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The Death Penalty and the Society We Want*

STEPHEN B. BRIGHT**

Winston Churchill once observed: “The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of any country. . . . [They] mark and measure the stored-up strength of a nation, and are the sign and proof of the living virtue within it.” It is worth a moment to examine how our society measures up by this standard and to look at the role that lawyers play in shaping the kind of society we have.

At the local level, we can tell a lot about a community by how it treats a homeless person suffering from schizophrenia who is begging on the street. One possibility is to look upon that person with the thought that there but for grace go I, that this person is desperately in need of help, and that we—individually and as a community—must respond by giving a helping hand and making sure that the person receives food, shelter, clothing, and care for such a debilitating mental illness. Another possibility is to simply ignore the person, to step around him or her on the way to buying a five-dollar cup of coffee, asking one’s self only: “Why should I help this person? Why should I give any money? Why should I do anything at all?” Another approach—the predominant view in many communities today—is to ask, why isn’t that person in jail? Why hasn’t the person been arrested for violating one of the “quality of life crimes” which many communities have adopted to protect the quality of life of those better off at the expense of those who are worse off? They have accomplished this by criminalizing behavior such as jaywalking, loitering, panhandling, and other conduct that makes it possible for the police to arrest almost anyone to clear the street of people we do not want to see. This is the “broken windows” approach to policing that Rudolph Guiliani used in New York. It uses the criminal law to clear the streets of the homeless, the mentally ill, and other “undesirables.” So there are three possible approaches: compassion, indifference, and hostility. The one adopted by a community tells us a lot about it.

Of course, there are different approaches to crime and criminals that are adopted at a much higher level of government. We might ask, does a society torture those it believes guilty of crimes? There is a fairly clear

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line between societies that torture people and those that do not torture. The Bush Administration tried to fudge it by adopting a definition for torture that did not include what the rest of the world understands to be torture.¹ But it did not work. Other nations and people throughout the world look upon the United States differently today because of its resort to torture than they did before. Unfortunately, when many people around the world think of the United States, they now think of holding people for years without trials at Guantanamo instead of the values symbolized by the Statue of Liberty.

We may also ask, does a society kill? Does it have capital punishment? Dr. Martin Luther King, Jr. said that the death penalty was society's final statement that it would not forgive. Supreme Court Justice Arthur Goldberg said that the deliberate institutionalized taking of life by the state was the greatest possible degradation of a human being. A society that responds to crime with capital punishment is an unforgiving society. Its use of such a degrading punishment says something about its commitment—or lack of commitment—to human dignity. It also reflects either arrogance on the part of the society—based on a belief that its institutions are infallible—or indifference—a belief that the people affected by its decisions to kill are of so little worth that it does not matter if they are mistakenly executed.

The point with both the death penalty and torture is not whether there are people who may deserve to be tortured or put to death, but whether the society is willing to engage in such practices. They are not only degrading to the person who is tortured or executed, they are also degrading to the society that tortures or executes. These practices coarsen the society and the people in it. Four countries—Iran, Saudi Arabia, China, and the United States—account for ninety-one percent of the executions in the world today.² The company one keeps also says a lot about a society.

If a society retains the primitive punishment of putting people to death, despite the availability of more recently developed methods of punishment, such as imprisonment in secure facilities, it should be committed to having a legal system that is capable to the extent humanly possible of ensuring the accuracy and the reliability of decisions that result in imposition of the death penalty. At a minimum, it should do everything it can to prevent conviction of the innocent, the influence of racial bias, and the arbitrary and uneven imposition of the death penalty.

1. See DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR 34–37 (2007).

2. See AMNESTY INTERNATIONAL, FACTS AND FIGURES ON THE DEATH PENALTY 2 (2007), available at http://www.amnesty.org/en/alfresco_asset/c3d650aa-a2a8-11dc-8d74-6f45f39984e5/act500022007en.pdf.

We have today indisputable evidence of the fallibility of our legal system. DNA comparisons have established beyond doubt that many people convicted of crimes—including some sentenced to death—were completely innocent.³ Unfortunately, we do not know how many people were wrongfully convicted in cases where there was no biological evidence available for comparison or, if there was such evidence, it was not preserved.

The DNA exonerations are a powerful reminder that police, prosecutors, judges, and juries make mistakes with regard to the most basic issue the legal system is responsible for deciding—guilt and innocence. Many public officials responsible for the criminal justice system—and many members of our society—would prefer not to think about that, but now it is undeniable. We have seen people who have lost years of their lives because of wrongful convictions and perpetrators of crimes who have remained at large because someone else was convicted of the crimes they committed.

It is impossible to eliminate the risk of error, but it can be minimized by such things as improving techniques for eyewitness identification, preventing interrogation practices that may produce false confessions, improving practices and oversight in crime laboratories, and assuring that those accused of crimes are capably represented.⁴ A commission appointed by Governor George Ryan in Illinois following the exonerations of thirteen people sentenced to death in that state made comprehensive recommendations for reducing error in capital cases,⁵ and the American Bar Association has established standards for the performance of counsel in capital cases.⁶ But many jurisdictions have not implemented these measures because of cost, resistance to change, or indifference.

The most fundamental element of fairness in an adversary system of justice is representation of the accused by competent counsel. Our legal system is so complex and contains so many procedural traps that a lay per-

3. See JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE 262–67 (2000).

4. See generally *id.*; The Innocence Project, Fix the System: Priority Issues, <http://www.innocenceproject.org/fix/Priority-Issues.php> (last visited Dec. 21, 2007).

5. See COMMISSION ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT (2002), available at http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/summary_recommendations.pdf.

6. See generally AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES 989 (rev. ed. 2003), available at http://law.hofstra.edu/pdf/confer_aba_DPGuidelines.pdf. The guidelines are not binding on lawyers defending capital cases, but they have been cited with approval by the U.S. Supreme Court in finding that representation violated the Sixth Amendment right to counsel. See *Rompilla v. Beard*, 545 U.S. 374, 387, 387 n.7 (2005); *Wiggins v. Smith*, 539 U.S. 510, 522 (2003); *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (“Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . .”).

son accused of a crime can no more navigate it alone than a passenger can fly a plane in the absence of the pilot. Those accused of crimes rely upon lawyers to protect all of their legal rights, investigate thoroughly the facts, test the prosecution's case against them through cross-examination of witnesses and other means, produce evidence that casts doubt upon guilt, and, for those found guilty, present evidence to be considered in mitigation with regard to punishment.

Such representation must be provided to both rich and poor for, as Justice Hugo Black stated for the Supreme Court in *Griffin v. Illinois*,⁷ “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”⁸ However, as we all know, in our country today, the kind of justice people get depends very much upon how much money they have. The kind of equal justice described by Justice Black has been an aspiration of our legal system—Justice William Brennan described the Bill of Rights as a “lodestar for our aspirations”⁹—but it is questionable how vigorously it is being pursued today despite such draconian punishments as death, life imprisonment without parole, and long prison terms.

Although a person accused of a crime must be provided a lawyer at trial,¹⁰ many states still lack comprehensive and adequate indigent defense systems.¹¹ Even in capital cases, the representation provided in many jurisdictions is simply a disgrace to the legal profession and the criminal justice system. There have been capital cases in which the lawyers appointed to represent the defendant have failed to investigate the facts of the crime or the backgrounds of their clients but have still been found to be sufficient counsel for purposes of the Sixth Amendment.¹² Death sentences have even been imposed and upheld in cases in which the defense lawyers were asleep, intoxicated, or under the influence of drugs.¹³

7. 351 U.S. 12 (1956).

8. *Id.* at 19.

9. See Justice William J. Brennan, Jr., *To the Text and Teaching Symposium, Georgetown University, October 12, 1985*, in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* (1986).

10. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); see also *Argersinger v. Hamlin*, 407 U.S. 25, 37–38 (1972).

11. See AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* (2004), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf>.

12. See, e.g., Kenneth Williams, *Ensuring the Capital Defendant's Right to Competent Counsel: It's Time for Some Standards!*, 51 WAYNE L. REV. 129, 140–141 (2005); see also Stephen Henderson, *Defense Often Inadequate in Four Death-Penalty States*, *MCCLATCHY NEWSPAPERS*, Jan. 16, 2007 (part one in a series of five articles regarding the poor quality of legal representation found in a study of eighty death penalty cases from Alabama, Georgia, Mississippi, and Virginia).

13. See Jeffrey L. Kirshmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 455–60 (1996).

A defendant relies upon counsel to protect all other rights, but a defendant is powerless to obtain a competent lawyer in the first place. Poor people accused of crimes are assigned lawyers. They are often dependent on the luck of the draw with regard to the competency of the lawyers they get. This is illustrated by the plight of an African American man, Gregory Wilson, who faced the death penalty in Covington, Kentucky. The judge presiding over the case had difficulty finding a lawyer for Wilson because a Kentucky statute limited compensation for defense counsel in capital cases to \$2500. When the head of the local indigent defense program suggested to the judge that more compensation was necessary to obtain a lawyer qualified for such a serious case, the judge suggested that the indigent defense program rent a river boat and sponsor a cruise down the Ohio River to raise money for the defense.

The judge eventually obtained counsel by posting a notice in the courthouse asking any member of the bar to take the case with the plea, "PLEASE HELP. DESPERATE." The notice said nothing about qualifications to handle a capital case. The judge appointed two lawyers who responded.

This method of selecting counsel did not produce a "dream team." The lead counsel can charitably be described as well past his prime. The lawyer did not have an office, but practiced out of his home, where a Budweiser beer sign was prominently displayed. The police had recently pried up the boards in his living room floor and recovered stolen property. The telephone number he gave Wilson was for a bar called "Kelly's Keg." The other lawyer, who had volunteered to assist lead counsel, had no felony trial experience.

Wilson, realizing that the lawyers were not up to the task of defending a capital murder case, repeatedly objected to being represented by the lawyers.¹⁴ He repeatedly asked the judge that he be provided with a lawyer who was capable of defending a capital case.¹⁵ The judge refused and proceeded to conduct a trial that was a travesty of justice. Lead counsel was not even present for some of the trial. He cross-examined only a few witnesses, including one witness whose direct testimony he missed because he was out of the courtroom. Wilson was sentenced to death.

(citing cases in which convictions were upheld even though defense lawyers were intoxicated, abusing drugs, or mentally ill).

14. See *Wilson v. Commonwealth*, 836 S.W.2d 872, 878 (Ky. 1992) (noting that "[a]t many points during the trial, Wilson repeated his assertion that his court-appointed standby counsel were, to use Wilson's words, 'unprepared, ill-trained, ill-equipped, and lacked the necessary competence and experience'"); see also *Wilson v. Commonwealth*, 975 S.W.2d 901, 902-04 (Ky. 1998).

15. See *Wilson*, 836 S.W.2d at 883 (quoting transcript in which Wilson asks for "competent counsel"); *id.* at 884 (noting Wilson's "insistence that the court appoint him an attorney who met Wilson's specifications as a death penalty expert").

What more could Gregory Wilson do to enforce his Sixth Amendment right to counsel? He objected. He complained about the lawyers appointed by the judge, who were clearly incapable of defending him. He asked for a real lawyer. But these efforts were insufficient to enforce the right to counsel.

Most of those accused of crimes who receive inadequate representation do not realize the incompetence of the lawyer appointed to defend them. But even if they do, they face a Hobson's choice. If they complain, they run the risk that the quality of the representation will deteriorate even further because they will offend their lawyer, but the judge will not replace them. Or there is the equally valid fear that the next lawyer appointed by the same judge may be even worse. Unless a state has a public defender system with a great deal of integrity, defendants may end up like Gregory Wilson.

In theory, the right to counsel can be vindicated after trial if the defendant can establish that the representation at trial amounted to ineffective assistance of counsel.¹⁶ The Catch-22 for most poor people, however, is that they need another lawyer—and a capable one—to establish in post-conviction proceedings the ineffectiveness of trial counsel, but the Supreme Court has held that they have no right to a lawyer at that stage of the process.¹⁷ Even if the state provides a lawyer to raise a claim of ineffectiveness as some do, there is no guarantee that the new lawyer will be any more competent than trial counsel. In Texas, for example, a person facing the death penalty may have equally bad lawyers at trial and in post-conviction proceedings.

The capital of capital punishment is Houston, Harris County, Texas. More people sentenced to death in Harris County have been executed than from any state except Texas itself.¹⁸ The *Houston Chronicle* described the trial of George McFarland in Houston as follows:

16. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (establishing a two part test for determining whether an accused received ineffective assistance: (1) whether the performance of counsel was deficient and, if so, (2) whether there is a substantial probability that the representation affected the outcome). Thus, even when a defendant receives deficient representation, the conviction and sentence may be upheld based upon a reviewing court's conclusion that it did not matter all that much. See also William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91 (1995).

17. See *Murray v. Giarratano*, 492 U.S. 1, 7–8 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 556–57 (1987).

18. See TEXAS COALITION TO ABOLISH THE DEATH PENALTY, TEXAS DEATH PENALTY DEVELOPMENTS IN 2007: THE YEAR IN REVIEW 1 (2007), available at <http://www.tcadp.org/uploads/File/2007annualreport.pdf> (reporting that at the end of 2007, 102 people sentenced to death in Harris County had been executed, more than any state except Texas as a whole). Only five states executed over fifty people between the resumption of capital punishment in 1976 and the end of 2007: Texas (408), Virginia (98), Oklahoma (86), Missouri (66), and Florida (64). DEATH PENALTY INFORMATION

Seated beside his client . . . defense attorney John Benn spent much of Thursday afternoon's trial in . . . deep sleep. His mouth kept falling open and his head lolled back on his shoulders, and then he awakened just long enough to catch himself and sit upright. Then it happened again. And again. And again.

Every time he opened his eyes, a different prosecution witness was on the stand describing another aspect of the Nov. 19, 1991, arrest of George McFarland in the robbery-killing of grocer Kenneth Kwan.

. . . .

Court observers said Benn seems to have slept his way through virtually the entire trial.¹⁹

When the judge finally called a recess, the lawyer was asked how he could be sleeping while supposedly defending a capital murder case. He replied, "It's boring."²⁰ The more important question was asked of the judge: how could he preside over a capital case in which the lawyer was sleeping? He answered that the Constitution guarantees a right to a lawyer, but it does not guarantee that the lawyer must be awake.²¹ This judge was a true strict constructionalist.

Three people in Houston—George McFarland, Calvin Burdine, and Carl Johnson—were represented by lawyers who slept during their capital trials while supposedly defending them. The entire United States Court of Appeals for the Fifth Circuit, sitting en banc, struggled with the question of whether Burdine's right to counsel was violated because his lawyer, Joe Frank Cannon, whose file was less than three pages of notes, slept during parts of the two-day trial in which Burdine was convicted and condemned to death.

It is an embarrassment to the legal profession that lawyers were arguing to an en banc court about whether the Constitution was violated by a defense attorney sleeping while supposedly defending a person in a capital trial. But the judges wanted to know whether Cannon slept through any *important parts* of the very short trial. There was no way to know since Cannon did not make a record as to when he was asleep and when he was awake. One judge asked if there was a difference between a lawyer who

CENTER, FACTS ABOUT THE DEATH PENALTY 3 (2008), available at <http://www.deathpenaltyinfo.org/FactSheet.pdf>.

19. John Makeig, *Asleep on the Job? Slaying Trial Boring, Lawyer Says*, HOUSTON CHRON., Aug. 14, 1992, at A35.

20. *Id.*

21. *Id.*

slept and one who was under the influence of alcohol or drugs or suffering from a mental illness. It was an important question because, as a panel of the court had noted in upholding Burdine's conviction and death sentence, courts have found that lawyers were not ineffective even though they had been impaired by alcohol, drug use, or mental illness.²² To distinguish that precedent, it was pointed out that a lawyer who was under the influence of alcohol, drugs, or mental illness would at least be conscious, although impaired. If a lawyer is sleeping, on the other hand, he or she is unconscious. A lawyer who has slept during parts of the trial cannot argue to the jury in closing that it did not hear any witness say a certain thing, as lawyers often do, because the lawyer may not know whether any witnesses testified that way or not.

The Fifth Circuit, sitting en banc, ultimately decided, by a vote of nine to five, that Burdine's right to counsel was violated and he was entitled to a new trial,²³ but not without a very bitter dissent by Judge Barksdale.²⁴

Most people caught sleeping on the job in any line of work are fired, but Houston judges continued to appoint Cannon to capital and other criminal cases. Cannon also slept during the capital trial of Carl Johnson. A law professor who later represented Johnson found in reading the trial transcript that Cannon's "ineptitude . . . jumps off the printed page."²⁵ Nevertheless, the death sentence was upheld by the Texas and federal courts. Johnson was executed by Texas in 1996.²⁶

These cases give a new meaning to being represented by the "dream team." Of course, most lawyers do not sleep during trial. But all too often, lawyers appointed to defend poor people facing the death penalty fail to investigate, do not know the law, or are at best mediocre in their representation.²⁷ But Johnson's execution and the bitter division of a federal court of appeals over whether sleeping during a capital trial violates the Constitution demonstrates how little regard the courts have for the quality of representation provided to poor people facing the death penalty. One federal judge, in reluctantly upholding a death sentence, observed that, as interpreted by the U.S. Supreme Court, the Constitution "does not require that

22. See *Burdine v. Johnson*, 231 F.3d 950, 959 (5th Cir. 2000), *vacated and rev'd en banc*, 262 F.3d 336 (5th Cir. 2001). The panel decided, by a two-to-one vote, to uphold Burdine's conviction and sentence.

23. *Burdine*, 262 F.3d at 338.

24. See *id.* at 357 (Barksdale, J., dissenting).

25. David R. Dow, *The State, the Death Penalty, and Carl Johnson*, 37 B.C. L. REV. 691, 694-95 (1996).

26. *Id.* at 710.

27. See *supra* notes 11-13 and accompanying text.

the accused, even in capital cases, be represented by able or effective counsel.²⁸

And those sentenced to death have no constitutional right to a lawyer at all during critical post-conviction review of their convictions and sentences.²⁹ This is the part of the process during which many people have proven their innocence, established violations of their constitutional rights, or shown that other grievous errors entitled them to new trials. People who can afford a lawyer to represent them in these proceedings may be successful in showing a violation of their constitutional rights and may be able to obtain a new trial. But those who cannot afford a lawyer may not be able to seek post-conviction review and, as a result, regardless of innocence or constitutional violations at their trial, must serve their sentences or even be executed.

While some states provide lawyers—at least to those sentenced to death—for post-conviction review in the state courts, most do not. People sentenced to death in states like Alabama and Georgia may obtain representation from public interest organizations or lawyers providing pro bono representation. But there are not enough lawyers for all of them. And poor people who receive sentences other than death—even those sentenced to life imprisonment without the possibility of parole—have virtually no hope of obtaining legal representation.

Exzavious Gibson, a man sentenced to death in Georgia whose IQ was found on different tests to be between seventy-six and eighty-two, stood, totally bewildered, in front of a judge at his first state post-conviction hearing in Georgia without a lawyer. The case proceeded as follows:

THE COURT: OK, Mr. Gibson are you ready to proceed?

MR. GIBSON: I don't have an attorney.

THE COURT: I understand that.

MR. GIBSON: I am not waiving my rights.

THE COURT: I understand that. Do you have any evidence to put up?

MR. GIBSON: I don't know what to plead.

THE COURT: Huh?

28. *Riles v. McCotter*, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring).

29. *Murray v. Giarratano*, 492 U.S. 1, 10 (1989).

MR. GIBSON: I don't know what to plead.³⁰

The state of Georgia, which sought to bring about Gibson's execution, was represented by an assistant attorney general who specialized in capital post-conviction cases. After the assistant attorney general presented testimony, the judge turned again to Mr. Gibson:

THE COURT: Mr. Gibson, would you like to ask [the witness] any questions?

MR. GIBSON: I don't have counsel.

THE COURT: I understand that, but I am asking, can you tell me yes or no whether you want to ask him any questions or not?

MR. GIBSON: I'm not my own counsel.

THE COURT: I'm sorry, sir, I didn't understand you.

MR. GIBSON: I'm not my own counsel.

THE COURT: I understand, but do you want . . . to ask him anything?

MR. GIBSON: I don't know.

THE COURT: Okay, sir. Okay, thank you. [To the witness], you can go down.³¹

This was a hearing which determined whether Exzavious Gibson would be put to death. Gibson was unable to call witnesses, make objections, or cross-examine the state's witnesses. The judge denied relief by signing a twenty-two-page order prepared by the assistant attorney general without changing even a comma. The Georgia Supreme Court upheld the proceedings, holding that Gibson had no right to counsel.³²

Other states may provide the condemned with lawyers to represent them in post-conviction review even though they are not required to do so. But the lawyers provided may be as bad or worse than those assigned to defend the accused at trial. A lawyer assigned to represent an inmate sentenced to death in Texas filed the identical brief for him that he had filed for another inmate in another case with different facts and different is-

30. Transcript of Hearing of Sept. 12, at 2-3, *Gibson v. Turpin*, No. 95-V-648 (Butts County, Ga. Super. Ct. 1995).

31. *Id.*

32. *Gibson v. Turpin*, 513 S.E.2d 186, 187 (Ga. 1999); *see also Murray*, 492 U.S. at 10; *Barbour v. Haley*, 471 F.3d 1222, 1228-32 (11th Cir. 2006) (holding no right to counsel in post-conviction review). *But see Jackson v. State*, 732 So. 2d 187, 191 (Miss. 1999) (holding that the state is required to appoint counsel for condemned persons in post-conviction proceedings).

sues.³³ The brief filed on behalf of another man condemned to die in Texas, Justin Fuller, was incoherent, repetitious, and rambling, making arguments that did not make any sense.³⁴ The lawyer copied some of his client's letters into the brief. As a result, the brief contained unintelligible and irrelevant statements such as, "I'm just about out of carbon paper so before I run out I want to try and list everything that was added to and took from me to convict me on the next page."³⁵ Nevertheless, Fuller's appeal was denied and he was executed.

There is no justification for a court accepting such briefs in any case. Without adequate briefing, a court cannot do its job. A court concerned about justice would have removed the lawyers from these cases and appointed competent lawyers so that it could decide the case based upon briefs on the issues in the cases. But the Texas Court of Criminal Appeals did not slow down in these or other cases in order to get decent briefing before denying relief and allowing executions.³⁶

Even condemned inmates who are fortunate to receive competent representation in seeking habeas corpus review face in the federal courts what Justice Harry Blackmun described as a "Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights."³⁷ The Writ of Habeas Corpus has been described "[o]ver the centuries" as "the common law world's 'freedom writ' by whose orderly processes the production of a prisoner in court may be required and the legality of the grounds for his incarceration inquired into, failing which the prisoner is set free."³⁸ The Supreme Court once said, "there is no higher duty than to maintain it unimpaired, and unsuspended, save only in the cases specified in our Constitution."³⁹

However, since its decision in *Wainwright v. Sykes*⁴⁰ in 1977, the Supreme Court has been on a "crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional

33. See Chuck Lindell, *Lawyer Makes 1 Case for 2 Killers*, AUSTIN AM.-STATESMAN, Feb. 26, 2006, at A1.

34. See Maro Robbins, *Convict's Odds Today May Rest on Gibberish*, SAN ANTONIO EXPRESS-NEWS, Aug. 24, 2006, at A1.

35. *Id.*

36. See, e.g., *Ex parte Rojas*, No. 39062-01, 2003 WL 1825617, at *1 (Tex. Crim. App. Feb. 12, 2003) (Price, J., dissenting) (no post-conviction review because lawyer assigned to case missed statute of limitations); *Ex parte Graves*, 70 S.W.3d 103 (Tex. Crim. App. 2002) (holding no right to competent counsel in state post-conviction proceedings where lawyer appointed by the court lacked experience and failed to raise certain claims); see also TEXAS DEFENDER SERVICE, LETHAL INDIFFERENCE (2002) (describing inadequacy of lawyers assigned to provide post-conviction representation in Texas), available at <http://www.texasdefender.org/publications.asp>.

37. *Coleman v. Thompson*, 501 U.S. 722, 758-59 (1991) (Blackmun, J., dissenting).

38. *Smith v. Bennett*, 365 U.S. 708, 712-13 (1961).

39. *Id.* at 713 (quoting *Bowen v. Johnson*, 306 U.S. 19, 26 (1939)).

40. 433 U.S. 72, 88-91 (1977).

claims.”⁴¹ Justice John Paul Stevens said in one case that “the Court has lost its way in a procedural maze of its own creation” and “grossly mis-evaluated the requirements of ‘law and justice.’”⁴² Congress restricted habeas corpus review even further by enacting the Antiterrorism and Effective Death Penalty Act of 1996, which placed new, unprecedented restrictions on habeas corpus review,⁴³ including a statute of limitations for filing petitions.⁴⁴

What does it say about our commitment to equal justice and the rule of law when courts and legislatures tolerate such poor representation or even no representation at all in cases where life and liberty are at stake? Richard Posner, a respected judge on the United States Court of Appeals for the Seventh Circuit, wrote:

I can confirm from my own experience as a judge that indigent defendants are generally rather poorly represented. But if we are to be hardheaded we must recognize that this may not be entirely a bad thing. The lawyers who represent indigent criminal defendants seem to be good enough to reduce the probability of convicting an innocent person to a very low level. If they were much better, either many guilty people would be acquitted or society would have to devote much greater resources to the prosecution of criminal cases. A bare-bones system for the defense of indigent criminal defendants may be optimal.⁴⁵

Judge Posner writes that if public defenders were much better, some guilty people might be acquitted; but he does not mention what is the most important result of better public defenders: some *innocent people*, who are now being convicted, would also be acquitted. That is what we should be concerned about, but it did not occur to him.

The “bare-bones system” he finds so attractive is only for poor people in criminal cases. He does not suggest a “bare-bones system” for cases involving wealthy people, for commercial cases, or any other kinds of cases. That says a lot about what kind of society we have: one kind of

41. *Coleman*, 501 U.S. at 758–59 (Blackmun, J., dissenting); see, e.g., *Dugger v. Adams*, 489 U.S. 401, 406–11 (1989); *Smith v. Murray*, 477 U.S. 527, 533–36 (1986); *Engle v. Isaac*, 456 U.S. 107, 130–34 (1982); see also Stephen B. Bright, *Is Fairness Irrelevant? The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1 (1997).

42. *Smith*, 477 U.S. at 541 (Stevens, J., dissenting).

43. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 107, 110 Stat. 1214, 1221–26.

44. 28 U.S.C. §§ 2244(d), 2255 (2006) (establishing a one-year statute of limitations). A statute of limitations of 180 days is provided in § 2263 for states that meet certain standards of providing counsel in capital post-conviction proceedings.

45. RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 163–64 (1999).

justice for people who can afford it and another kind of justice system—a “bare-bones system”—for people who cannot afford it. Whether we have these two very different systems of justice is not about being tough on crime or soft on crime, or for the death penalty or against it. It’s about whether we have equal justice; it’s about whether we have a fair and reliable system for deciding guilt and innocence, liberty and custody, life and death.

Those willing to settle for a “bare-bones system” or a second class system of justice for those accused of crimes suffer from, at best, a poverty of vision with regard to what kind of justice system we should have and, at worst, indifference to injustices that result from barely providing lawyers to people at trial and not guaranteeing lawyers at all in post-conviction review.

During the years of efforts to establish a public defender system in Georgia, one thing that we heard at meetings and legislative hearings was: “We don’t need a Cadillac, we’ll be happy with a Chevy.” When I was in Louisiana recently at a meeting regarding the sad condition of representation for poor people accused of crimes in that state, once again I heard people saying that Louisiana did not need a Cadillac, just a Chevy.

I do not understand why we do not want a Cadillac. This is a system responsible for providing representation to people facing loss of their liberty or lives. Why shouldn’t we have the very best system our society can provide? But we have set our sights on the embarrassing target of mediocrity. Our commitment as a society is to something that is quite a bit less than a full measure of justice for those accused of crimes.

The courts are failing to provide equal justice in another way as well. Their decisions continue to be influenced by race. This is the twentieth anniversary of the Supreme Court’s decision in *McCleskey v. Kemp*,⁴⁶ in which the Court upheld Georgia’s capital punishment system despite pronounced racial disparities in the imposition of the death penalty in that state. The Court suggested that racial disparities may be inevitable and held that they do not violate either the equal protection guarantee of the Fourteenth Amendment or the procedural protections of the cruel and unusual punishment clause of the Eighth Amendment.

As a result of *McCleskey* and other failures to deal with the influence of race, the criminal justice system is the part of our society which has been least affected by the civil rights movement. There have been many changes as a result of the civil rights movement. There are now people of color on city councils, county commissions, in state legislatures, and in Congress. John Lewis, who was among the civil rights marchers severely

46. 481 U.S. 279, 292 (1987).

beaten by Alabama troopers when they tried to cross the Edmund Pettus Bridge in an attempt to march from Selma to Montgomery in 1965, is now a member of the U.S. Congress.

But at many courthouses throughout the South, very little has changed. In many courtrooms, things look no different than they did in the 1950s and before. The prosecutor is white, the judge is white, the defense lawyers are white, and the clerks and court reporters are white. Even in communities with very substantial African American populations, the jury may be all white because it is still common for black people to be struck from juries because of their race. But when the defendants are brought in—when a group of African American men all handcuffed together wearing orange jumpsuits are brought into the courtroom—it looks like a slave ship has docked outside the courthouse.

Justice William Brennan described the reality of the impact of race in our criminal justice system in his dissenting opinion in *McCleskey*:

At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of McCleskey's past criminal conduct were more important than the fact that his victim was white. Furthermore, counsel would feel bound to tell McCleskey that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks. In addition, frankness would compel the disclosure that it was more likely than not that the race of McCleskey's victim would determine whether he received a death sentence: 6 of every 11 defendants convicted of killing a white person would not have received the death penalty if their victims had been black, while, among defendants with aggravating and mitigating factors comparable to McCleskey's, 20 of every 34 would not have been sentenced to die if their victims had been black. Finally, the assessment would not be complete without the information that cases involving black defendants and white victims are more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim. The story could be told in a variety of ways, but McCleskey could not fail to grasp its essential narrative line: there was a significant chance that race would play a prominent role in determining if he lived or died.⁴⁷

47. *Id.* at 321 (Brennan, J., dissenting).

Justice Brennan ended his opinion by concluding:

The Court's decision today will not change what attorneys in Georgia tell other Warren McCleskeys about their chances of execution. Nothing will soften the harsh message they must convey, nor alter the prospect that race undoubtedly will continue to be a topic of discussion. McCleskey's evidence will not have obtained judicial acceptance, but that will not affect what is said on death row. However many criticisms of today's decision may be rendered, these painful conversations will serve as the most eloquent dissents of all.⁴⁸

Twenty years later, we still have those conversations with our clients. We still tell them that race may be more important than anything else in influencing the outcome of their cases.

There must be a reckoning at some point. If the legislatures and the courts continue to deny people adequate legal representation, if race continues to be a powerful influence on decisions from police stops for "driving while black" to life and death decisions in capital cases, at some point we are going to have to sandblast "Equal Justice Under Law" off the Supreme Court building. It is one thing to say we are working towards it, that it is an aspiration of our legal system, but if our society gives up on it, if we settle for the very unequal treatment of people in our legal system that we have now, then that phrase should not be on the Supreme Court building.

Our society is moving in the wrong direction in part because instead of working to implement a vision of what kind of society we want to have, we have been reacting out of fear to threats to our way of life. We once had a President who told us "that the only thing we [had] to fear is fear itself."⁴⁹ President Roosevelt's message was that if the American people did not panic, if they kept their wits about them and tackled the immense problems that the country faced in 1933, they would find ways to deal with them and be successful in doing so. But today, we have a President who tells us to fear everything: to fear criminals; to fear drugs; to fear same-sex couples; and, more than anything else, to fear terrorists.

Out of our fear, we have been fighting a war on drugs that has cost us the protections of the Fourth Amendment and filled prisons at enormous costs, but done little or nothing to prevent crime or addiction. Out of fear, we have been fighting a war on crime that—in the popular understanding

48. *Id.* at 344–45.

49. FRANKLIN D. ROOSEVELT, FIRST INAUGURAL ADDRESS, MARCH 4, 1933, reprinted in INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 269, 269 (1989).

of things—has relegated the provision of the Bill of Rights to nothing more than a collection of “technicalities” that get in the way of fighting crime.

And we are in a war on terrorism that we are told justifies all sorts of things that are contrary to our values: holding people without charges, without lawyers, and without judicial review; engaging in interrogation techniques that amount to torture; intercepting people and sending them to countries that do not respect human rights for interrogation; limiting habeas corpus review even more or denying it altogether; and closing the courts to the public and the media in some cases for hearings and arguments.⁵⁰

Whether the government should have suspended some constitutional protections in the Civil War or World War II is very controversial, but at least those wars came to an end. The wars against terrorism, crime, and drugs will never end. There is no likelihood that crime or addiction will be eliminated from our society or any other. Terrorism is not an enemy, but a tactic that has been employed throughout history. One or two people can engage in an act of terrorism, as Timothy McVeigh and Terry Nichols demonstrated in bombing the federal courthouse in Oklahoma City.

Fighting all of these wars based upon fear and with the notion that we can suspend the rules in any of them fundamentally changes the kind of society we have. It is only a matter of time until the thin line between the war on terror and the war on crime is blurred; until the laws adopted to fight terrorism are used, for example, against those who are alleged to be members of gangs in Oakland or Los Angeles. Ultimately, there will be even fewer constitutional protections for those accused of crimes. The Constitution—and the willingness of judges to enforce it—provides the only protections that poor and the powerless people accused of crimes have from the passions and prejudices of the moment. They have no political action committees; they have not contributed thousands of dollars to obtain friends in high places.

Among the many questions before us are whether we will employ torture as a tactic and death as a punishment; whether every person, regardless of race, regardless of wealth or lack of it, and no matter what he or she is accused of, is entitled to due process when life and liberty are at stake; whether judges will enforce the Constitution; and whether courts will have jurisdiction to consider the pleas of those facing a loss of their lives or liberty. Will we answer these questions out of arrogance, vengeance, and fear or out of humility, understanding, and compassion?

These are questions about what kind of society we will have. The Constitutional Court of South Africa, in deciding whether post-apartheid

50. See generally COLE & LOBEL, *supra* note 1.

South Africa would have the death penalty, concluded that in that society, which was in transition from hatred to understanding, from vengeance to reconciliation, there is no place for the death penalty.⁵¹

For the time being, America through its elected leaders has demonstrated both arrogance and incompetence in adopting a very harsh and unforgiving approach to these questions. But we have the ability to change that direction. My hope is that out of humility, respect for the dignity of every person, compassion, and courage, we will decide that the United States does not torture people, and that, eventually, we will join the rest of the world in making permanent, absolute, and unequivocal the injunction “thou shall not kill.”

51. *State v. Makwanyane & Mchunu*, 1995 (3) SA 391 (CC) at 130–31 (S. Afr.), reprinted in 16 HUM. RTS. L.J. 154, 190 (1995) (Langa, J., concurring).