

# APPENDIX\*

[page 1] AS APPROVED BY THE ABA HOUSE OF DELEGATES  
FEBRUARY 3, 1997:  
AMERICAN BAR ASSOCIATION  
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES  
SECTION OF LITIGATION  
SECTION OF TORT AND INSURANCE PRACTICE  
COMMISSION ON MENTAL AND PHYSICAL DISABILITY LAW  
MASSACHUSETTS BAR ASSOCIATION  
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK  
NEW YORK STATE BAR ASSOCIATION

## RECOMMENDATION

RESOLVED, That the American Bar Association [“ABA” or “Association”] calls upon each jurisdiction that imposes capital punishment not to carry out the death penalty until the jurisdiction implements policies and procedures that are consistent with the following longstanding American Bar Association policies intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed:

(i) Implementing ABA “Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases” (adopted Feb. 1989) and Association policies intended to encourage competency of counsel in capital cases (adopted Feb. 1979, Feb. 1988, Feb. 1990, Aug. 1996);

(ii) Preserving, enhancing, and streamlining state and federal courts’ authority and responsibility to exercise independent judgment on the merits of constitutional claims in state post-conviction and federal *habeas corpus* proceedings (adopted Aug. 1982, Feb. 1990);

(iii) Striving to eliminate discrimination in capital sentencing on the basis of the race of either the victim or the defendant (adopted Aug. 1988, Aug. 1991); and

(iv) Preventing execution of mentally retarded persons (adopted Feb. 1989) and persons who were under the age of 18 at the time of their offenses (adopted Aug. 1983).

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This appendix is also available at <http://www.law.duke.edu/journals/61LCPAppendix>.

\* The Resolution and Report have been reformatted to follow *Law and Contemporary Problems* typeface style and citation form conventions. The substance has been faithfully reproduced; substantive alterations appear in brackets. The original pagination is indicated by a [page x] insertion.

FURTHER RESOLVED, That in adopting this recommendation, apart from existing Association policies relating to offenders who are mentally retarded or under the age of 18 at the time of the commission of the offenses, the Association takes no position on the death penalty.

**[page 2] REPORT\*\***

**INTRODUCTION**

The American Bar Association has adopted numerous policies bearing on the manner in which the death penalty should be applied in jurisdictions where it exists. These policies were adopted in view of the ABA's extensive experience with the administration of the death penalty and in light of several ABA-sponsored studies. The policies concern: (1) competent counsel in capital cases; (2) proper processes for adjudicating claims in capital cases (including the availability of federal *habeas corpus*); (3) racial discrimination in the administration of capital punishment; and (4) the execution of juveniles and mentally retarded persons.

The time has now come for the ABA to take additional decisive action with regard to capital punishment. Not only have the ABA's existing policies generally not been implemented, but also, and more critically, the federal and state governments have been moving in a direction contrary to these policies. The most recent and most dramatic moves, both strongly opposed by the ABA, have come in the form of laws enacted by Congress in 1996. Federal courts already are construing one law to significantly curtail the availability of federal *habeas corpus* to death row inmates, even when they have been convicted or sentenced to death as a result of serious, prejudicial constitutional violations. Another law completely withdraws federal funding from the Post-Conviction Defender Organizations that have handled many post-conviction cases and that have mentored many other lawyers who have represented death row inmates in such proceedings.

These two recently enacted laws, together with other federal and state actions taken since the ABA adopted its policies on capital punishment, have resulted in a situation in which fundamental due process is now systematically lacking in capital cases. Accordingly, in order to effectuate its existing policies, the ABA should now call upon jurisdictions with capital punishment not to carry out the death penalty until these policies are implemented. Of course, individual lawyers differ in their views on the death penalty in principle and on its constitutionality. However, it should now be apparent to all of us in the profession that the administration of the death penalty has become so seriously flawed that capital punishment should not be implemented without adherence to the various applicable ABA policies.

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\*\* American Bar Ass'n, Report No. 107 (Feb. 1997). This report was submitted with Recommendation No. 107 (Feb. 1997). Reports accompanying recommendations are not official ABA policy, but are provided to support the recommendation.

## BACKGROUND

The backdrop for this Recommendation is the two decades of jurisprudence and legislation since the United States Supreme Court upheld new death penalty statutes in *Gregg v. Georgia*,<sup>1</sup> [page 3] after having invalidated earlier death penalty statutes in 1972 in *Furman v. Georgia*.<sup>2</sup> In *Furman*, the Court believed that then-existing state statutes failed to properly balance the need to ensure overall consistency in capital sentencing with the need to ensure fairness in individual cases. Four years later, in *Gregg*, the Court concluded that new state statutes' special procedural requirements for capital prosecutions provided a means by which the states would achieve that balance.

However, two decades after *Gregg*, it is apparent that the efforts to forge a fair capital punishment jurisprudence have failed.<sup>3</sup> Today, administration of the death penalty, far from being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency. To a substantial extent, this situation has developed because death penalty jurisdictions generally have failed to implement the types of policies called for by existing ABA policies. The pervasive unfairness of the capital punishment system that has evolved since *Gregg* has led two of the Supreme Court Justices who were part of the majority in *Gregg* to regret having upheld the death penalty's constitutionality. Retired Justice Lewis Powell, in a 1991 interview, expressed his doubt whether the death penalty could be administered in a way that was truly fair and stated that, in retrospect, his greatest regret was that he had voted to uphold the constitutionality of capital punishment in *McCleskey v. Kemp*, 481 U.S. 279 (1987), and other cases.<sup>4</sup> Justice Harry Blackmun expressed similar concerns in his 1994 dissent in *McFarland v. Scott*:

When we execute a capital defendant in this country, we rely on the belief that the individual was guilty, and was convicted and sentenced after a fair trial, to justify the imposition of state-sponsored killing. . . . My 24 years of overseeing the imposition of the death penalty from this court have left me in grave doubt whether this reliance is justified and whether the constitutional requirement of competent legal counsel for capital defendants is being fulfilled.<sup>5</sup>

The already deplorable state of affairs noted by Justices Powell and Blackmun is exacerbated by three other, very recent developments. First, although certain states have begun [page 4] to implement some ABA policies, more

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1. 428 U.S. 153 (1976).

2. 408 U.S. 238 (1972).

3. See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 357 (1995) (reporting that "[v]irtually no one thinks that the constitutional regulation of capital punishment has been a success"); see also James S. Liebman & Jonathan M. Moses, *Fatal Distortion: The Chronic Making and Unmaking of Death Penalty Law* (publication forthcoming).

4. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451-52 (1994) (quoting Justice Powell).

5. 512 U.S. 1256, 1264 (1994).

states are moving in the opposite direction—undermining or eliminating important procedural safeguards that the ABA has found to be essential.

Second, Congress recently enacted legislation that makes it significantly more difficult for the federal courts to adjudicate meritorious federal constitutional claims in capital cases. Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996 establishes deadlines for filing federal *habeas* petitions, places limits on federal evidentiary hearings into the facts underlying federal constitutional claims, sets timetables for federal court action, limits the availability of appellate review, establishes even more demanding restrictions on second or successive applications for federal relief, and, in some instances, apparently bars the federal courts from awarding relief on the basis of federal constitutional violations where state courts have erred in concluding that no such violation occurred.

While the ABA has consistently supported meaningful *habeas corpus* reforms, this new federal legislation instead dramatically undermines the federal courts' capacity to adjudicate federal constitutional claims in a fair and efficient manner. Indeed, that may itself be unconstitutional, as the ABA already has asserted in an *amicus* brief. Congress'[s] adoption of the 1996 Act only underscores the extent of this country's failure to fashion a workable and just system for administering capital punishment.

Third, and also contrary to longstanding ABA policies, Congress has ended funding for Post-Conviction Defender Organizations (PCDO's), which have handled many capital post-conviction cases and have recruited and supported volunteer lawyers in these cases for many indigent death row prisoners. The ABA had a major role in supporting the creation of the PCDO's.

Together, these three developments have brought the adjudication of capital cases to the point of crisis. Unless existing ABA policies are now implemented, many more prisoners will be executed under circumstances that are inconsistent with the Supreme Court's mandate, articulated in *Furman* and *Gregg*, that the death penalty be fairly and justly administered.

The ABA has worked hard to foster the fair and just administration of capital punishment. The ABA's Post-[C]onviction Death Penalty Representation Project has provided expert advice and counsel to jurisdictions attempting to improve the delivery of legal services to death row prisoners. In addition, it has recruited more than 400 volunteer attorneys to represent indigent death row inmates. The Project also has assisted in the creation of PCDO's and strongly opposed the successful effort to cut off their federal funding. The ABA has testified in support of the Racial Justice Act and actively opposed the kind of *habeas corpus* restrictions enacted in 1996. And the ABA has conducted and supported a variety of training programs for lawyers and judges in capital cases and has advocated detailed standards for capital defense counsel. Also, various ABA groups have sponsored numerous education programs examining the fairness of capital punishment as implemented.

**[page 5]** The ABA's efforts have had some impact. But recent developments have made the impact of incompetent counsel and the instances of uncorrected due process violations substantially greater, and matters are likely to become worse in the future. It is essential that the ABA now forcefully urge that executions not occur unless each person being executed has had competent counsel and the due process protections that the ABA has long advocated.

### I. Competent Counsel

The ABA is especially well positioned to identify the professional legal services that should be available to capital defendants and death row inmates. The Association has shouldered that responsibility by conducting studies and adopting policies dating back nearly twenty years. Seven years ago, the ABA recommended that "competent and adequately compensated" counsel should be provided "at all stages of capital . . . litigation," including trial, direct review, collateral proceedings in both state and federal court, and *certiorari* proceedings in the U.S. Supreme Court.<sup>6</sup> To implement that basic recommendation, the ABA said that death penalty jurisdictions should establish organizations to "recruit, select, train, monitor, support, and assist" attorneys representing capital clients.

Eight years ago, the ABA published the "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases" and urged all jurisdictions that employ the death penalty to adopt them.<sup>7</sup> Those guidelines call for the appointment of two experienced attorneys at each stage of a capital case.<sup>8</sup> Appointments are to be made by a special appointing authority or committee, charged to identify and recruit lawyers with specified professional credentials, experience, and skills.<sup>9</sup> The guidelines make it clear that ordinary professional qualifications are inadequate to measure what is needed from counsel in "the specialized practice of capital representation." To ensure that the lawyers assigned to capital cases are able to do the work required, the guidelines state that attorneys should receive a "reasonable rate of hourly compensation which . . . reflects the extraordinary responsibilities inherent in death penalty **[page 6]** litigation." Concomitantly, counsel should be provided with the time and

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6. American Bar Ass'n, Resolution of the House of Delegates (Feb. 1990).

7. American Bar Ass'n, Resolution of the House of Delegates (Feb. 1989).

8. The ABA previously had urged the federal government to adopt similar procedures and standards for counsel appointed to represent death row prisoners in federal *habeas corpus* proceedings. See American Bar Ass'n, Resolution of the House of Delegates (Feb. 1988). Before that, the ABA had urged the U.S. Supreme Court and the Congress to provide for competent counsel to handle *certiorari* proceedings and petitions for clemency before the Court. See American Bar Ass'n, Resolution of the House of Delegates (Feb. 1979).

9. In addition, the guidelines set forth the way in which counsel in a capital case should perform various defense functions, from plea negotiations, through jury selection, the trial and sentencing phases, and post-conviction proceedings.

funding necessary for proper investigations, expert witnesses, and other support services.<sup>10</sup>

No state has fully embraced the system the ABA has prescribed for capital trials. To the contrary, grossly unqualified and undercompensated lawyers who have nothing like the support necessary to mount an adequate defense are often appointed to represent capital clients. In case after case, decisions about who will die and who will live turn not on the nature of the offense the defendant is charged with committing, but rather on the nature of the legal representation the defendant receives.<sup>11</sup>

Jurisdictions that employ the death penalty have proven unwilling to establish the kind of legal services system that is necessary to ensure that defendants charged with capital offenses receive the defense they require. Many death penalty states have no working public defender programs, relying instead upon scattershot methods for selecting and supporting defense counsel in capital cases.<sup>12</sup> For example, some states simply assign lawyers at random from a general list—a scheme destined to identify attorneys who lack the necessary qualifications and, worse still, regard their assignments as a burden. Other jurisdictions employ “contract” systems, which typically channel indigent defense business to attorneys who offer the lowest bids.<sup>13</sup> Other states use public defender schemes that appear on the surface to be more promising, but prove in practice to be just as ineffective.<sup>14</sup>

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10. In August 1996, the ABA adopted a policy regarding the appropriate representation of military defendants facing execution. To date, the military has failed to implement this policy.

11. See Marcia Coyle et al., *Fatal Defense: Trial and Error in the Nation's Death Belt*, NAT'L L.J., June 11, 1990, at 30 (reporting the conclusions of an extensive six-state survey: capital trials are “more like a flip of the coin than a delicate balancing of the scales” because defense counsel are “ill trained, unprepared . . . [and] grossly underpaid”).

12. See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime, but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

13. See Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 679-80 (1986).

14. See Bright, *supra* note 12, at 1849-52, summarizing the current situation as follows (citations omitted):

The structure of indigent defense not only varies among states, it varies within many states from county to county. Some localities employ a combination of programs. All of these approaches have several things in common. They evince the gross underfunding that pervades indigent defense. They are unable to attract and keep experienced and qualified attorneys because of lack of compensation and overwhelming workloads. Just when lawyers reach the point when they have handled enough cases to begin avoiding basic mistakes, they leave criminal practice and are replaced by other young, inexperienced lawyers who are even less able to deal with the overwhelming caseloads. Generally, no standards are employed for assignment of cases to counsel or for the performance of counsel. And virtually no resources are provided for investigative and expert assistance or defense counsel training.

The situation has further deteriorated in the last few years. This is largely due to the increased complexity of cases and the increase in the number of cases resulting from expanded resources for police and prosecution and the lack of a similar increase, and perhaps even a decline, in funding for defense programs.

Moreover, at an ABA Annual Meeting program in 1995, Scharlette Holdman described case after case of incompetent representation by counsel appointed by judges in California and other Western states, in which compensation is typically greater than that in most other states with capital punishment. See Symposium, *Is There Any Habeas Left in This Corpus?*, 27 LOYOLA U. CHI. L.J. 523, 581 (1996).

**[page 7]** It is scarcely surprising that the results of poor lawyering are often literally fatal for capital defendants. Systematic studies reveal the depth of the problems nationwide and thus supply the hard data to support reasoned policy-making.<sup>15</sup> Case after case all too frequently reveals the inexperience of lawyers appointed to represent capital clients. In *Tyler v. Kemp*<sup>16</sup> and *Paradis v. Arave*,<sup>17</sup> state trial courts assigned capital cases to young lawyers who had passed the bar only a few months earlier; in *Bell v. Watkins*,<sup>18</sup> a state trial court appointed a lawyer who had never finished a criminal trial of any kind; and in *Leatherwood v. State*,<sup>19</sup> yet another trial court allowed a third-year law student to handle most of a capital trial.

**[page 8]** Other cases demonstrate that defense counsel in capital cases often are incapable of handling such cases properly. In *Smith v. State*,<sup>20</sup> defense counsel asked for extra time between the guilt and sentencing phases of a capital case in order to read the state death penalty statute for the first time. In *Frey v. Fulcomer*,<sup>21</sup> defense counsel, in purported compliance with a state statute, limited his presentation of mitigating evidence. Unbeknownst to defense counsel, that statute had been held unconstitutional three years earlier precisely because it restricted counsel's ability to develop mitigating evidence. In *Ross v. Kemp*,<sup>22</sup> one defense attorney advanced a weak alibi theory, while his co-counsel mounted an inconsistent mental incompetency defense that necessarily conceded that the defendant had participated in the offense.<sup>23</sup> In *Romero v. Ly-naugh*,<sup>24</sup> defense counsel declined to offer any evidence at all during the penalty phase of a capital case, and then made the following brief and ineffective closing argument: "You are an extremely intelligent jury. You've got that man's life in your hands. You can take it or not. That's all I have to say." The jury, in its turn, sentenced the defendant to death.

In *Messer v. Kemp*,<sup>25</sup> defense counsel presented very little of the mitigating evidence available, made no objections at all, then essentially told the jury that the death penalty was appropriate. That defendant, too, was sentenced to die.

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Thus, as the ABA has recognized, the problem is not merely underfunding. It is also the appointment by judges of attorneys who lack either the expertise or the experience necessary to represent a capital defendant effectively.

15. Over the years, both the ABA and local bar and legislative groups have commissioned such studies. In one instance, illustrative of other states' practices as well, researchers found that Texas typically does not use central appointing authorities to choose counsel in death penalty cases, does not monitor the performance of assigned counsel in capital cases, and does not adequately compensate appointed counsel or reimburse them sufficiently for support services. See SPANGENBERG GROUP, A STUDY OF REPRESENTATION IN CAPITAL CASES IN TEXAS (1993).

16. 755 F.2d 741 (11th Cir. 1985).

17. 954 F.2d 1483 (9th Cir. 1992).

18. 692 F.2d 999 (5th Cir. 1982).

19. 548 So. 2d 389 (Miss. 1989).

20. 581 So. 2d 497 (Ala. Crim. App. 1990).

21. 974 F.2d 348 (3d Cir. 1992).

22. 393 S.E.2d 244 (Ga. 1990).

23. See Bright, *supra* note 12 (listing these illustrative cases and dozens more).

24. 884 F.2d 871 (5th Cir. 1989).

25. 831 F.2d 946 (11th Cir. 1987).

In *Young v. Kemp*,<sup>26</sup> the defense counsel was himself so dependent on drugs during trial that, as even he later admitted, he mounted only the semblance of a defense. His client received the death penalty, but then chanced to see the defense lawyer thereafter in a prison yard. The attorney had, in the interim, been convicted and sentenced on state and federal drug charges.

Even when experienced and competent counsel are available in capital cases, they often are unable to render adequate service for want of essential funding to pay the costs of investigations and expert witnesses.<sup>27</sup> In some rural counties in Texas, an appointed attorney [page 9] receives no more than \$800 to represent a capital defendant.<sup>28</sup> Similar limits are in place in other states. In Virginia, the hourly rate for capital defense services works out to about \$13.<sup>29</sup> In an Alabama case, the lawyer appointed to represent a capital defendant in a widely publicized case was allowed a total of \$500 to finance his work, including any investigations and expert services needed. With that budget, it is hardly surprising that the attorney conducted no investigation at all.<sup>30</sup>

Poorly prepared and supported trial lawyers typically do a poor job. When they do recognize points to be explored and argued, they often fail to follow through in a professional manner. And when they do not recognize what needs to be done, they do nothing at all or they take actions that are inimical to the needs of their clients. The result of such inadequacies in representation is that counsel often fail to present crucial facts. They also may fail to raise crucial legal issues, causing their clients to forfeit their opportunity to explore those issues later—in any court. In one recent case, appointed defense counsel scarcely did *anything* to represent his client at trial and, along the way, neglected to raise three significant constitutional claims. The federal court that reviewed the case could not consider any of these omitted claims because, under state law, counsel's numerous defaults barred their later consideration.<sup>31</sup>

The same pattern is repeated with respect to the legal services available for the appellate and post-conviction stages of capital cases. State appellate court standards for adequate representation under state law are extraordinarily low. These courts sometimes dispose of capital appeals on the basis of inadequate briefs containing only a few pages of argument—and, in so doing, often rely on defense counsel's "default" at trial to avoid considering constitutional claims on

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26. No. 85-98-2-MAC (M.D. Ga. 1985).

27. See SPANGENBERG GROUP, *supra* note 15, at 159; see also Anthony Paduano & Clive A.S. Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 RUTGERS L. REV. 281 (1991) (providing a national survey).

28. See Marianne Lavelle, *Strong Law Thwarts Lone Star Counsel*, NAT'L L.J., June 11, 1990, at 34. In one celebrated Texas case, the Fifth Circuit Court of Appeals noted that an appointed attorney had received only \$11.84 per hour in a capital case and, at that price, had rendered particularly dreadful service to his indigent client. That, said the court, explained much of the problem. "[T]he justice system got only what it paid for." *Martinez-Macias v. Collins*, 979 F.2d 1067 (5th Cir. 1992).

29. See Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 366 (1993).

30. See Deposition of Richard Bell at 24-25, *Grayson v. State* (Cir. Ct. Shelby County, Ala., Oct. 10, 1991). The state payment limit is now \$1,000.

31. See *Weeks v. Jones*, 26 F.3d 1030 (11th Cir. 1994).



the merits.<sup>32</sup> As for post-conviction, an ABA Task Force developed an enormous body of evidence in 1990 demonstrating that prisoners sentenced to death typically receive even less effective [page 10] representation in post-conviction than at the trial stage.<sup>33</sup> The Supreme Court has held that there is no constitutional right to counsel in post-conviction proceedings, even in capital cases.<sup>34</sup> Although many states and the federal government once funded Post-Conviction Defender Organizations, which recruited lawyers for death row inmates at the post-conviction stage and represented others themselves, today many of those centers have been forced to close because Congress has eliminated their federal funding.<sup>35</sup>

The federal courts generally have not rectified this situation. The standard for effective assistance of counsel under the Sixth Amendment is so egregiously low that the potential for relief in federal *habeas corpus* on such grounds is almost always more theoretical [than] real. The federal courts found the “services” rendered in the *Romero*, *Messer*, and *Young* cases, cited above, to be “effective” for constitutional purposes—and, accordingly, all three prisoners were executed.

Compounding the effect of incompetent representation of capital defendants and death row inmates is improper representation of the state by prosecutors inadequately trained in avoiding constitutional violations. In describing this combined impact, former Pennsylvania Attorney General Ernest Preate said at an ABA Annual Meeting program, “[I]n too many capital cases, there is ineffective assistance of counsel on both sides. . . . [T]he defense counsel’s ineffective assistance of counsel is not necessarily a mistake that the defense counsel originally made, but a mistake by the prosecutor. The prosecutor did something he or she shouldn’t have done and the defense counsel failed to object or failed to take advantage of it.”<sup>36</sup> Unfortunately, relief rarely is granted under any of the circumstances described above.

## II. Proper Processes

[page 11] The ABA consistently has sought to ensure that adequate procedures are in place to determine whether a capital sentence has been entered in violation of federal law. No other organization has monitored the federal *ha-*

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32. See Bright, *supra* note 12, at 1843 & n.55.

33. See American Bar Ass’n, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1 (1990).

34. See *Murray v. Giarratano*, 492 U.S. 1 (1989).

35. See generally *The Crisis in Capital Representation*, 51 THE RECORD 169, 187-91 (Association of the Bar of the City of New York, Mar. 4, 1996). The PCDO’s were extremely effective. In 1989, Chief Judge Tjoflat of the United States Court of Appeals for the Eleventh Circuit told the ABA Task Force that the Resource Centers were “indispensable.” American Bar Ass’n, *supra* note 33, at 73. In 1994, Judge Arthur L. Alarcon of the Court of Appeals for the Ninth Circuit wrote that the PCDO’s were “critical” to the efficient processing of capital cases. Memorandum to Judges Cox and Cedarbaum (Dec. 7, 1994), cited in *The Crisis in Capital Representation*, *supra*, at 188-89. Nevertheless, they were defunded.

36. Symposium, *The Death of Fairness? Counsel Competency & Due Process in Death Penalty Cases*, 31 HOUS. L. REV. 1105, 1120-21 (1994) (comments of Ernest Preate).

*beas* system more closely, developed greater expertise regarding that system's strengths and weaknesses, or offered more detailed prescriptions for reform.

Fourteen years ago, the ABA publicly opposed three bills then pending in Congress that would have dramatically restricted the federal courts' ability to adjudicate state prisoners' *habeas* claims. At the same time, the ABA proposed alternatives that would have streamlined *habeas* litigation without undermining the federal courts' authority and responsibility to exercise independent judgment on the merits of constitutional claims.<sup>37</sup>

Since that time, the ABA has been deeply involved in the national debate over federal *habeas*—particularly in capital cases. The ABA task force that studied the situation in depth created a solid scholarly foundation for its work, then received written and oral testimony from knowledgeable individuals and organizations at hearings in several cities.<sup>38</sup> In 1990, the ABA House of Delegates adopted a set of recommendations for improving current law that were based upon the Task Force's work.<sup>39</sup> The recommendations included the principles that a death row prisoner should be entitled to a stay of execution in order to complete one round of post-conviction litigation in state and federal court; that the federal courts should consider claims that were not properly raised in state court if the reason for the prisoner's default was counsel's ignorance or neglect; and that a prisoner should be permitted to file a second or successive federal petition if it raises a new claim that undermines confidence in his or her guilt or the appropriateness of the death sentence.

Regrettably, none of these recommendations has been generally adopted. In fact, the Supreme Court has denied death row prisoners the very opportunities for raising constitutional claims that the ABA has insisted are essential. Prisoners have not been entitled even to a single stay of execution to maintain the status quo long enough to complete post-conviction litigation.<sup>40</sup> The federal courts typically have refused to consider claims that were not properly raised in state court, even if the failure to raise them was due to the ignorance or neglect of defense counsel.<sup>41</sup> And prisoners have often not been allowed to litigate more than one petition, even if they have [page 12] offered strong evidence of egregious constitutional violations that they could not have presented earlier.<sup>42</sup>

The consequence of these legal tangles has been that meritorious constitutional claims often have gone without remedy. Contrary to popular belief, most *habeas* petitions in death penalty cases do not rest on frivolous technicalities. As Professor James S. Liebman has reported, in 40 percent of all capital cases, even in the face of all the procedural barriers, death row inmates still

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37. See American Bar Ass'n, Resolution of the House of Delegates (Feb. 1982).

38. See American Bar Ass'n, *supra* note 33.

39. See *id.*; American Bar Ass'n, Resolution of the House of Delegates (Feb. 1990).

40. See *McFarland v. Scott*, 512 U.S. 1256 (1994).

41. See, e.g., *Coleman v. Thompson*, 501 U.S. 722 (1991).

42. See, e.g., *McCleskey v. Zant*, 499 U.S. 467 (1991). Moreover, the Supreme Court has developed numerous other door-closing doctrines that restrict death row prisoners' access to the federal courts for *habeas corpus* adjudication. See Symposium, *supra* note 36.

have been able to secure relief due to violations of their basic constitutional rights.<sup>43</sup> The percentage securing relief would be substantially higher if the federal courts had considered all death row inmates' claims on their merits.

Yet, in 1996, Congress enacted legislation that will make it even more difficult for the federal courts to adjudicate federal claims in capital cases. This new law, which the ABA vigorously opposed, establishes deadlines for filing federal *habeas* petitions, limits on federal evidentiary hearings into the facts underlying federal claims, timetables for federal court action, limits on the availability of appellate review, and even more demanding restrictions on second or successive applications from a single petitioner. The new law also contains a provision that, according to the *en banc* Seventh Circuit (and contrary to the ABA's position as *amicus curiae*), prevents a federal court from awarding relief on the basis of a claim that the federal court finds to be meritorious if it concludes that the state court that rejected the claim was not "unreasonably" wrong in doing so.<sup>44</sup>

### III. Race Discrimination

In 1988, the ABA adopted a policy of striving to eliminate "discrimination in capital sentencing on the basis of the race of either the victim or the defendant."<sup>45</sup> Nevertheless, longstanding patterns of racial discrimination remain in courts across the country.

**[page 13]** Numerous studies have demonstrated that defendants are more likely to be sentenced to death if their victims were white rather than black.<sup>46</sup> Other studies have shown that in some jurisdictions African Americans tend to receive the death penalty more often than do white defendants.<sup>47</sup> And in

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43. Memorandum of James S. Liebman (Nov. 22, 1995).

44. *Lindh v. Murphy*, 96 F.3d 856, 870 (7th Cir. 1996)[, *rev'd*, 521 U.S. 320 (1997)]. For a summary and analysis of the various new *habeas corpus* provisions, see Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996).

45. American Bar Ass'n, Resolution of the House of Delegates (Aug. 1988). In addition, the ABA has urged Congress to "prevent or minimize any disproportionate effects of general federal death penalty legislation on Native Americans subject to federal jurisdiction." American Bar Ass'n, Resolution of the House of Delegates (Aug. 1991).

46. See Ronald J. Tabak, *Is Racism Irrelevant? Or Should the Fairness in Death Sentencing Act Be Enacted to Substantially Diminish Racial Discrimination in Capital Sentencing?*, 18 N.Y.U. REV. L. & SOC. CHANGE 777, 780-83 (1990-91) (summarizing various studies) (this law review article is an adaptation of the ABA's testimony in support of the proposed Racial Justice Act); U.S. GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES A PATTERN OF RACIAL DISPARITIES (Feb. 1990), *reprinted in* 136 CONG. REC. S6889-90 (daily ed., May 24, 1990); Symposium, *The Death Penalty in the Twenty-First Century*, 45 AM. U. L. REV. 239, 320-23, 341, 345, 347, 348 (1995) (comments of Laurie Ekstrand & Harriet Ganson in a panel discussion on Race and the Death Penalty); see also SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING (1989). In Kentucky, approximately 1,000 African Americans have been murdered over the past 20 years. Yet none of the prisoners on that state's death row is there for having killed a black victim. Letter from the Death Penalty Information Center (Apr. 2, 1996).

47. See, e.g., DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 399 (1990).

countless cases, the poor legal services that capital clients receive are rendered worse still by racist attitudes of defense counsel.<sup>48</sup>

Justice Blackmun lamented the Court's failure to fashion an effective means of preventing the "biases and prejudices that infect society generally" from influencing "the determination of [page 14] who is sentenced to death."<sup>49</sup> After years of watching race play so large a role in the administration of capital punishment, he concluded, in part for that reason, that he no longer could find any execution consistent with the Constitution. The ABA need not go so far in order to resolve, as a matter of ABA policy, that executions should cease until effective mechanisms are developed for eliminating the corrosive effects of racial prejudice in capital cases.

The Supreme Court, in rejecting a constitutional challenge to the systemic pattern of racial discrimination in capital sentencing, invited legislative action to deal with this situation.<sup>50</sup> Thereafter, the ABA, in conformance with a resolution adopted by the House of Delegates in August 1988, supported enactment of the Racial Justice Act, a measure designed to create a remedy for such racial discrimination.<sup>51</sup> Although the House of Representatives twice has approved the Racial Justice Act, the full Congress has not enacted it. Accordingly, these patterns of racial discrimination remain unrectified. Ironically, Justice Powell, the author of the Supreme Court's 5-4 decision rejecting the constitutional challenge discussed above, has now indicated that he regrets his participation in that decision (as well as in other decisions upholding the death penalty) more than anything else during his tenure on the court.<sup>52</sup>

#### IV. Execution of Mentally Retarded Individuals and Juveniles

The ABA has established policies against the execution of both persons with "mental retardation," as defined by the American Association of Mental Retardation,<sup>53</sup> and persons who were under the age of 18 at the time of their offenses.<sup>54</sup> Nevertheless, the Supreme Court has upheld the constitutionality of

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48. Sadly, defense attorneys who shrink from rocking the boat locally still may fail, even in this day and age, to object to jury selection procedures that exclude African Americans from service. See Bright, *supra* note 12, at 1857 (citing *Gates v. Zant*, 863 F.2d 1492, 1497-1500 (11th Cir. 1989) (denying relief in such an instance)). Cases in which defense attorneys use racial slurs in reference to their clients are also all too common. See Bright, *supra* note 12, at 1865 (citing Transcript of Opening and Closing Arguments at 39, Record Excerpts at 102, *State v. Dungee* (11th Cir.) (No. 85-8202), *decided sub nom.* *Isaacs v. Kemp*, 778 F.2d 1482 (11th Cir. 1985) (showing the following opening argument: "You have got a little ole nigger man over there that doesn't weigh over 135 pounds. He is poor and he is broke. He's got an appointed lawyer. . . . He is ignorant. I will venture to say he has an IQ of not over 80.")). Unsurprisingly, the jury that heard that statement from defense counsel later sentenced the defendant to death.

49. *Callins v. Collins*, 510 U.S. 1141, 1153 (1994) (Blackmun, J., dissenting).

50. See *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987).

51. See Tabak, *supra* note 46.

52. See JEFFRIES, *supra* note 4, at 451-452.

53. See American Bar Ass'n, Resolution of the House of Delegates (Feb. 1989).

54. See American Bar Ass'n, Resolution of the House of Delegates (Aug. 1983).

executions in both of those instances.<sup>55</sup> While many states now bar executions of the retarded, other states continue to execute both retarded individuals and, on [page 15] occasion, offenders who were under 18 at the time they committed the offenses for which they were executed.<sup>56</sup>

## CONCLUSION

As former American Bar Association President John J. Curtin, Jr., told a congressional committee in 1991, “Whatever you think about the death penalty, a system that will take life must first give justice.”<sup>57</sup> This recommendation would not commit the ABA to a policy regarding the morality or the advisability of capital punishment *per se*. Rather, this Recommendation would reinforce longstanding Association policies that seek to bring greater fairness to the administration of the death penalty. Those policies rest firmly on the special competence and experience that only members of the legal profession can bring to bear.

For many years, the ABA has conducted studies, held educational programs, and produced studies and law review articles<sup>58</sup> about the administration of the death penalty. As a result of that work, the Association has identified numerous, critical flaws in current practices. Those flaws have not been redressed; indeed, they have become more severe in recent years, and the new federal *habeas* law and the defunding of the PCDO’s have compounded these problems. This situation requires the specific conclusion of the ABA that executions cease, unless and until greater fairness and due process prevail in death penalty implementation.

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55. See *Penry v. Lynaugh*, 492 U.S. 302 (1989) (refusing to hold that the execution of a mentally retarded prisoner violated the Eighth Amendment); *Stanford v. Kentucky*, 492 U.S. 361 (1989) (refusing to hold that the execution of prisoners who were 16 and 17 years of age at the time of their offenses violated the Eighth Amendment).

56. See EMILY REED, *THE PENRY PENALTY: CAPITAL PUNISHMENT AND OFFENDERS WITH MENTAL RETARDATION* 39 (1993) (reporting that mentally retarded prisoners account for 12% to 20% of the population on death row); RAYMOND PATERNOSTER, *CAPITAL PUNISHMENT IN AMERICA* 95 (1991) (reporting that near the end of 1990 there were 32 death row prisoners who had been under 18 years of age at the time of their offenses); VICTOR STREIB, *REPORT* (Sept. 19, 1995) (reporting 42 such prisoners only five years later). Since 1973, 140 death sentences have been imposed on juvenile offenders. Letter from the Death Penalty Information Center (Apr. 2, 1996).

57. *Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong. 447 (1991).

58. See, e.g., Symposium, *supra* note 14; Symposium, *supra* note 36; Ronald J. Tabak, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 *FORDHAM URB. L.J.* 239 (1994).