argued that the crime was really committed by the Devil. That one somehow got past the state law standard on attorney competence. 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.

We have talked about the loss of the Illinois Capital Resource Center. My colleagues in Skadden's Chicago office have at least one and usually two death penalty cases going at any one time. I would not do a capital matter without the Illinois Capital Resource Center. The elimination of these resources to aid private firm death penalty lawyers cannot be justified.

It's also happening on the civil side. The National Clearinghouse for Legal Services, which provides the same sort of resources to poverty lawyers, public interest lawyers, and private lawyers doing *pro bono* work, at last report will lose its federal funding at the end of the year, with only three months to close up.<sup>436</sup> The destruction of these organizations is irreversible; it seems that this is the congressional aim.

I don't know what I could do about these important issues, or what can be done by others. The assault on habeas and legal resources for those who need them most probably cannot be stopped. We are preaching to the converted here, and there are not enough of us in the room.

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436. See John F. Rooney, *Senate Action Saving LSC Draws Praise*, CHI. DAILY L. BULL., Oct. 2, 1995, at 1.

## RONALD J. TABAK

We are now going to hear perspectives from prosecutors, beginning with E. Michael McCann, who was first elected District Attorney of Milwaukee County, Wisconsin in 1968 and has been re-elected every two years. He currently chairs the ABA Criminal Justice Section. He received a Bachelor of Law from Georgetown University and has an L.L.M. from Harvard University. District Attorney McCann's office was responsible for convicting the notorious Jeffrey Dahmer.<sup>437</sup> District Attorney McCann has been a leader in efforts to prevent the reimposition of the death penalty in the State of Wisconsin. Several years ago, District Attorney McCann was the most eloquent speaker in support when the ABA adopted a resolution to oppose racial discrimination in capital punishment. Here is District Attorney Michael McCann.

## E. MICHAEL MCCANN

As we know, the ABA does not have a position on the death penalty, although it has supported the proposed Racial Justice Act.<sup>438</sup> You may recall that, in 1994, two things delayed enactment of the Federal Crime Act: the assault weapons provision and the Racial Justice Act.<sup>439</sup> The Board of the National District Attorneys Association, on which I sit, fought bitterly against the Racial Justice Act<sup>440</sup> and unfortunately was successful. The President thereby reduced the opposition to passing the Federal Crime Act, by excluding the Racial Justice Act, and it was passed.<sup>441</sup>

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437. See Jim Stingl, *Dahmer's Macabre Killing Made Him Infamous Worldwide*, MILWAUKEE J. SENTINEL, Nov. 28, 1994, at A8. Dahmer confessed in 1991 to drugging, murdering, and dismembering 17 young men and boys. *Id.* A Milwaukee County jury determined that Dahmer was sane at the time of the killings and the trial judge sentenced him to nearly 1000 years in prison. *Id.* A fellow inmate beat Dahmer to death in a prison bathroom in 1994. Louis Sahagun, *Dahmer Slain in Prison Attack; Inmate Held*, L.A. TIMES, Nov. 29, 1994, at 1.

438. See Tabak, *supra* note 263, at 777 (giving an adaptation of the May 3, 1990 congressional testimony of the American Bar Association in support of the proposed Racial Justice Act).

439. H.R. 3315, 103d Cong., 2d Sess. §§ 601-11 (1994). See generally *Death of Fairness*, *supra* note 308, at 1122 n.48 (explaining that the Racial Justice Act would have "allow[ed] convicts to challenge their death sentences by using evidence that reveals 'a pattern of racially discriminatory death sentencing'" (citation omitted)).

440. See H.R. 3315, §§ 601-11.

441. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 1994 U.S.C.C.A.N. (108 Stat.) 1796.

When I read *McCleskey v. Kemp*,<sup>442</sup> I noticed that one of the attacks was that the Atlanta District Attorney's office had apparently not established a policy as to the cases in which capital punishment would be pursued. Of course, Mr. McCleskey was not successful. But Justice Powell's majority decision invited legislative bodies to address the issue of disparities in sentencing between cases in which the victims were white and cases in which the victims were black. The Racial Justice Act was a response to that, since it was a legislative attempt to address racial disparities in sentencing patterns.<sup>443</sup>

I testified before Congress in 1989 against the then proposed expansion of grounds for the federal death penalty. The Federal Crime Act of 1994<sup>444</sup> very measurably expanded the grounds for federal capital punishment. I noticed that the Anti-Terrorism Act introduced by Representative Hyde would make all murders of federal officers in performance of their duties subject to the death penalty.<sup>445</sup> I would suspect that would be a substantial broadening element.

I am speaking here as a prosecutor who opposes the adoption of capital punishment in a state which is close to enacting it. I am in my twenty-seventh year as district attorney, having run every two years. I assume this may be an issue in the next campaign. It was the only real issue upon which the Republican opponent ran against Wisconsin's Attorney General last year.<sup>446</sup>

As you can imagine, during my twenty-seven years as district attorney, we have made mistakes in convicting people. I recall one case that just stunned me. We convicted a man of attempted murder, abduction, and a savage rape. All the evidence was, in my opinion, extremely persuasive. The jury believed that and convicted him. However, it later became possible to test semen and determine blood types and from that exclude certain individuals, and the semen from the young victim's panties was still in sufficient condition to be tested

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442. 481 U.S. 279, 313 (1987) (holding that a sophisticated study indicating that, even after holding other factors constant, killers of whites were far more likely to be given the death penalty in Georgia than killers of blacks did not establish a constitutional claim).

443. H.R. 3315, 103d Cong., 2d Sess. §§ 601-11 (1994).

444. Pub. L. No. 103-322, 1994 U.S.C.C.A.N. (108 Stat.) 1796.

445. H.R. 2703, 104th Cong., 1st Sess. § 101 (1995) (proposed to amend 18 U.S.C. § 114 (1994)).

446. See generally Amy Rinard, *Death Penalty, 'Gungate' Fuel Heated Attorney General Race*, MILWAUKEE J. SENTINEL, Nov. 3, 1994, at A8 (noting that Republican candidate Jeffrey Wagner "has based his campaign on the most emotional and controversial crime issue of the day, the death penalty").

by two laboratories. It was determined that the defendant could not have been the assailant.

He served eight years behind bars. If it had been a murder, there was sufficient evidence that, in my opinion, we would have convicted him. If he had then received the death penalty and there had been the kind of fast track for adjudicating post-conviction proceedings which is now being proposed, the exonerating evidence would not have become available in time to save his life.

The exonerating evidence had not been available earlier because you formerly had to have blood at the scene and blood samples from the defendant—not merely semen—to determine whether or not a person could have done such a crime. But it was later discovered that certain types of persons are “secretors,” that there is a crossover from their blood system to their semen, and that you can test the semen left in the vagina or on the garments of the victim to determine whether or not the accused could have committed the crime.

I am sure many of you have read the *Stanford Law Review* article detailing, over the last number of decades, a great number of cases in which it appears to conscientious reviewers that innocent persons were convicted of first-degree murder.<sup>447</sup>

As a prosecutor, I should also note the cases in years past where a judge or appellate panel seems to have extended the search and seizure laws in order to overturn a homicide conviction where the court did not wish that person executed. Maybe the judges in those cases suspected the verdicts’ propriety, but the search and seizure laws were distorted in order to save people. In the mood that exists today, I’m sure the concern is that the search and seizure laws will be twisted in order to facilitate executions.

Of course, capital punishment is costly.<sup>448</sup> We know that. The studies that have been done in Florida and North Carolina suggest that it involves millions of dollars, when you take the costs of all the cases that start out as capital punishment cases and divide those costs by the number of executions.<sup>449</sup> When I argue this way, some respond that that’s the reason we have to cut back on habeas corpus and expedite

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447. See Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 36, 173-79 (1987).

448. See generally *Death Penalty Carries Steep Price Tag*, MILWAUKEE J. SENTINEL, Sept. 11, 1995, at 10A (stating that the cost of reinstating the death penalty in Wisconsin would include “\$2.2 million to build and outfit a 12-unit death row, including a death chamber[,] \$458,000 a year to staff it[, and] \$375,916 a year in salaries and related expenses for each death-row defendant’s representation and appeals”).

449. See, e.g., PHILIP J. COOK & DONNA B. SLAWSON, *THE COSTS OF PROCESSING MURDER CASES IN NORTH CAROLINA I* (1993).

matters so that we don't have sagas where it takes fifteen years to get a person executed.

There is unquestionably racism in capital punishment. I don't think anyone who conducts an honest study of capital punishment can fail to see that it is polluted with racism. Indeed, racism isn't strictly restricted to capital punishment. A number of years ago, there was a thorough study of four types of crime in Wisconsin covering, I believe, burglary, robbery, theft, and aggravated battery. They studied our county, Milwaukee County, and Dane County, which includes our capital, Madison, and the University of Wisconsin, which is very liberal politically. The researchers tried to see if they could determine whether racism was playing a role. They discovered that for two types of crimes, armed robbery and another crime, racism was playing a role in sentencing in Milwaukee County and the very liberal Dane County. This is in Wisconsin, a generally progressive state.

A number of years ago, Andy Sonner<sup>450</sup> and I had a discussion after the ABA (with Andy's and my help) opposed racial discrimination in capital punishment. We wondered how many prosecutions could be successful if the Racial Justice Act test<sup>451</sup> were applied to all types of prosecutions, not just to capital punishment. We were two DAs troubled by what the role of racism might be in sentencing for all types of crime.

Then there is the poverty aspect. Poor people unquestionably will wind up with insufficient counsel. But rarely indeed, if ever, does one read of a rich man being executed. The Dane County District Attorney<sup>452</sup> and I have appeared a number of times to oppose the adoption of capital punishment in our State, and he often speaks of the fact that he will not, as district attorney, be reduced to the level of killing people. In a capital punishment system, no matter how we decorate it, we, as district attorneys would be involved in the killing. That is so when one strips away the various symbols which our society uses to get people to respect what is happening, including the judges who sit on elevated platforms and wear black robes in order to

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450. Andrew L. Sonner is the State's Attorney for Montgomery County, Maryland. See *infra*, at 602-05, for the remarks of Mr. Sonner.

451. The Racial Justice Act would have allowed the use of statistical evidence to establish a racially discriminatory pattern in the imposition or execution of the death penalty. H.R. 3315, 103d Cong., 2d Sess. §§ 601-11 (1994). See also *Death of Fairness?*, *supra* note 308, at 1105, 1152 n.115 (discussing the Racial Justice Act and noting that it was eventually excised from the 1994 Crime Act) (citing Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 1994 U.S.C.A.N. (108 Stat.) 1796).

452. The Dane County District Attorney is C. William Frost.



summon the respect of the community. I, at fifty-eight years of age, having abhorred killing all these years, do not see myself getting involved in killings any more than the Dane County District Attorney.

I serve on a committee of district attorneys that handles some aspects of collective bargaining with the state-wide assistant district attorneys' union. One of the few issues in the current collective bargaining concerns the involvement of assistant district attorneys if Wisconsin were to enact capital punishment. Interestingly enough, the 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. I support them in that regard. One of my colleagues, who was on the executive committee of the Wisconsin District Attorneys Association, says the main reason he wants to be able to seek the death punishment is because it would provide leverage in plea bargaining.

My office has wrestled with the question of what sentence to seek under our current law. The question arose after a Wisconsin statute effective in 1988 added a penalty for first-degree murder under which the judge can set the parole date so far beyond the defendant's life expectancy that he or she certainly will die behind bars.<sup>453</sup> I asked my deputies to reread the *McCleskey* case.<sup>454</sup> We put together a racially mixed committee which studies the aggravating and mitigating grounds in these cases to decide *after conviction* what sentence to seek.

We do not use our discretion regarding what sentence we will seek as a basis for plea bargaining, because the possibility of a sentence which lasts one's natural life can be overwhelming. I can't imagine what spending one's entire remaining life in jail would be like. A person who may be contending that he is innocent could be confronted with the options of (1) plea bargaining, pleading guilty to first-degree murder and getting life, which might mean parole in thirteen years (although very few get paroled that soon, the average being twenty years), or (2) taking the case to a contest and risking being sentenced for the rest of the person's natural life. It seems to me that that is an inhuman option to impose on a person who may be arguing that he is innocent. As a result, our policy is that we will not negotiate these cases. We proceed and then, after the conviction, the committee reviews these cases to decide on our recommendation considering the aggravating and mitigating circumstances.

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453. WIS. STAT. ANN. § 973.014 (West Supp. 1994).

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

Probably the most forceful argument for the death penalty is retribution.<sup>455</sup> Those of us who have been around for a while remember Von Hirsch's "Just Deserts" theory of punishment, which asserted that punishment is the main ground for the criminal justice system to incarcerate.<sup>456</sup> That seems to have grown stronger and stronger as a rationale for the imposition of penalty and punishment. The most forceful proponents of capital punishment in our State are saying, "Look at this as retribution. It's punishment. Don't try to argue deterrence." Because, as we all know, the evidence on deterrence is quite mixed. Although our State is one of only twelve without capital punishment,<sup>457</sup> we have the sixteenth lowest homicide rate in the country.<sup>458</sup> I think ours is 4.4 per 100,000.<sup>459</sup> Texas, as I recall, is several times higher,<sup>460</sup> and we all know that it's the execution capital of the country.<sup>461</sup>

Obviously, fear has a lot to do with support for the death penalty. People are afraid, although our murder rate, thank goodness, is dropping a little bit—although not as much as it has dropped in New York in recent years prior to its implementation of capital punishment.

We are in a struggle now in Wisconsin to oppose the reinstatement of the death penalty.<sup>462</sup> It is believed that the Wisconsin assembly would

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455. See, e.g., HUGO A. BEDAU, *THE DEATH PENALTY IN AMERICA* (3d ed. 1982).

456. See ANDREW VON HIRSCH, *DOING JUSTICE* 45-46 (1976); see also Marc Miller, *Purposes of Sentencing*, 66 S. CAL. L. REV. 413, 431 (1992) (explaining that reformers such as Von Hirsch criticized the rehabilitative theory of punishment "and offered in its place some version of just deserts as the primary organizing principle for sentencing") (footnote omitted).

457. The 12 states without capital punishment are Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. See Bright & Kennan, *supra* note 332, at 779 n.88 (listing those states with capital punishment statutes).

458. U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 200 (1995) (listing 1993 homicide rates).

459. *Id.*

460. *Id.* (noting that the 1993 homicide rate in Texas was 11.9 per 100,000 population).

461. Since 1976, Texas has carried out more than twice as many executions as any other state. Mauro, *supra* note 193, at 3A (indicating that Texas has executed 104 prisoners since the 1976 reinstatement of capital punishment).

462. *Editor's Note*: On March 28, 1996, the Wisconsin Senate rejected a plan which would have asked Wisconsin voters in November 1996 whether they want a death penalty in Wisconsin. Mike Flaherty, *Senate Quashes Death Penalty, Referendum Defeated in 21-12 Vote*, WIS. ST. J., Mar. 29, 1996, at 1B. The referendum would have been non-binding. Matt Pommer, *Senate Rejects Death Penalty Vote*, THE CAPITAL TIMES (Madison, Wis.), Mar. 29, 1996, at 3A. Death penalty proponents in the Wisconsin Senate sought the referendum after admitting they lacked the votes for restoring executions. *Id.*

adopt it, but there are two persons in the State Senate who have been stopping it from going forward. We had capital punishment in Wisconsin for five years, from 1848 to 1853. In 1850, there was a tragic murder in Kenosha County followed by a conviction, after which a mob witnessed the offender's hanging outside the jail.<sup>463</sup> In revulsion, the State rejected the death penalty, and we have not had it since 1853.<sup>464</sup>

I hate to tell you the following, because I am a Democrat. President Clinton is running an ad in certain states, apparently as a preliminary to next year's campaign. The ad says three things: (1) fight assault weapons (I certainly agree with the President on that); (2) we need 100,000 policemen, which was part of the 1994 Federal Crime Act;<sup>465</sup> and (3) we need to expand the death penalty. The first time I saw the ad, I was stunned. This ad is running in our State at a time when we, one of only twelve remaining states that don't have it, are considering restoring the death penalty. As a Democrat, I feel terribly torn by this.

I do not know, but I assume the President believes in the death penalty. As Governor of Arkansas, he left his presidential campaign for a few days to return to Arkansas while a person was executed there.<sup>466</sup> Certainly, you cannot anticipate that whatever passes Congress would be vetoed on the grounds that the President opposes it, because he apparently is advocating the expansion of the death penalty.<sup>467</sup>

The bar has surveyed the prosecutors of Wisconsin. A 65% majority favors a life without parole sentence as opposed to capital punishment, for various reasons. (The Wisconsin District Attorneys Association has not taken a position on capital punishment because, as with gun control, that would divide and split the association.).

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463. George H. Kendall, *in Are Executions in New York Inevitable?*, 22 *FORDHAM URB. L.J.* 557, 592 (1995). See also Mike Miller, *Hung Up in the Death Penalty*, *THE CAPITAL TIMES* (Madison, Wis.), Oct. 22, 1994, at 1A (noting that newspaper articles describing the August 21, 1851 execution stated that an estimated 3000 people attended the hanging).

464. Miller, *supra* note 463, at 1A.

465. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 1994 U.S.C.C.A.N. (108 Stat.) 1796.

466. Marshall Frady, *Annals of Law and Politics: Death in Arkansas*, *THE NEW YORKER*, Feb. 22, 1993, at 105-15; George E. Jordan, *Lawyer: Execution a Disgrace*, *N.Y. NEWSDAY*, May 4, 1992, at 19.

467. Ann Devroy, *White House Shows Clinton Campaign Ads; TV Messages Promote Assault Weapons Ban*, *WASH. POST*, June 27, 1995, at A4 (describing a Clinton television advertisement wherein President Clinton advocates expansion of the death penalty); see David Maraniss, *Clinton's Journey of the Spirit*, *WASH. POST NAT'L WEEKLY ED.*, July 13-19, 1992, at 10, 11.

I can't predict what's going to happen in Wisconsin. The State Senate is the critical area. It was pretty clear that we had the votes to stop it there if it had been voted on in May, but the vote was delayed until September.<sup>468</sup> The battle continues. We don't have the money to run anti-capital punishment ads like the President's pro-capital punishment ads. If it goes to a referendum, somehow we will try to raise the money to inform the public. We felt slightly wounded when New York went over<sup>469</sup> and the number of non-death penalty states was diminished down to twelve. But we will continue to fight.

RONALD J. TABAK

I want to add two perspectives. First, those who argue that eliminating habeas corpus would make the death penalty cheaper than the alternative are not correct. The extra cost of the death penalty principally arises from the extra *trials* that occur when the death penalty is sought—most of which do not end up with death penalty verdicts, and even fewer of which ultimately lead to executions.<sup>470</sup> Second, the President did not appoint any commission after the Racial Justice Act<sup>471</sup> was deleted from last year's crime legislation.<sup>472</sup>

We'll now turn to our next speaker, who is also a prosecutor but has a somewhat different perspective. Andrew Sonner is serving his seventh term as State's Attorney for Montgomery County, Maryland, having first been elected in 1970. He taught government and politics at Walter Johnson High School in Bethesda, Maryland, while attending American University's Washington College of Law at night. He is a past chair of the ABA Criminal Justice Section. His office is currently seeking the death penalty in a case, as it has done on some other occasions. Ten years ago, State's Attorney Sonner wrote an excellent article in the state bar journal decrying the fact that there are no standards to guide prosecutors as to when they should seek the death penalty.<sup>473</sup> Here is State's Attorney Andrew Sonner.

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468. See *supra* note 462 (explaining the current status of Wisconsin's proposed death penalty statute).

469. New York's death penalty statute was enacted on March 7, 1995. Dao, *supra* note 195, at A1; N.Y. CRIM. PROC. LAW § 400.27 (McKinney 1996).

470. See COOK & SLAWSON, *supra* note 449, at 97-98. About 10% of the defendants sentenced to the death penalty are eventually executed. *Id.* at 3.

471. H.R. 3315, 103d Cong., 2d Sess. §§ 601-11 (1994).

472. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 1994 U.S.C.C.A.N. (108 Stat.) 1796.

473. Andrew Sonner, *Prosecutorial Discretion and the Death Penalty*, MD. B.J., Mar. 1985, at 6, 7.

## ANDREW L. SONNER

Years ago, I got a letter which I later learned was a joke. It was from an itinerant preacher who said that he went around the country preaching in tents about the evils of alcohol. A man named Clyde would sit on the podium with him as a drunk, with clothes all mussed and slobbering and so forth. The preacher would point to him as an example of the evils of drink. The letter said that Clyde had unfortunately died and that I was suggested as a person to replace him. I feel like that as a prosecutor that you can point to as somebody who is involved in the imposition of the death penalty.

Let me say at the beginning that I agree with Mike [McCann].<sup>474</sup> 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 wish at the time of the *Gregg v. Georgia* decision,<sup>475</sup> the Supreme Court would have indulged in Dickens's *Christmas Carol*<sup>476</sup> and gone forth and looked at capital punishment previous, capital punishment as it existed then, and capital punishment as it was to be administered; had they known the mess they would create for us prosecutors, I think it would have been nine-to-zero opposing the death penalty. Clearly, two justices who were in the majority in *Gregg* (Justices Powell and Blackmun) have later changed their minds.<sup>477</sup>

Justice White's concurring opinion in *Gregg* says that you don't have to worry about prosecutors acting in a "standardless fashion" because all they do is consider "the strength of their case and the likelihood that a jury would impose the death penalty if it convicts."<sup>478</sup> If we just did that, we would have a whole host of cases going forward, and it would be chaos. I admit that it is chaos now, and it is also false promises.

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474. See Comments by E. Michael McCann, *supra*, at 594-601.

475. 428 U.S. 153 (1976).

476. CHARLES DICKENS, *A CHRISTMAS CAROL* (Pocket Books, Inc., 1939) (1843).

477. See *Callins v. Collins*, 114 S. Ct. 1127, 1138 (1994) (Blackmun, J., dissenting) (concluding that the death penalty, as currently administered, is unconstitutional); JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451 (1994). Jeffries notes that after Justice Powell's retirement, Powell suggested that Congress and state legislatures take a serious look at "whether retention of a punishment that is being enforced only haphazardly is in the public interest." *Id.* Powell stated that if he were in the state legislature, he would vote against capital punishment. *Id.*

478. *Gregg v. Georgia*, 428 U.S. 153, 225 (1976) (White, J., concurring).

We have roughly 3000 people on death row, and there were 31 executions in 1994 and 38 in 1993.<sup>479</sup> Executions occur in such a small percentage of even those cases in which death verdicts are imposed that it's an exercise in futility.

Having said that, let me add that you have prosecutors from the City of New York saying in varying degrees that they are not going to use it. The Bronx District Attorney Robert Johnson has said that he is absolutely not going to use it.<sup>480</sup> Mayor Giuliani criticized him, saying that he would not be upholding the law. District Attorney Johnson replied that he *would* be upholding the law, since it gives him the authority as to whether or not he is going to seek the death penalty.<sup>481</sup> Manhattan District Attorney Robert Morgenthau wrote a very thoughtful article in the *New York Times* opposing the death penalty while the legislation was pending.<sup>482</sup> After it was adopted, he said that, now that it's the law, he will consider it, but he has not come out and said that he is actually going to seek it.<sup>483</sup>

As Ron[ald J. Tabak] mentioned,<sup>484</sup> we have one pending death penalty case in Montgomery County.<sup>485</sup> The case will probably go to trial sometime next winter. I have had to detach two attorneys full-time to prepare that case. There are two very fine defense attorneys on the other side who are going to be paid by the public defender, and they are working roughly full-time on the case. This has been pending now for six or seven months. Is it justified in a cost-benefit analysis? Are the two defendants likely to get the death penalty? I really don't know. I do know, however, that the community wanted the death penalty.

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479. DEATH ROW USA, *supra* note 46, at 3.

480. Adam Nossiter, *In New York City, A Mixed Response to Law From Prosecutors*, N.Y. TIMES, Mar. 8, 1995, at B5. *Editor's Note*: See *supra* notes 103-110 for a discussion of recent developments regarding District Attorney Johnson and the death penalty.

481. Nossiter, *supra* note 480, at B5.

482. Robert Morgenthau, *What Prosecutors Won't Tell You*, N.Y. TIMES, Feb. 7, 1995, at A25 (calling capital punishment "a mirage that distracts society from more fruitful, less facile answers").

483. See Nossiter, *supra* note 480, at B5.

484. See Comments by Ronald J. Tabak, *supra*, at 601.

485. *Editor's Note*: On October 16, 1995 a Montgomery County (Maryland) jury sentenced hit man James Edward Perry to death for murdering three people, including a severely disabled eight-year-old boy. Karl Vick, *Jurors in Triple Slaying Make the Toughest Choice; Hit Man's Death Sentence a Rarity in Montgomery*, WASH. POST, Oct. 18, 1995, at D3. The father of the boy allegedly hired Perry to kill his son for insurance money. *Id.* The father's trial is slated to begin in April 1996, with Montgomery County prosecutors again seeking the death penalty. *New Lawyer for Horn*, WASH. POST, Dec. 23, 1995, at D4.

My situation may bear on what the New York prosecutors I mentioned before may face. I usually don't have an opponent when I run for re-election. But this last time, I had several opponents, and two really defining issues. One was the prosecution of a police officer for having shot in the chest and killed a suspect who got out of the car with a Frito bag in her hand. The officer had armed himself with a shotgun in order to respond to a stabbing, and was looking for a person who had used a broken Coke bottle. We prosecuted him for manslaughter and convicted him, and he went to jail. So, the police union was opposed to me. I had to go up against 864 police officers. The other issue was my opposition to the death penalty—in not believing it is justified. My opponent said that if he were elected, he would use it more often. If that had been the only factor in the election and I didn't have a record of six previous terms, I would have lost easily in one of the most sophisticated counties in the United States, with a high degree of government workers with good educations and Ph.D.s.

There's no question in my mind that in the politics of today in the whole area of criminal justice, the death penalty is the symbolic, get-tough approach to crime. Quite frankly, I'm ashamed as a Democrat to see the Democrats 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.

In Maryland, the prosecutor has to certify each case in which he seeks the death penalty. My office has certified thirteen cases since *Furman v. Georgia*.<sup>486</sup> Eleven of those thirteen cases had African American defendants. I was put through a post-conviction proceeding where I felt most uncomfortable sitting in the chair as the defense attorney very properly brought up each file and asked, "In this case, was the defendant white or black?" Quite frankly, I did not know in one instance, because it turned out that the defendant pled guilty before we went ahead with the trial.

I agree that racism is very much an ugly part of the American character today. Try as I might to do it as fairly as I possibly could, the net result was, of the thirteen people that we had certified, eleven of them were African Americans, although there are probably only eight to ten percent African Americans within our county.

I don't like to watch *Court TV* because I despise the way that it turns every trial into something like a Saturday afternoon football game

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486. 408 U.S. 238 (1972) (holding the death penalty as it then existed in Georgia unconstitutional).

in discussing strategy. But sometimes I turn it on in spite of myself. I turned it on one day and saw a middle-aged woman, rather attractive, looking like a lot of people within this room, sitting at a table—and she was really kind of pleading for her life. As it went forward, I saw that she was one of the Manson family killers and was there at a parole hearing, asking to be paroled. I thought to myself: what terrible punishment that woman is going through after these many, many years; how much easier it would have been for her to simply go into oblivion some twenty-five years earlier.

As to which punishment is worse, I find it hard to say. Anybody who has undergone anesthesia knows that if we were to die while we're under anesthesia, there would be no pain, no suffering. This woman is suffering every day of her life, and probably will for the rest of her term.

I tried to explain that to the family of the victim who came to me and wanted us to seek the death penalty. I asked, which is the worse penalty, the simple death penalty or life in prison? In my opinion, the worse penalty is that given to the person who stays there with not much of a meaningful life and who completes that penalty in a box.

The last thing I'd like to leave you with is that there is no net benefit for the prosecutor. It's a huge, huge undertaking. It's an enormous political liability. Certainly, you cannot make the case for deterrence, but you can make the case for revenge. The families we deal with are survivors of murder victims who, because it's on the table, because it's an option, want the death penalty. They somehow value the life of the person who has departed by how much revenge you're willing to take out as a prosecutor. A father came in and asked me how he was going to explain to his son that I did not go for the ultimate penalty in the death of his mother. It's very hard to make an explanation, yet making such decisions is what we're in the business of doing.

Having the death penalty is not the soundest way to effectuate the kinds of ideals that we wish to propose as a country. In the long run, the Supreme Court is somehow going to revisit the issue and, perhaps attaching a cost-benefit analysis to it, will free us from the obligation of going forward. As I said, I try to do it as fairly as I possibly can, and I don't think that I'm doing it fairly.

RONALD J. TABAK

You will now hear about two people whose guilt or innocence is severely in question, from Jeffrey Urdangen, a Chicago attorney who has been trial counsel for numerous capital defendants, in state and federal courts. Beginning in 1989, Mr. Urdangen, with co-counsel,



has represented Alejandro Hernandez in the Nicarico murder case, one of the most controversial capital cases in Illinois history.<sup>487</sup> A fourth trial is pending for Mr. Hernandez, who no longer can receive a death sentence. A third trial is pending for his co-defendant, Rolando Cruz, whose possible innocence *60 Minutes* has discussed. Mr. Urdangen has written and spoken extensively about the legal and political significance of the case. He is a board member of Illinois Attorneys for Criminal Justice and chair of its Death Penalty Committee. Here is Jeffrey Urdangen.

#### JEFFREY URDANGEN

It was refreshing to listen to the prosecutors who preceded me discuss the political backdrop for capital prosecutions. It was also nice to hear Mr. McCann, an eminent prosecutor, admit to having made a mistake and having been willing to rectify that mistake.<sup>488</sup> Sadly, that is all too rare when innocent people have been convicted, particularly in capital cases.

That's the underlying problem in the Nicarico case. Rolando Cruz and Alex Hernandez have been incarcerated for eleven-and-a-half years for crimes in which they did not participate and about which they had no knowledge. Much of that time, particularly Cruz's time, has been spent on death row. I'm not here to convince you of the innocence of Alex Hernandez or Rolando Cruz, who, scandalously, still face retrials.<sup>489</sup> Their innocence is a foregone conclusion for anybody knowledgeable with the history of this egregious prosecution. The case's significance for today's discussion is that it shows that the state court

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487. See *infra* note 489 and accompanying text for a detailed discussion of the trials.

488. See Comments by E. Michael McCann, *supra*, at 595-96.

489. The State has tried Cruz and Hernandez multiple times for the 1983 murder of Jeanine Nicarico. Maurice Possley, *The Nicarico Nightmare: Admitted Lie Sinks Cruz Case*, CHI. TRIB., Nov. 5, 1995, § 1, at 1. The first trial, in 1985, resulted in convictions and death sentences for both Cruz and Hernandez. *Id.* In 1988, the Illinois Supreme Court ordered new trials for both defendants, citing trial court error. *Id.* Hernandez's second trial resulted in a hung jury. Ted Gregory, *Hernandez Team Ready for a Fight*, CHI. TRIB., Nov. 15, 1995, at 1. Cruz's second trial again produced a conviction and death sentence. Possley, *supra*, at 1. Hernandez's third trial resulted in a conviction and 80-year prison sentence. Gregory, *supra*, at 1. An Illinois appellate court reversed Hernandez's second conviction in January 1995. *Id.* The Illinois Supreme Court later affirmed the appellate court's reversal. *Id.*

In 1994, the Illinois Supreme Court again ordered a new trial for Cruz, finding trial error. Possley, *supra*, at 1. *Editor's Note:* Cruz's third trial resulted in an acquittal. *Id.* The DuPage County State's Attorney's office dropped all charges against Hernandez prior to his fourth trial. *No 4th Trial for Hernandez*, CHI. TRIB., Dec. 8, 1995, § 1, at 1 (Eve. Update). See *infra* notes 490-517 and accompanying text for a more detailed discussion of the facts of the case.

system is not where we should place our final faith—whether or not people who are convicted of capital crimes are guilty of those crimes.

Briefly, in 1983, a young girl named Jeanine Nicarico was abducted from her own home and then raped and murdered on an obscure hiking trail—one of the most unspeakable crimes one could imagine, a nightmare of any parent.<sup>490</sup> All the evidence immediately following the murder pointed to a sole white perpetrator. But as the case evolved, the racist fantasies of the local prosecutor led to the arrest a year later of two young Hispanic men, against whom there was no evidence. A white man was also arrested, and the crime was depicted as a burglary gone badly.<sup>491</sup> The only reason for these indictments was the impending vote for the Republican candidate for State's Attorney of DuPage County. The ensuing show trial was presided over by a judge who was later reversed for abusing his discretion in conducting it.<sup>492</sup>

After the two Hispanic men were convicted for this murder they had nothing to do with, a most remarkable thing happened—something that separates this particular miscarriage of justice from so many other equally tragic cases, and gives this case a bizarre wrinkle. In 1985, a serial killer named Brian Dugan was arrested for the murder of a young girl named Melissa Ackerman.<sup>493</sup> The case bore striking similarities to the Nicarico murder.<sup>494</sup> Nobody noticed it except for a couple of policemen who were interested in these types of things. Eventually, Brian Dugan, in saving his life, negotiated pleas, which local prosecutors quickly accepted, whereby he received two life terms for two murders and several sex crimes.<sup>495</sup> In the context of his confessions, he also admitted to killing Jeanine Nicarico.<sup>496</sup> He gave chilling details of the crime, indicative of first-hand knowledge, and was consistent and unwavering.<sup>497</sup> He knew the color of her under-

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490. Possley, *supra* note 489, at 1.

491. *Id.* (noting that the State also initially charged Stephen Buckley with the crime; Buckley's trial resulted in a hung jury and the State eventually dropped the charges).

492. *People v. Cruz*, 521 N.E.2d 18, 27 (Ill.) (concluding that prejudice arising from the prosecution's use of inculpatory statements of codefendants was predictable enough to necessitate a severance), *cert. denied*, 488 U.S. 869 (1988); *People v. Hernandez*, 521 N.E.2d 25, 34 (Ill.) (finding that Hernandez was deprived of his constitutional right to confront a prosecution witness because of insufficient redaction), *cert. denied*, 488 U.S. 869 (1988).

493. Possley, *supra* note 489, at 1.

494. *Id.* (explaining that Dugan was convicted for sexually attacking and murdering eight-year-old Melissa Ackerman).

495. *See People v. Cruz*, 643 N.E.2d 636, 645-46 (Ill. 1994) [hereinafter *Cruz II*] (describing Dugan's statements and plea bargain).

496. *Id.* at 645-46.

497. *See id.* at 646.

garments, the number of blows, the precise location of where she was murdered.<sup>498</sup> He described the interior of the house.<sup>499</sup> He described the type of tape that was used to put around her head.<sup>500</sup> His DNA matched.<sup>501</sup> His boot print matched on the door that he had kicked in.<sup>502</sup> He was able to take investigators to all the pertinent sites.<sup>503</sup> So that his confession to this crime couldn't be used against him, it was couched in terms of hypotheticals. He wanted to avoid the death penalty for this crime as well.<sup>504</sup>

The DuPage County prosecutors would not accept the truth of his statements, even though there was no evidence tying the Hispanics on death row to this crime. Indeed, after the Hernandez and Cruz convictions were reversed based on issues unrelated to Brian Dugan,<sup>505</sup> these prosecutors did everything they could to keep from the next jury the details about Brian Dugan's confessions. Eventually, the same presiding judge permitted only a very limited amount of evidence about Brian Dugan, and would not let the jury at Rolando Cruz's next trial hear that Brian Dugan had committed similar sex crimes and murders.<sup>506</sup> After this incredible violation of existing Illinois law, Rolando Cruz was again convicted.<sup>507</sup> Alex Hernandez's second trial ended in a hung jury.<sup>508</sup> In his third trial, Alex was convicted,<sup>509</sup> but he has now been spared the death penalty.

It soon became clear to everybody who was not politically motivated that these were innocent men on death row. You don't have to take it from me, a partisan. Jerry Margolis, who was the head of the Illinois State Police at the time that Brian Dugan was arrested, publicly declared that these men were innocent.<sup>510</sup> Mary Brigid Kenney, who was assigned to write the State's appellate brief against Rolando Cruz,

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498. *Id.* at 646-47 (noting that Dugan knew the precise location where Nicarico was murdered).

499. *Id.* at 647.

500. *Id.* at 648.

501. *See* Possley, *supra* note 489, at 1 (noting that "DNA testing showed with near certainty that semen taken from Nicarico's body came from Dugan").

502. *Cruz II*, 643 N.E.2d at 647-48.

503. *Id.* at 648.

504. *Id.* at 646.

505. *See supra* note 489.

506. *Cruz II*, 643 N.E.2d at 647.

507. *Id.* at 639.

508. *See* Possley, *supra* note 492, at 1.

509. *See id.*

510. *See generally* Eric Zorn, *Scales of Justice Remain Off Center*, CHI. TRIB., Feb. 6, 1994, § 2, at 1 (noting that Margolis supported a new trial for Cruz).

resigned rather than write the brief.<sup>511</sup> Detectives and crime lab technicians associated with the DuPage County lab resigned in protest, as did the commanders for the Illinois State Police. But although all this was done publicly, DuPage County would not admit a mistake.

This takes us back to the theme of whether or not we can reliably depend upon elected state officials who stand for re-election to admit mistakes. The prosecutor who headed the DuPage County office at the time was ambitious. He was contemplating a run for Illinois Attorney General. He would not accept Dugan's confession, and changed the theory of prosecution at the next trials to be that even if Brian Dugan was telling the truth, this merely meant that he committed this crime with Rolando Cruz.<sup>512</sup> So, without any evidence, they fashioned a theory which saved political face and continued to prosecute and convict these innocent men for political reasons.

After Cruz was convicted a second time, another remarkable thing happened. The (elected) Illinois Supreme Court affirmed by a four-three vote,<sup>513</sup> in its last decision as then constituted. Three new judges were seated two days later. Cruz's lawyers filed a petition for rehearing, and *amicus* briefs were submitted on behalf of most Chicago area bar associations, a group of concerned former federal prosecutors, religious leaders, and numerous other very influential groups. The court granted rehearing, and Cruz's conviction was reversed four-three.<sup>514</sup> Nothing had changed except the court's membership, as was quickly pointed out by the prosecuting attorney.<sup>515</sup> But the facts were quite clear. The court found that the trial judge had again abused his discretion.<sup>516</sup>

Even this limited success story shows how we are controlled by the political whims of the given moment and how inadequate the state system's safeguards are to prevent the kind of miscarriage of justice that almost took place. I'm sorry to say that despite informal efforts to

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511. See Andrew Martin, *Cruz Ruling Finds 2 on Right Side of Law*, CHI. TRIB., Nov. 7, 1995, § 1, at 1 (noting that "Kenney refused to write a brief supporting the conviction and death sentence of Cruz because she believed the case was marred by misconduct").

512. See *Cruz II*, 643 N.E.2d at 656.

513. *People v. Cruz*, No. 70407, 1992 WL 356036 (Ill. Dec. 4, 1992).

514. *Cruz II*, 643 N.E.2d at 639.

515. See Andrew Gottesman, *For Ryan, A New Trial Has Political Overtones*, CHI. TRIB., July 15, 1994, § 1, at 14. Then DuPage County State's Attorney James Ryan suggested that the Supreme Court's decision could only be explained by its change in membership because the court voted to uphold Cruz's conviction in 1992. *Id.*

516. *Cruz II*, 643 N.E.2d at 650.

get the local prosecutors to admit their mistake, there has been no success. Prosecutors in this country are rarely willing to admit errors.

Research indicates that jurors who participate in death verdicts rarely can be persuaded later that they were wrong, even in the face of overwhelming evidence. The Nicarico case is an exception. Many former jurors have expressed outrage that they were misled by prosecutors and the judge's rulings. But usually, jurors, witnesses, prosecutors and judges have a profound and deep-seated unwillingness to admit the possibility of error where they have participated in a process of sentencing someone to death. We can understand why that is and how critical it is, then, to have a fresh look by the federal courts—free from political considerations and personal involvement.

For a postscript, here's the old "where are they now?" analysis. Cruz and Hernandez, as innocent as you and I, are still sitting in jail, their lives ruined.<sup>517</sup> The judge who abused his discretion twice and sentenced these innocent men to death is now the Presiding Judge of DuPage County, having been elevated. The trial prosecutor who suppressed favorable evidence, misled lawyers and judges, and offered perjured testimony from jailhouse snitches was appointed a Circuit Judge in DuPage County. The elected prosecutor who orchestrated the unjust reconvictions of these innocent young men, despite overwhelming evidence that the real and only killer of Jeanine Nicarico is confessed killer Brian Dugan, is now the Attorney General of Illinois.

So, when we consider what leverage one has in a state system to prevent these kinds of miscarriages, we are confronted with the inverse. There is almost a reward for engaging in this kind of malfeasance. This shows that federal 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.

I thought it would be useful to give you a local perspective on what can happen in any community. This is our own horror story. Hopefully, it will have a happy ending and impress upon the powers that be that we need to reconsider what we are doing to habeas corpus.

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517. *Editor's Note:* Both men have since been released from jail. See *supra* note 489.

## RONALD J. TABAK

We are now going to turn to a religious perspective, which will be provided by the Reverend Michael D. Place. Reverend Place is the consul for Policy Development for the Archdiocese of Chicago, and a member of Cardinal Bernardin's cabinet. A graduate of the Catholic University of America, with a Doctorate in Sacred Theology, Father Place is an adjunct faculty member of the Institute of Pastoral Studies at Loyola University and Mundelein Seminary of the University of Saint Mary of the Lake.

## REVEREND MICHAEL PLACE

I feel a bit awkward for two reasons: first, the original invitation went to the Cardinal. It was before his illness and his schedule precluded his attending, and in a way, I'm a stand in. Secondly, I'm not a lawyer. What I can share, very quickly at the end of this fascinating morning, is the current perspective of the Roman Catholic Church on the death penalty.

There are two contexts for the Church's position. First, there is the belief that there is something which we call objective truth, that there is a reality which is common to human experience and that we can discover it, we can come to know it. This truth is not something that is defined by sectarian or religious perspectives. People of good will can come to find out what it means to be a human person and how it is that we ought to live in society. There is something that grounds us and sustains us in our common venture. In traditional language, we spoke of this being the natural law. So we come to this discussion not so much as people with belief in a creed, but as a people who hold that there is something common to who we are as human persons and that this "commonness" is the basis out of which we should develop our understanding of law that serves the cause of the public morality.

Secondly, we understand that there is a possibility of development in our understanding of human nature. We can come to understand it better than we did before. I mention this because one could say, in light of the Inquisition and the Crusades, that the Church has had an uneven history on the topic of capital punishment. I hope not out of self-justification, but out of the humility we recognize on matters of prudential judgment such as this, that it is possible for us to accept a development in our understanding. That certainly has been the case regarding capital punishment.

With those two preludes, I'd like to quickly outline the foundation on which the Church enters this discussion. The first point is that we perceive that there is to each human person a profound dignity. This is the same perspective that we would bring to discussions about abortion or euthanasia. There is a consistency (something which Cardinal Bernardin has developed under the title of the Consistency of Human Life) to our perspective that is grounded in the fact that there is a natural sacredness to each human person, an inviolability which sustains the human person. Because we believe that there is such dignity, such worth, such inviolability to what it is to be a human person, some consequences follow. The first is we have an obligation to promote and enhance the dignity of a human person. Secondly, we have an obligation never to directly attack or bring harm to that dignity, especially of the innocent. Those two obligations, positive and negative, apply to us as individuals, and from the Catholic perspective, also apply to us as a society. We have a profound belief that the social good is part of what we must pursue, that there is a common good which serves as the basic grounding or context of the social order. And so we are called to promote, enhance, and protect it.

That being said, we realize that we are in a world in which, to use religious language, evil is present, where bad things happen. Therefore, we recognize that we have an obligation to defend ourselves against an unjust aggressor. Because of our dignity, we have the right to preserve that dignity if someone comes to attack it or to take it away. That realization, that balancing in the presence of evil, has resulted in the development of three different, but interrelated, theories: one, the theory of justified self-defense for an individual; secondly, the just war theory for how the state defends itself; and third, the concept of capital punishment for when the state has the right, if necessary, to impose the penalty of capital punishment in order to serve that common good. That's the general background.

What John Paul II has done is to step back and reflect in his encyclical, *The Gospel of Life, or Evangelium Vitae*, on the principles I noted earlier, in light of today's social conditions.<sup>518</sup> What has struck him is that, from his perspective, there is about us a culture of death—that in a way we have come to lose a sense of the profound worth and dignity of human life, and that there seems to be in various ways and various parts of our international community a perspective that, in fact, enhances violence and death. A perspective that in a way has become

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518. JOHN PAUL II, ENCYCLICAL LETTER, *EVANGELIUM VITAE, THE GOSPEL OF LIFE; ON THE VALUE AND INVIOABILITY OF HUMAN LIFE* (1995).

almost second nature to part of the human experience. He calls out against that culture and says what we must do is reclaim a culture of life.

In this context, he deals with the question of capital punishment. He notes that, historically, the Church has used three reasons to justify capital punishment in certain situations. They have been alluded to earlier: retribution, deterrence, and reform. Since he speaks rather obliquely as to why he does not feel those three categories sustain the argument any longer, I'd like to put what he says in context by using what the Roman Catholic Bishops of the State of Illinois have said on capital punishment. They argue quite forcefully that the traditional justifications of capital punishment no longer apply. The use of capital punishment does not effectively deter serious crime; it does not alleviate the fear of violent crime, or better safeguard people; it fails to protect society more effectively than other alternatives, such as life in prison without parole; it does not truly restore the social order breached by the offenders. It is not imposed with fairness, falling disproportionately on racial and ethnic minorities and the poor. Neither is it imposed in such a way as to prevent the execution of possibly innocent death row inmates.

I believe it is safe to infer that it is for reasons such as the above that the Pope has come to a conclusion that significantly develops the historical perspective of the Roman Catholic Church. Let me read what he says, set in the context of all the Church had said before. He first says: "[T]he nature and extent of the punishment must be carefully evaluated and decided upon."<sup>519</sup> That being said, he says that "[it] ought not go to the extreme of executing the offender except in the case of absolute necessity," that is, there is no other means to defend society.<sup>520</sup> At the level of principle, he has restricted the historical Catholic perspective by saying that capital punishment is permissible only in the context of there being no other way to defend society. Then, he takes that perspective and looks at the concrete situation of today and says that today such conditions are rare if not practically non-existent. He then quotes from the *Catechism of the Catholic Church*,<sup>521</sup> which came out in the last two years, to say that the non-use of capital punishment or the elimination of capital punishment better corresponds to the common good and the dignity of the human person.<sup>522</sup> This is a rather

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519. *Id.* at 99-100.

520. *Id.* at 100.

521. CATHOLIC CHURCH, CATECHISM OF THE CATHOLIC CHURCH (First Image Books 1995) (1994).

522. *See id.* § 2267, at 605, which suggests:



significant development in the Catholic teaching at the level of Papal Magisterium.

The Roman Catholic Bishops of the United States have been on record and have gone further, in a sense, than the Pope's conclusion, saying that, at this time in the United States, the common good would be best preserved, for all the reasons said above, by abolishing capital punishment. It is an opinion which we know is not held by many Catholics in the United States. But the Bishops feel that if we are going to be consistent, that if we argue for preserving the dignity of life in all areas, there is no way we as a society can sustain the self-image of exacting violence for violence. Capital punishment accomplishes nothing. In fact, it cheapens us, and cheapens the life that, in the end, the pursuit of justice is meant to preserve.

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If bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons, public authority should limit itself to such means, because they better correspond to the concrete conditions of the common good and are more in conformity to the dignity of the human person.

*Id.*