Report Regarding the Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions

Randall T. Coyne, University of Oklahoma College of Law
Lyn Entzeroth

Available at: https://works.bepress.com/randall_coyne/80/
REPORT REGARDING IMPLEMENTATION OF THE AMERICAN BAR ASSOCIATION’S RECOMMENDATIONS AND RESOLUTIONS CONCERNING THE DEATH PENALTY AND CALLING FOR A MORATORIUM ON EXECUTIONS

Randall Coyne and Lyn Entzeroth

I. INTRODUCTION

A. The ABA Has Given Careful Consideration to Issues Surrounding the Death Penalty for the Past Several Decades

The American Bar Association (ABA) is a voluntary, national membership organization of the legal profession, dedicated to the promotion of a fair and effective system for the administration of justice. The ABA’s more than 365,000 members come from each state and territory and the District of Columbia. Its constituency includes prosecutors, public defenders, private lawyers, trial and appellate judges from the state and federal courts, legislators, law professors, law enforcement and correctional personnel, law students, and a number of “non-lawyer” associates in allied fields.

Although the ABA takes no position on the constitutionality or morality of the death penalty, it has worked hard to try to ensure that the death penalty is administered fairly. To that end, during the past several decades the ABA has passed numerous resolutions dealing with various legal issues presented by capital cases. Firm ABA policies exist governing the provision of competent counsel in capital cases, proper procedures for adjudicating claims in capital cases (including federal habeas corpus), race discrimination in capital cases, and standards for determining who is eligible for the death penalty. ABA members frequently have testified before Congress on myriad capital punishment issues.

Further, the ABA has filed numerous amicus curiae briefs in capital cases in the U.S. Supreme Court, has conducted and supported training programs for lawyers and judges handling capital cases, and has conducted a wide range of public education programs dealing with the death penalty.

In 1986, the ABA created a Death Penalty Post-Conviction Representation Project. Since then, the Project has recruited more than 400 volunteer lawyers to represent death row inmates and has sought to create programs that provide qualified, compensated counsel to capital post-conviction petitioners. The ABA’s
Bar Information Project has assisted in the development of the new Louisiana Indigent Defense Board. The ABA's Judicial Administration Division is presently preparing a trial handbook for judges who preside over capital cases. Moreover, the ABA has commissioned several studies that focus on the experiences of counsel in capital post-conviction cases and judicial review in capital cases.7

In 1988, the ABA formed a Task Force on Death Penalty Habeas Corpus (ABA Task Force), which undertook an intensive, year-long study of the process of review of capital convictions and sentences.8 The ABA Task Force formulated concrete recommendations that, if implemented, would enhance the efficiency and fairness of state and federal review procedures.9

Notwithstanding the enormous efforts of the ABA, the crisis in capital cases has only worsened, in substantial part because the ABA's recommendations largely have been ignored.10

As two scholars recently observed in the Harvard Law Review, "the Supreme Court's chosen path of constitutional regulation of the death penalty has been a disaster."11

U.S. Court of Appeals Judge Alex Kozinski recently described the current state of the Supreme Court's death penalty case law:

Assuaging death penalty opponents, the Court has devised a number of extraordinary safeguards applicable to capital cases; but responding to complaints that these procedures were used for obstruction and delay, it has also imposed various limitations and exceptions to these safeguards. This pull and tug has resulted in a procedural structure—what Justice Harry Blackmun called a "machinery of death"—that is remarkably time-consuming, painfully cumbersome and extremely expensive.12

Nor is the criminal justice system the only victim of this grotesquely inefficient and unjust “machinery of death.” As Judge Kozinski explained,

[F]ully 40 percent of the death sentences imposed since 1972 have been vacated, sometimes 5, 10 or 15 years after trial. One worries about the effect on the families of the victims, who have to endure the possibility—often the reality—of retrials, evidentiary hearings and last-minute stays of execution for years after the crime.13

Greatly exacerbating the situation is a chronic lack of lawyers willing to work on capital cases. Judge Kozinski observed, "the jurisprudence of death is so complex, so esoteric, so harrowing, this is the one area where there aren't nearly enough lawyers willing and able to handle all the current cases."14 The result is a "peculiar limbo."

[W]e have constructed a machine that is extremely expensive, chokes our legal institutions, visits repeated trauma on victims' families and ultimately produces nothing like the benefits we would expect from an effective system of capital punishment. This is surely the worst of all worlds.15

Prosecutors likewise have begun speaking out against our current system of capital punishment. At a recent ABA-sponsored program, Ernest Preate, Jr., former Attorney General for the Commonwealth of Pennsylvania, observed, "[I]n too many of our capital cases there is ineffective assistance of counsel on both sides."16 Attorney General Preate publicly endorsed capital resource centers for prosecutors and defense attorneys and the establishment of rigorous standards for trial and appellate counsel in capital cases.17

In another ABA-sponsored program, Andrew L. Sonner, the State's Attorney for Montgomery County, Maryland, who has prosecuted numerous capital cases, observed:

There is absolutely no value to the prosecution of having the death pen-
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, the Supreme Court would have indulged in Dickens’s [A] Christmas Carol 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.\textsuperscript{17}

In 1995, Robert M. Morgenthau, the Manhattan District Attorney, revealed “the dirty little secret [prosecutors] too often share only among themselves: The death penalty actually hinders the fight against crime.”\textsuperscript{18} This prominent prosecutor described the system of capital punishment in operation in the United States as follows:

Promoted by members of both political parties in response to an angry populace, capital punishment is a mirage that distracts society from more fruitful, less facile answers. It exacts a terrible price in dollars, lives and human decency. Rather than tamping down the flames of violence, it fuels them while draining millions of dollars from more promising efforts to restore safety to our lives.\textsuperscript{19}

Similarly, after New York reinstated capital punishment in 1995, the Bronx District Attorney, Robert Johnson, announced that he would not seek the death penalty, opting instead for life without parole. Johnson explained that as a young prosecutor he convicted a man of intentional murder, after utterly destroying the man’s alibi. Three witnesses identified the defendant but, after the conviction, the defendant’s brother confessed. The brother, knowing that the defendant was innocent, expected that the jury would acquit. Johnson explained his refusal to seek death in future cases: “What [appellate] courts look for is legal errors, and there were no legal errors in the case I tried.”\textsuperscript{20}

\textbf{B. The ABA Is Not Taking a Moral or Philosophical Position in Favor of or in Opposition to the Death Penalty}

Nothing in this Report and accompanying Resolution should be read to contravene the freedom of individual ABA members to take philosophical or moral positions in favor of or in opposition to capital punishment. Rather, as former ABA 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.”\textsuperscript{21}

\textbf{C. Nevertheless, the Failure of Capital Jurisdictions to Implement the Various ABA Policies Developed over the Past Twenty Years and the Consequent Erosion of Fairness in Capital Cases Compels the Conclusion That a Moratorium on Executions Should Be Imposed Until the ABA Policies Are Fully Implemented and Fairness Guarantees Are Restored}

The most frequent criticisms of the “day-to-day operation of the death penalty system” were recently catalogued as follows:

The process of selecting those offenders who will be put to death by the states has been described by one prosecutor as “random, chance, [a] throw of dice;” other observers refer to the system as “a sham,” “scandalous,” “shameful,” and “deplorable.” While elaborate procedures and rules peculiar to capital punishment have been developed to ensure that only those defendants “most deserving of death” are singled out for execution, in practice those who have been sentenced to death, as a class, are largely indistinguishable from convicted murderers who have been spared the ultimate punishment. As applied, these procedures have done too little to remove the influence of prejudice and caprice in decisions made by prosecutors, judges, and juries in capital cases.
Many attribute this failure to the pervasive influence of racism. Numerous empirical studies have linked sentencing patterns in death penalty cases with the racial characteristics of the defendant and the victim. Others point to the distorting effects of politics on a death penalty system that is administered at the local level by popularly-elected prosecutors and judges. The fear of voter backlash from an electorate that overwhelmingly supports the death penalty colors the way in which discretion is exercised by the central decision-makers in the capital punishment system. Still others, such as former Justice Harry Blackmun, have concluded that the problem is more fundamental: efforts to accommodate basic constitutional values such as consistency, reliability, and fairness in the context of capital punishment have spawned constitutional rules that cannot be reconciled with one another and cannot achieve their intended ends. This view maintains that even if the lingering influences of racism and politics could be wrenched from the system tomorrow, the system would still yield unacceptably arbitrary results.22

The trend away from fairness guarantees and due process protection in capital cases has not gone unnoticed by members of the Supreme Court. Significantly, former Supreme Court Justices Lewis Powell and Harry Blackmun — both of whom dissented in Furman, which invalidated the death penalty nationwide, and concurred in Gregg, which reinstated capital punishment four years later — ultimately have concluded that the systems of capital punishment in effect today serve no useful purpose and should be abolished.23

As noted above,24 the ABA has worked long and hard to improve the system of capital punishment in this country. The ABA believes that the policies and recommendations it has promulgated over the years must be fully implemented to minimize arbitrariness in capital sentencing and lead to more rational, more consistent, and ultimately more fair sentences in capital cases.25 Virtually all death penalty jurisdictions have ignored the ABA recommendations and policies. Although a few states may have followed some ABA recommendations, no state has implemented even most recommendations. To the contrary, as documented below,26 far from embracing the ABA’s recommendations and policies, most capital jurisdictions in fact have gone in the opposite direction.

D. The Constitutional Framework

1. The Constitutional Foundation of Modern Death Penalty Jurisprudence27

In 1972, the U.S. Supreme Court in Furman v. Georgia28 struck down all then-existing death penalty statutes essentially because these statutes gave the jury unbridled discretion to impose death or spare the life of the defendant. Four years later, in Gregg v. Georgia,29 the Court found constitutional certain newly enacted death penalty statutes that endeavored to narrow the class of persons subject to the death penalty and to guide the jury’s capital sentencing determination while at the same time allowing the jury the ability to take into consideration the unique characteristics of each defendant and each case. The constitutional provisions at issue in these and other death penalty cases decided during this period were: the due process and equal protection clauses of the Fifth and Fourteenth Amendments, and the Eighth Amendment’s prohibition against cruel and unusual punishment. Brief highlights of these key early Court decisions are provided immediately below.

2. Trop v. Dulles30

In 1944, Alfred L. Trop, a private in the United States Army, was convicted, sentenced and punished for wartime desertion. In addition, under a federal statute, Trop was stripped of his U.S. citizenship because of his conviction for desertion.31 Relying on the “principle of civilized treatment guaranteed by the Eighth Amendment,”32 the Supreme
Court, in a plurality opinion, stated, "the words of the [Eighth] Amendment are not precise and their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Interpreting the Eighth Amendment in accordance with "evolving standards of decency," the Court held that the "use of denationalization as a punishment is barred by the Eighth Amendment."

Since Trop was decided, the Court has recognized that the Eighth Amendment's guarantee against cruel and unusual punishment is not an immutable principle. Because the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," the theory of "original intent" has no application to the Cruel and Unusual Punishment Clause.

3. McGautha v. California

Dennis McGautha challenged his death sentence on Fourteenth Amendment grounds, arguing that where death was a possible sanction, due process required that the decisionmaker's discretion be guided by concrete standards. The Court not only rejected McGautha's Fourteenth Amendment challenge, but suggested that identifying standards to channel jury discretion in capital cases might well be impossible:

To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.

Notwithstanding the McGautha Court's categorical rejection of the Fourteenth Amendment claim, in the very next Term the Court considered a challenge to standardless sentencing discretion grounded on the Eighth Amendment.

4. Furman v. Georgia

Within a month of the McGautha decision, the Supreme Court granted certiorari in a group of three cases to decide whether "the imposition and carrying out of the death penalty [in these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." All three cases involved black defendants, two of whom—Lucious Jackson and Elmer Branch—received death sentences for raping white women. The third defendant, William Furman, received his death sentence for murder. In each case, the jury had complete, unguided discretion to impose a sentence of life imprisonment or death.

By a vote of five to four, the Supreme Court set aside all three death sentences in Furman v. Georgia. As a result of the decision, Jackson, Branch, Furman, and nearly 600 other condemned persons then incarcerated on "death rows" throughout the country avoided execution. In striking down the death penalty laws of thirty-nine states and various federal statutory provisions, the Court held that the imposition and infliction of the death penalty under arbitrarily and randomly administered systems in which juries are given unrestricted and unguided discretion to impose a sentence of life or death constitutes "cruel and unusual" punishment in violation of the Eighth and Fourteenth Amendments.

After Furman, a number of states, including Georgia, Florida, Texas, North Carolina, and Louisiana, revised their death penalty statutes in an effort to satisfy the requirements of Furman. In 1976, the Court addressed the constitutionality of these death penalty statutes in a group of five consolidated cases.

5. Gregg v. Georgia and the 1976 Cases

While holding that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an
arbitrary and capricious manner," the Court in Gregg v. Georgia\textsuperscript{44} and four companion cases\textsuperscript{45} concluded that the Eighth Amendment erected no \textit{per se} barrier to the punishment of death. The \textit{Gregg} Court found that the revised Georgia death penalty statute remedied the constitutional defects raised in \textit{Furman}. The new Georgia statute required specific findings as to the circumstances of the crime and the character of the defendant and provided a list of aggravating circumstances. The jury was not authorized to consider imposing a death sentence unless it found beyond a reasonable doubt that one of the statutory aggravating circumstances was present in the case. In addition, the statute provided for automatic review of a death sentence by the Georgia Supreme Court. That court was required to determine whether the sentence was influenced by passion, prejudice, or any other arbitrary factor, and whether the death sentence was "excessive or disproportionate to the penalty imposed in similar cases."\textsuperscript{46}

On the same day the Court issued its landmark \textit{Gregg} decision, the Court decided four companion cases addressing the constitutionality of post-\textit{Furman} death penalty statutes in Florida, Texas, North Carolina, and Louisiana: \textit{Proffitt v. Florida},\textsuperscript{47} \textit{Jurek v. Texas},\textsuperscript{48} \textit{Woodson v. North Carolina},\textsuperscript{49} and \textit{Roberts v. Louisiana.}\textsuperscript{50}

In \textit{Proffitt} and \textit{Jurek}, the Court found that the death penalty statutes of Florida and Texas provided sufficient procedural safeguards to withstand constitutional challenge. The Court rejected attacks on the Florida death penalty statute on the grounds that aggravating and mitigating circumstances were vague, overbroad, and imprecise. Justice Powell wrote, "[w]hile the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of \textit{Furman} are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition."\textsuperscript{51}

Texas' death penalty statute was markedly different from the Georgia and Florida statutes. Rather than using aggravating circumstances to narrow the class of death-eligible defendants, Texas simply identified five offenses punishable by death.\textsuperscript{52} If a defendant was found guilty of one of these five offenses, then the jury was required to answer three questions that will determine whether death is the appropriate penalty.\textsuperscript{55}

Justices Stewart, Powell and Stevens concluded that "each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating factors."\textsuperscript{54} Justice Stevens reasoned that, "in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed,"\textsuperscript{55} and "requires the sentencing authority to focus on the particularized nature of the crime."\textsuperscript{56}

Not all legislative attempts to cure the constitutional defects identified in \textit{Furman} were as successful as those in Georgia, Florida, and Texas. The Court struck down the mandatory death penalty statutes of North Carolina and Louisiana in \textit{Woodson v. North Carolina} and (Stanslaus) \textit{Roberts v. Louisiana.}\textsuperscript{58} In striking down mandatory death penalty statutes, the Court noted that mandatory death sentences had long been viewed with disfavor because such mandatory sentencing practices were perceived as "unduly harsh and unworkably rigid."\textsuperscript{59} In addition, the Court identified two other reasons to strike down the North Carolina statute. First, the mandatory sentencing procedure did not address "\textit{Furman}'s rejection of unbridled jury discretion in the imposition of capital sentences."\textsuperscript{60} "North Carolina's mandatory death penalty statute provides no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live.
and which shall die." Moreover, studies showed that jurors faced with mandatory death sentences were reluctant to return guilty verdicts because of the "enormity of the sentence automatically imposed."

The second reason for invalidating the North Carolina statute is that the mandatory sentencing procedure did not allow for "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." According to Justice Blackmun's dissenting opinion in Callins v. Collins:

There is a heightened need for fairness in the administration of death. This unique level of fairness is born of the appreciation that death truly is different from all other punishments a society inflicts upon its citizens. "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." Woodson, 428 U.S. at 305 (opinion of Stewart, Powell, and Stevens, JJ.). Because of the qualitative difference of the death penalty, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

In holding that Georgia's revised capital statute satisfied the concerns identified in Furman, the Gregg plurality recognized that "[t]here is no question that death as a punishment is unique in its severity and irrevocability. When a defendant's life is at stake, the Court has been particularly sensitive to ensure that every safeguard is observed." The "death-is-different" doctrine has been a basic tenet of capital jurisprudence since Gregg. As Justice Stevens observed in another case: "We must . . . be as sure as possible that novel procedural shortcuts have not permitted error of a constitutional magnitude to occur. For after all, death cases are indeed different in kind from all other litigation. The penalty, once imposed, is irrevocable." According to Justice Blackmun's dissenting opinion in Callins v. Collins:

E. Death is Different and Individualized Consideration

In reaching its decision in Woodson, the Court acknowledged the fundamental truth that "death is different." According to Woodson:

"The penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

In Woodson, a decision striking down mandatory death penalty statutes as unconstitutional, a plurality of the Court explained: "A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind."
the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Woodson, at 304. Thus, although individualized sentencing in capital cases was not considered essential at the time the Constitution was adopted, Woodson recognized that American standards of decency could no longer tolerate a capital sentencing process that failed to afford a defendant individualized consideration in the determination whether he or she should live or die.71

The requirement that sentencers give capital defendants individualized consideration is another bedrock feature of capital jurisprudence. The Court elaborated on the principle of individualized sentencing in Lockett v. Ohio.72 In Lockett, a plurality acknowledged that strict restraints on sentencer discretion are necessary to achieve the consistency and rationality promised in Furman, but held that, in the end, the sentencer must retain unbridled discretion to afford mercy. Any process or procedure that prevents the sentencer from considering "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death,"73 creates the constitutionally intolerable risk that "the death penalty will be imposed in spite of factors that may call for a less severe penalty."74 The Court's duty under the Constitution therefore is to "develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual."75 This Report concludes that judicial and legislative developments over the past twenty years have rendered existing systems of capital punishment inconsistent and arbitrary. Although the ABA has endorsed countless recommendations and resolutions designed to insure fairness, reliability, and efficiency in capital cases, these have largely been ignored.

II. The Death Penalty States and the Federal Government Have Largely Ignored the Critical Safeguards Contained in the Various ABA Recommendations and Resolutions Regarding Capital Punishment

Although a few states have followed some ABA policies, many have adopted none, and no jurisdiction has adopted all.

A. Competent and Adequately-Compensated Counsel Is Not Provided in Many Capital Cases and Guidelines for the Appointment and Performance of Counsel in Capital Cases Have Not Been Adopted in Most Jurisdictions.

1. The Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense.76

Perhaps more than any other constitutional guarantee, the Sixth Amendment right to counsel is of fundamental importance in capital cases. Although the Supreme Court has long interpreted the right to the assistance of counsel to include the right to the assistance of "effective" counsel, the Court has set the standard of effective representation shamefully low, particularly in capital cases.

Competent and adequately compensated counsel—from trial through post-conviction and habeas review—has been described as "the sine qua non of a just, effective, and efficient death penalty system."77 And, to ensure reliability and fairness, the ABA has adopted detailed policies that impose rigorous standards for counsel in capital cases.

2. The ABA Policies

In 1990, the ABA recommended that "competent and adequately compensated" counsel be provided "at all stages of capital...litigation."78 Also, the ABA urged capital jurisdictions to establish
organizations to “recruit, select, train, monitor, support and assist” attorneys who represent capital clients.

More than seven years ago, the ABA promulgated Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (Guidelines) and urged that all death penalty jurisdictions follow them. The Guidelines require appointment of at least two experienced attorneys at each stage of a capital case. Under the Guidelines, appointments in capital cases are to be made by a select committee whose mission is to identify and recruit lawyers with specific professional credentials, experience and skill. The Guidelines recognize that the practice of representing capital clients is “specialized” and that ordinary professional qualifications are inadequate in capital cases.

So that specialist attorneys in capital cases are permitted to provide adequate representation, the Guidelines require that counsel in capital cases be paid at a level that “reflects the extraordinary responsibilities inherent in death penalty litigation.” Further, the Guidelines insist that counsel receive the funding necessary for investigators, expert witnesses, and other support services.

Standard 4-1.2(c) of the ABA Standards for Criminal Justice explicitly recognizes the awesome responsibilities that attend capital representation:

Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused.

Nor has the ABA been alone in examining the critical problems regarding counsel in capital cases. An Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, formed by Chief Justice William Rehnquist and chaired by retired Justice Lewis F. Powell, identified a serious problem in satisfying the need for qualified counsel to represent inmates in collateral review. According to the Ad Hoc Committee:

When counsel are not involved in collateral proceedings from the start, both the prisoners and the courts are less able to ensure that all meritorious claims are addressed. The end result may be the belated entry of a lawyer in the case only under the pressure of a pending execution. This postponement of counseled presentation of claims to the eleventh hour increases the difficulty of ensuring both fairness and finality. In addition, the Committee recognized that capital habeas litigation is difficult and complicated.

The Committee’s report, as modified, urged states to provide indigent defendants with experienced criminal attorneys at trial, on direct appeal, and in post-conviction proceedings.


In Strickland v. Washington, the Supreme Court established an unduly burdensome two-prong test for determining whether a capital conviction or death sentence should be reversed. First, a defendant must show that counsel made errors “so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.” To satisfy the second prong, the defendant must show “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”

Thus, serious errors by counsel, even if professionally unreasonable, do not warrant setting aside a conviction unless the defendant also shows he was prejudiced by the error. Moreover, under Strickland, courts must apply a strong presumption of competency, and also must accord substantial deference to an attorney’s “tactical decisions.”
Remarkably, since Strickland, the Court has only increased the burdens on capital defendants who allege ineffective assistance of counsel.

Justice Marshall dissented in Strickland, complaining that "the performance standard adopted by the Court is . . . so malleable that, in practice, it will have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts."95 Justice Marshall further commented on Strickland's prejudice prong:

First, it is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer . . . .

Second and more fundamentally, the assumption on which the Court's holding rests is that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted. In my view, the guarantee also functions to ensure that convictions are obtained only through fundamentally fair procedures. . . . Every defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer. A proceeding in which the defendant does not receive meaningful assistance in meeting the forces of the State does not, in my opinion, constitute due process.94

A panel of the U.S. Court of Appeals for the Fifth Circuit has observed:

The Constitution, as interpreted by the courts, does not require that the accused, even in a capital case, be represented by able or effective counsel. It requires representation only by a lawyer who is not ineffective under the standard set by Strickland v. Washington. Proof that the lawyer was ineffective requires proof not only that the lawyer bungled but also that his errors likely affected the result. Ineffectiveness is not measured by the standards set by good lawyers but by the average—"reasonableness under prevailing professional norms"—and "judicial scrutiny of counsel's performance must be highly deferential." Consequently, accused persons who are represented by "not-legally-ineffective" lawyers may be condemned to die when the same accused, if represented by effective counsel, would receive at least the clemency of a life sentence.95

Many lawyers and judges agree that Strickland has proved to be a disaster.96 According to the vice-president of the Georgia Trial Lawyers Association, the standard for competence in Georgia can be measured by the "mirror test": "You put a mirror under the court-appointed attorney's nose, and if the mirror clouds up, that's adequate counsel."97 The 1982 capital trial of Jerry White in Orlando, Florida provides a graphic example of the "foggy mirror" test in action. Each morning before trial, the judge had the prosecutor and defense attorney Emmett Moran come to his chambers so that the state's attorney could check the defense attorney's breath for alcohol. No odor was detected. However, in an affidavit submitted during post-conviction proceedings, the defense investigator swore that he had seen Moran shoot up with cocaine during trial recesses and had also seen Moran use speed, alcohol, morphine, marijuana, and quaaludes after court recessed for the day. The trial judge ultimately found no "credible evidence" of intoxication and therefore held that Moran was not ineffective during trial. Five justices of the Florida Supreme Court agreed and upheld the conviction and death sentence.98

It is significant that the ABA promulgated the Guidelines after the Supreme Court decided Strickland. Indeed, the ABA has never accepted that the Strickland standard for ineffective assistance
of counsel is adequate to ensure fairness and reliability in capital cases.

Remarkably, since Strickland, the Court has only increased the burdens on capital defendants who allege ineffective assistance of counsel. In _Lockhart v. Fretwell_, the Court suggested that the prejudice prong of _Strickland_ may no longer be satisfied by a demonstration that counsel's errors undermine confidence in the outcome of the trial. Instead, capital defendants must now "point to some additional indicia" that counsel's errors rendered the trial "fundamentally unfair."100

4. State Court Judges Fail to Ensure that Capital Counsel Is Adequate

The death penalty and politics—local and national—are inseparable. This idea should surprise no one, given that the vast majority of judges who preside over capital cases must answer to the electorate, either through judicial elections or retention ballots.102 As the ABA's Commission on Professionalism concluded more than a decade ago, "judges are far less likely to... take tough action if they must run for reelection or retention every few years."103 According to Justice John Paul Stevens:

The "higher authority" to whom present-day capital judges may be "too responsive" is a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess fealty to the death penalty... The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III.104

Put somewhat more directly,

Judges have come under attack and have been removed from the bench for their decisions in capital cases—with perhaps the most notable examples in states with some of the largest death rows and where the death penalty has been a dominant political issue. Recent challenges to state court judges in both direct and retention elections have made it clear that unpopular decisions in capital cases, even when clearly compelled by law, may cost a judge her seat on the bench, or promotion to a higher court. This raises serious questions about the independence and integrity of the judiciary and the ability of judges to enforce the Bill of Rights and otherwise be fair and impartial in capital cases.105

The prevalence of this problem becomes apparent when one considers that judges in thirty-two of thirty-eight death penalty states are elected.106

The insidious influence of political pressures on capital cases is by no means a modern phenomenon. In the notorious "Scottsboro Boys" prosecution of the 1930s, a group of black defendants sentenced to death for rape in Scottsboro, Alabama had their convictions and sentences twice reversed by the U.S. Supreme Court.107 In 1933, Alabama Circuit Judge James Edwin Horton granted the defendants a new trial.108 The next year, Judge Horton was voted out of office, ending his judicial and political career.109

Contemporary examples abound.110 In California, a state with the largest death row in the nation, Governor George Deukmejian in 1986 publicly opposed three justices of the state supreme court who stood for retention due to their votes in capital cases.111 All three lost their seats following a campaign dominated by the death penalty; Governor Deukmejian appointed their replacements.112 During the past six years, the newly-constituted California Supreme Court has affirmed nearly ninety-seven percent of all capital cases it has reviewed.113 The literature is replete with comparable examples throughout the country.114

Of course, this is not to suggest that elected or retained judges universally merit reproach. To the contrary,
Capital cases put extraordinary pressures on all participants in the legal system. Even the most conscientious and independent judge faces an enormous challenge of reigning in the emotions that accompany a brutal crime and the loss of innocent life. If decisions about guilt and punishment are to be made fairly, objectively, and reliably, it is critical that judges be guided by the Constitution, not personal political considerations.\textsuperscript{115}

5. The Relationship Between Poverty and the Death Penalty

The ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases were designed in substantial part to remedy the situation, demonstrated in case after case, that poor people accused of capital crimes are frequently defended by lawyers who lack the skills, resources, and commitment required when a defendant's life is at stake.

Concurring in the Court's decision to strike down capital punishment in \textit{Furman v. Georgia}, Justice White concluded that under then-existing capital statutes, there was "no meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not."\textsuperscript{118} Recent scholarship has identified a troubling basis: It is not the facts of the crime, but the quality of legal representation, that distinguishes cases in which the death penalty is imposed from many similar cases in which it is not imposed.\textsuperscript{117}

\textbf{a. A Crisis of Counsel Appointed in Capital Cases}

Virtually all states that impose capital punishment have refused to adopt the ABA Guidelines. Many death penalty states have no working public defender systems whose resources might parallel the prosecutorial functions of the district attorneys' offices.\textsuperscript{118}

Some states simply assign lawyers at random from a general list. The result, more often than not, is that a capital defendant's life is entrusted to an under-qualified and overburdened lawyer, who may or may not have any experience with criminal cases.\textsuperscript{119} Some jurisdictions use "contract" systems, which typically channel indigent defense business to attorneys who agree to handle all the indigent defense work in a particular area for a flat fee. Contracts are often awarded to the lawyer—or group of lawyers—who bids the lowest.\textsuperscript{120} Contract lawyers typically are permitted to maintain private practices. Also, any money spent on investigation and experts reduces the fee that the contract attorneys earn.\textsuperscript{121} Still other states use public defender systems, which often employ remarkably dedicated attorneys who specialize in criminal law. Although in theory public defender systems may appear equipped to provide quality representation for indigent clients, overwhelming caseloads and inadequate funding frequently make effective representation impossible.\textsuperscript{122}

Systematic studies reveal the depths of the national crisis of counsel in capital cases. A comprehensive report, prepared for the State Bar of Texas, concluded that, contrary to the ABA policies on the death penalty, states typically do not use central appointing authorities to choose counsel in capital cases; states do not assign more than a single lawyer to represent a capital defendant; states fail to monitor the performance of assigned counsel in capital cases; states do not compensate appointed counsel adequately; and states fail to fully reimburse counsel for support services.\textsuperscript{123}

Numerous examples illustrate the inexperience of lawyers typically appointed to represent capital clients. In \textit{Tyler v. Kemp}\textsuperscript{124} and \textit{Paradis v. Arave},\textsuperscript{125} state trial judges assigned capital cases to young lawyers who had passed the bar only a few months earlier. Similarly, the lawyer appointed to defend his client's life in \textit{Bell v. Watkins}\textsuperscript{126} had never completed a criminal trial of any kind. And, in \textit{Leatherwood v. State},\textsuperscript{127} a third-year law student was assigned to handle the bulk of the capital trial.
Other cases demonstrate the rank incompetence that frequently pervades the defense in capital cases. For example, defense counsel in *Smith v. State* requested 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*, defense counsel limited his presentation of mitigating evidence to comply with a statute that had been held unconstitutional three years earlier—for the very reason that it restricted counsel's ability to develop and present mitigating evidence. And in *Ross v. Kemp*—a rare case in which a capital defendant had two attorneys—one attorney presented a weak alibi theory, while the second attorney advanced a mental incompetency defense that necessarily conceded that the defendant had participated in the offense.

Equally tragic were the efforts expended by defense counsel in *Romero v. Lynaugh*. There, the defense lawyer refused to present any evidence at all during the penalty phase of a capital case and then had this (and only this) to say by way of closing argument: "You are an extremely intelligent jury. You've got this man's life in your hands. You can take it or not. That's all I have to say." The jury, of course, sentenced the defendant to death. Finally, in *Young v. Kemp*, defense counsel was so dependent on drugs that he offered a mere semblance of a defense on behalf of his client. Although the client was sentenced to death, he encountered his defense lawyer a few months later. The two met in the prison yard after the former defense attorney was convicted and sentenced on state and federal drug charges.

Counsel on direct appeal can likewise provide grossly inadequate assistance and escape a finding that they are ineffective. Death row inmates on direct appeal have received supposedly effective assistance of counsel from attorneys who filed no brief whatsoever; filed a five-page brief after being threatened with sanctions; failed to appear for oral argument; and failed to comply with a court's request for a supplemental brief.

**b. Orenthal James Simpson and Other Examples**

That competent counsel literally make the difference between life and death in capital cases is a point that was made with remarkable clarity when Los Angeles District Attorney Gil Garcetti decided *not to even seek the death penalty* for O.J. Simpson, whom Garcetti's office charged with two particularly vicious capital murders. Although Simpson stood accused of the brutal slashing deaths of his former wife, Nicole Brown Simpson, and her friend, Ronald Goldman, Simpson's wealth—and consequently his ability to hire a formidable legal team—spared him from having to face even the possibility of death under circumstances in which a poor person would likely be quickly convicted, sentenced to death, and shipped to San Quentin to await execution.

The Simpson case is a particularly dangerous model, however. Because of the exhaustive media coverage of the trial and the great latitude afforded Simpson's lawyers by Judge Lance Ito, many who watched may wrongly assume that the unprecedented efforts of Simpson's defense team replicate the defenses mounted by underpaid, court-appointed attorneys who are assigned to represent indigent defendants. During an ABA program co-sponsored by the Association of the Bar of the City of New York, one veteran capital litigator observed that the preliminary hearing in the Simpson case lasted longer than most capital trials in Alabama, Arkansas, Georgia, Louisiana, and Mississippi.

For example, the trial in Georgia of David Peek started one morning at about 9:00 a.m., the jury was picked by about 11:00 a.m., the guilt phase evidence was all in by 4:30 p.m., and the jury went out. At about midnight, with the jury deadlocked, the foreman said...
that if the court would just remove one of the jurors, that would probably improve the chances of reaching a verdict. The court-appointed defense lawyer agreed to that, and the juror was replaced. Three minutes later, the jury did reach a verdict—of guilt. At 1:30 a.m., the penalty phase of the trial started, and by 2:30 a.m., David Peek had been sentenced to death. His whole trial took one day.

In another Georgia case, Tony Amadeo was one of three people tried on capital charges in a single week in Putnam County, Georgia. Tony’s trial lasted two days; one codefendant’s trial lasted two days; and the last case was tried on Friday. These three death penalty cases involving three young men from the Marines were disposed of within a single week. The same lawyers represented the three defendants in those successive trials and received the fee payment that was in place in that district at that time: $2,500, plus $50 for each motion you filed, up to five motions. That was the limit. In each of the three cases, five motions were filed. So, the lawyers got the full fee available to them.

One of the things the Simpson case has done is to educate people about the adversary system and how it might really work, including the extensive use of experts. Recently, the Philadelphia Inquirer did a study of twenty capital cases from Philadelphia, all of which went to death penalty verdicts, and found that there had been experts in only two of the cases. Both experts were psychologists. One was paid $600 and the other $500. What I see so much more often in southern capital cases is that the defense hires no expert at all.

At one point in the O.J. Simpson case, there was an 800 number you could call to provide evidence, including information about whomever you thought might have done the crime. The defense had investigators who went out and pursued those leads. In contrast, the Philadelphia Inquirer study found that in only eight of the twenty death penalty cases examined had there even been one defense investigator, and those investigators were paid an average of $605. You don’t, in a complex homicide case, get a great deal of investigation done for that amount of money.

One of my clients, Darrell Grayson, was sentenced to death in Shelby County, Alabama, in a case where his sole lawyer was paid a flat rate of $1,000 and was given no money for any expert or any investigator. The lawyer testified at one point that he had a choice between: (a) closing down his practice and devoting everything to this case and not being able to feed his family or keep his mortgage paid; and (b) just simply showing up for trial and trying the case. He picked the latter, for better or for worse—worse for Darrell Grayson.

O.J. Simpson has Alan Dershowitz and Gerald Uelmen, both esteemed law professors who are providing assistance with regard to other legal issues in the case. Yet, one lawyer who has tried a number of Georgia death penalty cases was asked recently to name all the criminal law decisions from any court that he could recall. He thought about it for awhile and then said, “Well, everybody knows the Miranda decision.” Then he thought a little longer and said, “And then there’s the Dred Scott decision.” Those were the only two criminal cases that he could name. Of course, Dred Scott is not a criminal case.

Larry Heath, a client of mine who was executed two years ago, was represented in the Alabama Supreme Court by a lawyer appointed by Judge Johnson, a local judge. The appellate brief was one page long. It cited only one case—one which went against Heath’s position. The brief had more typographical errors than citations to authority. The lawyer did not even show up for the oral argument in this death penalty case. One would think that any court concerned about justice would have stopped at that point and said, “We need to have the issues briefed. We can’t do our job as a court.” But that did not happen. The Alabama Supreme Court ruled on the one issue presented to it. I guess it read the one case cited in the brief and affirmed the conviction and death sentence. It was
not hard for the State to prevail later in the federal proceedings. As a result Larry Heath was executed.

A federal district court in Georgia upheld Wiley Dobbs' death sentence. As we see so often in death penalty cases, Wiley was an African-American man charged with a crime against a white person. He was tried in Georgia. He was represented by a lawyer who admitted quite candidly in post-conviction testimony that he did not like African-Americans and who thought that when you hire an African-American you do so with the knowledge he will steal something. He described Chattanooga as a "black boy jungle." He said blacks make good basketball players but can't be teachers. This was the only lawyer that Wiley Dobbs had. During the sentencing phase of the trial, the lawyer basically showed up, listened and then read from Justice Brennan's concurring opinion in Furman v. Georgia as his closing argument.

The federal district judge in Dobbs' case has ruled that the lawyer's representation of a poor person facing the death penalty in Georgia was sufficient and that the lawyer's racism was irrelevant. That ruling is hard for me to understand because presenting the penalty phase of a capital trial involves presenting the life and background of the defendant—who he is, where he came from and how he got there. How can you do that if you don't associate with, or deal with, or like, or understand, or empathize with people of other races? But the thing that really struck me about this case is that you don't really have to be a lawyer to do what the defense counsel did in that case. Anybody with a fifth grade education could show up and hear the trial and read Justice Brennan's concurring opinion. And we now have a ruling that as a matter of constitutional law, that's all the Sixth Amendment guarantees [as representation] for a poor person facing the death penalty.

I look at the size of the O.J. Simpson defense team, all those lawyers and resources, and I think about another client, Judy Haney. Unlike Simpson, she was not the alleged abuser; she was the abused. She endured fifteen years of abuse and finally did what she thought she had to do and had her husband killed. She was represented by two court-appointed lawyers in Talladega, Alabama. One lawyer was so drunk during the trial that the judge had to stop the trial for a day and send him to the Talladega jail to sober up. The next morning, the sheriff produced both the lawyer and Ms. Haney from the jail and resumed the trial, at which she was sentenced to death. The other lawyer who represented her, Bill Denson, was recently disciplined by the Alabama Bar because he missed the statute of limitations in two different workmen's compensation cases. So Ms. Haney's life hinged on the representation of two lawyers: one who was too drunk to go on during the trial and the other who was too incompetent to handle a workmen's compensation case.

There's an old adage, "You get what you pay for." I read a piece in The New York Times about the Simpson case, in which legal experts were asked how much money Simpson would pay for his legal defense. The answer was "All he's got," which was a substantial amount. It is far more common, of course, for poor people to receive only as much justice as they can afford, rather than the quality representation to which they would be entitled if the ABA Guidelines had actually been adopted anywhere.

6. The Importance of Quality Legal Representation: Nelson v. Zant (15 to $20 per hour) and Martinez-Macias v. Collins ($11.84 per hour)

In a recent Yale Law Journal article, the critical importance in capital cases of quality legal representation—and the failure of Strickland to guarantee quality representation—was illustrated by two examples:

Quality legal representation... made a difference for Gary Nelson and Fre-
derico Martinez-Macias, but they did not receive it until years after they were wrongly convicted and sentenced to death. Nelson was represented at his capital trial in Georgia in 1980 by a sole practitioner who had never tried a capital case. The court-appointed lawyer, who was struggling with financial problems and a divorce, was paid at a rate of only $15 to $20 per hour. His request for co-counsel was denied. The case against Nelson was entirely circumstantial, based on questionable scientific evidence, including the opinion of a prosecution expert that a hair found on the victim's body could have come from Nelson. Nevertheless, the appointed lawyer was not provided funds for an investigator and, knowing a request would be denied, did not seek funds for an expert. Counsel's closing argument was only 255 words long. The lawyer was later disbarred for other reasons. Nelson had the good fortune to be represented pro bono in post-conviction proceedings by lawyers willing to spend their own money to investigate Nelson's case. They discovered that the hair found on the victim's body, which the prosecution expert had linked to Nelson, lacked sufficient characteristics for microscopic comparison. Indeed, they found that the Federal Bureau of Investigation had previously examined the hair and found that it could not validly be compared. As a result of such inquiry, Gary Nelson was released after eleven years on death row.

Frederico Martinez-Macias was represented at his capital trial in El Paso, Texas, by a court-appointed attorney paid only $11.84 per hour. Counsel failed to present an available alibi witness, relied upon an incorrect assumption about a key evidentiary point without doing the research that would have corrected his erroneous view of the law, and failed to interview and present witnesses who could have testified in rebuttal of the prosecutor's case. Martinez-Macias was sentenced to death.

Martinez-Macias received competent representation for the first time when a Washington, D.C. firm took his case pro bono. After a full investigation and development of facts regarding his innocence, Martinez-Macias won federal habeas corpus relief. An El Paso grand jury refused to re-indict him and he was released after nine years on death row.

Despite his woefully inadequate performance, Nelson's trial attorney, though eventually disbarred, was not found to be ineffective. Conversely, Macias' trial attorney had spent more than ten years as a district attorney, had prosecuted seven or eight capital murder cases, and was partner in a prestigious El Paso law firm at the time of his appointment to represent Macias. In finding Macias' trial attorney ineffective, a federal magistrate noted that the attorney "is, and [at the time of Macias' trial] was, one of the best attorneys in El Paso. Thus, the trite-but-true lesson is that 'it can happen to the best of us.' "

7. "Effective," but Fatal, Counsel

Myriad cases in which defendants have been executed confirm that Strickland's minimal standard for attorney competence in capital cases is a woeful failure. Demonstrable errors by counsel, though falling short of ineffective assistance, repeatedly have been shown to have had fatal consequences. The case of John Eldon Smith, the first condemned person to suffer death in Georgia after Gregg, though illustrative, is not exceptional. Smith was tried before and sentenced to death by an unconstitutionally composed jury, from which women had been excluded unlawfully. Within weeks of Smith's conviction and death sentence, his common-law wife and codefendant, Rebecca Machetti, was tried separately before a jury that suffered the same constitutional defect. She, too, was sentenced to death.

Machetti's lawyers challenged the composition of her jury in state post-conviction proceedings. Because Smith's lawyers were unaware of a dispositive U.S. Supreme Court decision, they did not challenge the jury's composition in state
post-conviction proceedings. The Eleventh Circuit Court of Appeals ordered a new trial for Machetti, whose lawyers had managed to preserve the issue. Following retrial, a jury that fairly represented the community sentenced Machetti to life. Smith was less fortunate. Because his lawyers had failed to preserve the issue by objecting in state post-conviction proceedings, the Eleventh Circuit refused to consider the identical issue in his case—even though that court had already granted relief to Machetti—and Smith was electrocuted soon thereafter. As one seasoned capital defense attorney observed, “If Machetti had been represented by Smith’s lawyers and vice versa in state court, Machetti would have been executed and Smith would have obtained federal habeas corpus relief. This is not how a principled selection process should work.”

Similarly, in Dugger v. Adams, the Court held that Aubrey Adams was disentitled to relief because his trial lawyer failed to object to jury instructions that unconstitutionally reduced the jury’s sense of responsibility for its decision. An Eleventh Circuit panel had unanimously held that Adams had been unconstitutionally sentenced to die because of those instructions. Nonetheless, the Supreme Court’s five-to-four decision denying relief held that the mistake of Adams’ trial attorney was fatal to his ability to raise that constitutional claim, in part because counsel’s negligence did not constitute ineffective assistance of counsel. Adams was electrocuted in Florida on May 4, 1989.

2. No Constitutional Right to Direct Appeal

Since 1894, the Supreme Court has uniformly held that a state is not constitutionally required to provide appellate review of criminal convictions. McKane v. Durston left little room to argue that this general rule should be modified in capital cases under the Court’s “death is different” jurisprudence. According to McKane:

An appeal from a judgment of conviction is not a matter of absolute right, independent of [state] constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common-law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review.

Thus, the right to appeal a criminal conviction, whether state or federal, exists purely as a matter of legislative grace. Nonetheless, all states, as well as the federal system, provide some mechanism for review of criminal convictions. Most states and the federal system supply a statutory right to appellate review. Several states simply provide the oppor-
tunity for appellate review at the discretion of the state's highest court.

3. Constitutional Protection of Statutory Right

Once the right to appeal is granted, however, constitutional protections attach. For example, states that choose to provide an appeal are prohibited from imposing "unnecessary impediments" to the exercise of that right.\textsuperscript{164} Thus, the Court has held that due process was violated where a defendant who successfully appealed his conviction was subsequently reconvicted and received a greater punishment than originally imposed.\textsuperscript{165} To punish more severely, and overcome a "presumption of vindictiveness," the court must provide a reasonable explanation, on the record, for increasing the sentence. Similarly, due process may be violated where a prosecutor decides to increase the charge against a defendant who successfully appeals her conviction on a lesser charge. Again, the key is vindictive motivation and the concern is that prosecutors not be allowed to "up the ante" to discourage defendants from exercising their appeal rights.\textsuperscript{166}

Equal protection guarantees also safeguard the right to appeal, once granted. Therefore, if a state decides to provide a right to appeal, it may not condition the exercise of that right in a way that discriminates against indigent defendants. For example, the Court in \textit{Griffin v. Illinois}\textsuperscript{167} held that due process and equal protection were violated when a state that conditioned appellate review on defendant's presentation of a trial record refused to provide an indigent defendant with a free trial transcript.

4. Right to Counsel on Direct Appeal

The Sixth Amendment by its terms does not confer a right to counsel on appeal. That amendment merely guarantees a person the assistance of counsel "for his defence" in "criminal prosecutions."\textsuperscript{168} Once convicted and sentenced, a defendant's prosecution is completed. Nonetheless, drawing upon the equal protection and due process guarantees of the Fourteenth Amendment, the Court has held that a state must provide counsel for an indigent's first statutory appeal as of right.\textsuperscript{169} Therefore, even though a state is not required to provide a right to appeal, when it does so it undertakes the additional obligation of providing counsel to indigents.

Where a constitutional right to counsel on appeal exists, counsel must be effective.\textsuperscript{170} Of course, effectiveness is judged under the woefully inadequate standard of \textit{Strickland v. Washington}.\textsuperscript{171}

5. No Right to Counsel on Certiorari or in State or Federal Post-Conviction Proceedings

The importance of post-conviction proceedings cannot be overstated, particularly in capital cases. Insofar as many capital defendants receive inadequate—if not ineffective—counsel at trial and on direct appeal, state post-conviction proceedings may provide the first real opportunity for a defendant to establish innocence or prove constitutional errors that infected the earlier proceedings.\textsuperscript{172}

In \textit{Ross v. Moffitt},\textsuperscript{173} the Court refused to extend the principles of \textit{Griffin} and \textit{Douglas} to require appointed counsel to assist indigent defendants in their second, discretionary state appeals and in preparing petitions for certiorari to the U.S. Supreme Court. Similarly, the Court, in \textit{Pennsylvania v. Finley},\textsuperscript{174} held that there is no right to appointed counsel in state post-conviction proceedings. The majority stated:

Post-conviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature. It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction. States have no obligation to provide this avenue of relief, and when they do, the
Fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well.\textsuperscript{175}

*Finley* was not a capital case but *Murray v. Giarratano*\textsuperscript{176} was. In *Giarratano*, a plurality held that *Finley* should apply no differently in capital cases than in non-capital cases. The *Giarratano* Court reiterated that there is no right to appointed counsel in state post-conviction proceedings, even those brought by capital defendants.\textsuperscript{177} The ABA filed an amicus brief in *Giarratano*, urging that states provide funding for the representation of death row inmates in post-conviction proceedings.\textsuperscript{178}

According to one scholar, because the Constitution does not require—and many states do not provide—counsel to capital inmates beyond direct appeal, "the most significant role played by state post-conviction proceedings in the administration of the death penalty is the additional opportunities they provide for forfeiting substantive constitutional claims."\textsuperscript{179} Lawyerless death row inmates who fail to raise meritorious claims in state post-conviction forfeit the opportunity to have those issues reviewed by federal courts during habeas proceedings.\textsuperscript{180} Death row inmates fortunate enough to have counsel during state post-conviction proceedings are entirely at the mercy of these attorneys. In the event post-conviction attorneys render inadequate or ineffective assistance, causing irreparable harm to their clients' cases, there is no remedy. In *Coleman v. Thompson*,\textsuperscript{181} the Court rejected a claim that attorney error in failing to file a state habeas appeal on time constituted "cause" that should excuse petitioner's procedural default. Earlier, the Court had held that attorney error can be "cause" only if it constitutes ineffective assistance of counsel violative of the Sixth Amendment. Because there is no constitutional right to an attorney in state post-conviction proceedings, there can be no claim of constitutionally ineffective assistance of counsel in those proceedings.

Thus far the Supreme Court has not directly addressed the issue of whether a death row inmate has a constitutional right to appointed counsel during federal habeas corpus proceedings. In all likelihood, the Court would draw upon *Moffitt, Finley*, and *Giarratano* and hold that no such constitutional right exists. Lower federal courts have held that the Constitution does not provide the right to counsel in federal habeas corpus proceedings.\textsuperscript{182} Nonetheless, capital defendants currently do have a statutory right to the assistance of counsel in federal habeas corpus proceedings.\textsuperscript{183}

6. Defunding of the Death Penalty Resource Centers

One critical recommendation, issued by the ABA Task Force, is that death penalty jurisdictions "should establish and fund organizations to recruit, select, train, monitor, support, and assist attorneys involved at all stages of capital litigation and, if necessary, to participate in the trial of such cases."\textsuperscript{184} Virtually nothing has been done to implement this recommendation at trial and on direct appeal. However, in 1988, acting under the authority of the Criminal Justice Act,\textsuperscript{185} the federal judiciary established twenty post-conviction defender organizations (PCDOs) to help alleviate the crisis in counsel facing capital inmates in state post-conviction and federal habeas corpus proceedings.\textsuperscript{186}

The PCDOs, also known as Resource Centers, were extremely effective. Chief Judge Tjoflat of the United States Court of Appeals for the Eleventh Circuit, testifying before the ABA Task Force, called the Resource Centers "indispensable."\textsuperscript{187} Similarly, Judge Arthur L. Alarcon of the Court of Appeals for the Ninth Circuit, wrote that these organizations were "critical" to the efficient processing of capital cases.\textsuperscript{188} The Cox Subcommittee on Death Penalty Representation described
the work of the Resource Centers as follows:

Resource centers 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 resource center attorneys 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 resource center or similar organization. State and federal judges agreed that resource center assistance was critical to the recruitment of private attorneys to represent death sentenced inmates. Furthermore, resource centers 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. Resource centers can also enhance the quality of representation by providing continuity of counsel over the course of the case.189

Although the full Judicial Conference subcommittee found that PCDOs facilitated the provision of counsel to capital inmates, "enhanced the quality of representation and—by offering expert advice and assistance—encouraged private counsel to provide capital representation . . . the 104th Congress decided to kill them."190

Supreme Court Justices, lower federal court judges, state judiciaries, state bar associations, and the ABA spoke out in support of the Resource Centers.191 Indeed, former ABA President George E. Bushell publicly denounced the effort to defund the Resource Centers.192 Nonetheless, the 104th Congress defunded them all.193

If Congress had hoped to save money by defunding the Resource Centers, it is likely to be disappointed. The average salary of a PDCO staff attorney was $30,000 per year, which translates to an average hourly wage of $55. Court-appointed private attorneys in federal habeas corpus cases earn an average hourly wage of $138.194 Richard A. Arnold, Chief Judge of the United States Court of Appeals for the Eighth Circuit and head of the budget committee of the Judicial Conference of the United States, has put the increased cost in perspective. According to Chief Judge Arnold's estimates, the cost of representing death row inmates without PCDOs will skyrocket in fiscal 1996, increasing somewhere between 75 and 158 percent. Whereas PCDOs cost taxpayers $21.2 million, representation of death row inmates without PCDOs will require between $37.2 and $51.1 million.195

Economic projections capture only a fraction of the costly consequences of defunding. Earlier this year, a report of the Bar of the City of New York assessed the likely impact of Congress' refusal to fund PCDOs:

The withdrawal of PCDO funding could not have come at a worse time. At the creation of the PCDOs in 1988, the death row population was 2,124. Seven years later, the death row population has increased by more than 43% to more than 3,040. More than three-quarters of death row inmates' cases have yet to reach the federal courts. There, and in the state courts, new confusion and greater log jams will follow PDCO funding.196

C. Far From Embracing the Recommendations of the ABA, the Supreme Court Has Pushed Capital Habeas Jurisprudence in the Opposite Direction and Congress Has Eviscerated the Great Writ, Ensuring Less Fairness and Heightening the Risk of Error in Capital Cases

As detailed below, the ABA in recent years has devoted enormous resources to studying habeas corpus in death penalty cases. No other organization has monitored habeas corpus more closely, developed greater expertise about the
strengths and weaknesses of habeas corpus, or offered more detailed recommendations for habeas reform.

In 1981, the ABA publicly opposed three bills then pending in Congress that would have drastically restricted the ability of federal courts to adjudicate claims in habeas corpus. At the same time, the ABA proposed alternative habeas reforms, designed to expedite habeas litigation, while acknowledging the authority and responsibility of federal courts to exercise independent judgment on the merits of constitutional claims.

In 1988, an ABA Task Force began a year-long project of gathering information from judges, prosecutors, and defense attorneys on how to improve a system virtually everyone agreed was unsatisfactory. In a comprehensive report, the Task Force concluded that “the post-conviction process of reviewing capital convictions and sentences is, on the one hand, too long and too slow and, on the other hand, susceptible to unfair outcomes due to the inadequate presentation of constitutional issues.” Accordingly, the Task Force proposed substituting a new process that would “achieve greater fairness and facilitate rational review.” The ABA endorsed this new process and adopted the set of sixteen recommendations contained in the Task Force report.

Far from embracing the recommendations of the ABA Task Force, capital jurisdictions have essentially ignored them. Worse, recent Supreme Court decisions have pushed the law further in the opposite direction. There is no reason to believe that the situation will improve. To the contrary, recent legislation is certain to make matters significantly worse.

1. Overview of The Great Writ

In 1996, Congress gutted the writ of habeas corpus by placing limitations on the remedy that sweep even further than the rigid restrictions adopted by the Supreme Court during the past few years.

The writ of habeas corpus traces its roots to England and entered the fabric of American law during the colonial period. The Supreme Court has recognized “the extraordinary prestige of the Great Writ,” which Blackstone described as “the most celebrated writ in the English law.”

Article I, Section 9 of the Constitution reads: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” Habeas corpus derives its name from Latin and means “have the body.”

As initially developed sometime before the thirteenth century, the writ was a form of mesne process by which courts compelled the attendance of parties whose presence would facilitate their proceedings. It was not until the mid-fourteenth century that it came to be used as an independent proceeding designed to challenge illegal detention. The subsequent characterization of habeas corpus as the Great Writ of Liberty—the alleged procedural underpinning of the guarantees of the Magna Carta—stemmed primarily from battles fought in establishing its effectiveness against imprisonment by the Crown without judicial authorization.

In the United States, the very first Congress expressly included the writ of habeas corpus in the first Judiciary Act, passed in 1789. According to that Act:

[T]he several courts of the United States shall have the power to issue writs of habeas corpus which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either the justices of the Supreme Court, as well as judges of the District Courts, shall have power to grant writs of habeas corpus for the purpose of inquiry into the cause of commitment.

Originally, the writ only extended to federal prisoners: those in custody “un-
der or by color of the authority of the United States." In *Ex Parte Dorr*, the Supreme Court held that the common law writ of habeas corpus did not extend to state prisoners. In 1867—the year the Fourteenth Amendment was adopted—Congress passed a new Judiciary Act. Its provisions allowed state prisoners "in custody in violation of the Constitution or laws of the United States" to challenge their confinement in federal court. *Ex Parte Dorr* was thus overruled.

Prior to 1915, courts limited the writ's availability by restricting its use to state prisoners who had been sentenced by a court lacking proper jurisdiction. However, in *Frank v. Mangum*, the Court took a more expansive approach to the writ:

*Frank v. Mangum*, the Supreme Court's first major twentieth century habeas corpus decision, held that the habeas remedy should be provided whenever the state, "supplying the corrective process, . . . deprives the accused of life or liberty without due process of law." If the state did not provide an effective remedy to vindicate federal constitutional rights, the federal courts had jurisdiction to hear habeas petitions. Nearly forty years later, in *Brown v. Allen*, the Court made an even more significant pronouncement, holding that, assuming state remedies have been exhausted, a state prisoner can petition a federal court for adjudication of a constitutional claim even when the state corrective process is adequate.

From *Brown* until the 1970s, the Court continued to support an expansive view of the writ, to the point where it became available to virtually any state prisoner with a constitutional claim who had not deliberately bypassed the state corrective process. But since the mid-1970s, the Court, while not overturning *Brown*, has moved from heavy reliance on habeas corpus as a means of reviewing state court decisions to a preference for state resolution of most constitutional conflicts arising in criminal cases. . . .

The Court-led retreat from an expansive view of the writ continues to generate significant debate. As a practical matter, this retreat has had an impact in two areas: first, the type of substantive claim a state criminal defendant may bring in federal court; and second, the extent to which habeas relief may be foreclosed due to a criminal defendant's failure to adequately litigate his claims in state court or comply with other procedural requirements.

The retreat from an expansive view of the writ is a result of at least three factors. First, the Supreme Court expresses greater faith in the capabilities of state courts. Second, the Supreme Court hopes to promote comity between the federal and state systems by showing greater respect for, and thus increased deference to, the decisions of state courts. Finally, and perhaps most important, the Court repeatedly emphasizes the need for finality in the judicial process and the burden that habeas petitions place on federal courts. According to a majority opinion authored by Justice Anthony Kennedy,

> Finality has a special importance in the context of a federal attack on a state conviction. Reexamination of state convictions on federal habeas "frustrate[s] . . . 'both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.' " Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them.

> Habeas review extracts further costs. Federal collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes.

In this regard, from time to time, various Justices have expressed a desire to shorten the appeals process for death row inmates and to increase the pace of
executions, in hopes of achieving some deterrent effect.

2. Forty Percent Reversal Rate in Capital Cases

More than forty years ago, Justice Jackson complained about the "flood" of "stale, frivolous and repetitious [habeas] petitions."219 Justice Jackson wrote,

It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.220

Contrary to Justice Jackson’s assessment, meritorious habeas petitions are anything but “occasional,” particularly in capital cases. Recently, a Supreme Court justice described the error rate in state capital cases as “staggering.”221 Forty-six percent of state capital cases reviewed in federal habeas corpus between 1976 and 1991 were found to contain harmful constitutional error.222 This alarming rate has only decreased slightly, and has hovered at around forty percent for the past several years.223 And, of course, the forty percent reversal rate includes at least some persons condemned to die who were later determined to be actually innocent.224

Nor can the federal constitutional violations that led the surprisingly high success rate for death row inmates be fairly characterized as “technicalities.”225 Here are some examples:

* A mentally deficient man gave the police two vastly different statements during forty-two hours of uncounseled questioning. The later of the two confessions used words beyond the defendant’s capability and, unlike the first confession, distinctly recited facts that qualified the defendant for the death penalty. The court noted that the interrogators’ zealous intent to secure a statement that would qualify the defendant for the death penalty, even though the previous statement was sufficient to convict of the crime accused, and the absence of any indication that the defendant was made aware of the significance of the changes in the statement, created a suggestive environment that rendered the second statement involuntary. [Jurek v. Estelle, 623 F.2d 929 (5th Cir. 1980) (en banc), cert. denied, 450 U.S. 1001 (1981).]

* The grand jury that indicted the defendant was selected in a process that systematically excluded African Americans. [Vasquez v. Hillery, 474 U.S. 254 (1986).]

* The prosecution knowingly presented misleading evidence by using the same expert witness to testify at the defendant’s trial that he must have been the sole triggerman, when that expert had previously testified at the codefendant’s trial that the codefendant must have been the sole triggerman. [Troedel v. Dugger, 828 F.2d 670 (11th Cir. 1987), aff’g 667 F. Supp. 1456 (S.D. Fla. 1986).]

* The prosecution withheld its most crucial witness’ prior statement, which corroborated evidence favorable to the defendant and would have been material in challenging the witness’ trial testimony. [Carter v. Rafferty, 826 F.2d 1299 (3d Cir. 1987), cert. denied, 484 U.S. 1011 (1988) (jury sentenced defendant to life on three first degree murder charges).]

* The prosecutor withheld investigative reports containing substantial evidence indicating that someone other than the defendant may have committed the murder. [Bowen v. Maynard, 799 F.2d 593 (10th Cir.), cert. denied, 479 U.S. 962 (1986).]

* The prosecutor deliberately withheld the fact that his chief witness had received a deal for his trial testimony, and improperly misled the jury by stating in his closing argument that the absence of such a deal favorably reflected upon the veracity of the witness. [Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1986).]

Forty-six percent of state capital cases reviewed in federal habeas corpus between 1976 and 1991 were found to contain harmful constitutional error.
The prosecutor withheld investigative reports containing substantial evidence indicating that someone other than the defendant may have committed the murder.

* The prosecutor suppressed evidence showing that the defendant did not commit the killing. [Chaney v. Brown, 730 F.2d 1384 (10th Cir.), cert. denied, 469 U.S. 1090 (1984).]

* The prosecutor inaccurately told the jury that a verdict of death would not be final because the appellate courts would correct any mistakes it made. [Wheat v. Thigpen, 793 F.2d 621, 624-29 (5th Cir. 1986), cert. denied, 480 U.S. 930 (1987).]

* The prosecutor based his argument in favor of a death sentence on prior felony convictions that he knew, although stipulated to by defense counsel, did not exist. [Lewis v. Lane, 832 F.2d 1446 (7th Cir. 1987), cert. denied, 488 U.S. 829 (1988).]

* The defendant was insane at the time of the trial and thus was not competent to assist his attorney. [Wallace v. Kemp, 757 F.2d 1102 (11th Cir. 1985).]

* The defendant's attorney failed to inform the jury (which convicted and sentenced the defendant to death) that the State's only witness—the admitted killer, who testified in return for a lesser sentence—did not link the defendant to the murder in his detailed confession to police. [Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986).]

* The defendant was sentenced to death by a jury that had been unconstitutionally instructed in a way that prevented it from considering the defendant's mental retardation as a factor that would support a sentence other than death. [Penry v. Lynaugh, 492 U.S. 302 (1989).]

* The jury was unconstitutionally instructed in a way that prevented it from considering the defendant's brain damage, his full cooperation with the police, or his favorable prospect for rehabilitation as mitigating factors. [Hitchcock v. Dugger, 481 U.S. 393 (1987).]

* Defense counsel filed no pretrial motions, did not try to locate any defense witnesses, did not interview the defendant's family or the State's witnesses, did not visit the crime scene, failed to use possibly exculpatory evidence available from the State's scientific tests, and failed to seek a new trial after evidence emerged that the victims were alive after the last time that the defendant could have been in contact with them. [House v. Balkcom, 725 F.2d 608 (11th Cir.), cert. denied, 469 U.S. 870 (1984).]

* Defense counsel failed to present significant evidence to the jury concerning the defendant's retardation, limited education and "poverty-stricken socioeconomic background"—evidence that might have persuaded the jury to impose a sentence other than death. [Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991).]

* Neither defense lawyer conducted any investigation seeking evidence that might persuade the jury not to impose the death sentence, because "[e]ach lawyer ... believed ... the
other was responsible for preparing the penalty phase.” [Harris v. Dugger, 874 F.2d 756, 763 (11th Cir.), cert. denied, 493 U.S. 1011 (1990).] * Defense counsel did not investigate or otherwise prepare for the capital sentencing hearing because he was confident that he could negotiate a sentence other than death. [Osborn v. Shillinger, 861 F.2d 612, 624-30 (10th Cir. 1988).] * Defense counsel failed to bring to the jury's attention evidence relating to the defendant's mental retardation, the fact that his IQ was below 41, that he was only seventeen years old at the time of the crime, and was not proven to have had any intent or played any role in the homicide. [Jones v. Thigpen, 788 F.2d 1101, 1103 (5th Cir. 1986), cert. denied, 479 U.S. 1087 (1987).] * Defendant was denied the benefit of the presentation of crucial mitigating evidence by the defense counsel's failure to conduct a reasonable investigation to uncover information regarding defendant's mental retardation and psychiatric history. [Baxter v. Thomas, 45 F.3d 1501 (11th Cir.), cert. denied, 116 S. Ct. 385 (1995).] * The prosecutor's deliberate and repeated misrepresentations before the jury, directly "aimed at discrediting the core of the defense," rendered defendant's trial fundamentally unfair. [Davis v. Zant, 36 F.3d 1538, 1550 (11th Cir. 1994).] * The prosecution withheld information that three individuals, known to be associates in criminal activity, had previously been identified as being at the scene of the crime, that one of the individuals identified had confessed committing the crime to his cellmate, that the same individual was positively identified as having forged endorsement on the money orders taken during commission of the crime, and that the same individual had committed manslaughter by using a weapon of a similar caliber as the one used in commission of the crime. [Banks v. Reynolds, 54 F.3d 1508, 1516-22 (10th Cir. 1995).] * Defense counsel's failure to order a mental evaluation prevented the presentation of mitigating evidence regarding defendant's mental state at the time of the murder. [Antwine v. Delo, 54 F.3d 1357, 1364-68 (8th Cir. 1995), cert. denied, 133 L. Ed. 2d 700 (1996).] * Confusion among defendant's counsel as to whose responsibility it was to prepare for the sentencing phase of trial resulted in a failure to follow up on mitigating information regarding defendant's life history and personal hardship, rendering their assistance "ineffective for failure to prepare for the sentencing phase.” [Jackson v. Herring, 42 F.3d 1350 (11th Cir. 1995).] * The net effect of evidence suppressed by the prosecution raised a reasonable probability that disclosure would have produced a different outcome. [Kyles v. Whitley, 115 S. Ct. 1555, 1560 (1995).]

3. The ABA Policy: The Task Force Report

The ABA's policy concerning federal habeas corpus review of death penalty cases is embodied in a comprehensive set of sixteen recommendations, perhaps best described as a "carefully crafted package of interconnected reforms designed as a whole to make the process less complex and to preserve fairness.”227 These recommendations, which were approved by the ABA House of Delegates in February 1990, are appended to this Report as an Appendix.

In 1988, the ABA's Criminal Justice Section formed a ten-member Task Force to study judicial review of capital cases that resulted in death sentences.228 The Task Force members included state and federal judges, a deputy attorney general, capital trial and post-conviction counsel, a court administrator, and several law professors. This broad base of expertise facilitated full consideration of
Many meritorious legal issues go unaddressed in capital cases because of the failure of counsel to raise the issue at all, or in a timely fashion, or in the proper manner.

The Task Force presupposed the continued existence of both capital punishment and federal court review of capital cases.

In its Background Report, released in August 1990, the Task Force described its mission as follows:

[T]o formulate a series of comprehensive recommendations that, when implemented, would produce state and federal review procedures in death penalty cases that: are coordinated; are efficient (in terms of the use of the time and resources of both counsel and the courts); result in certainty, to the extent possible, that no person will be executed on the basis of a conviction that is flawed by fundamental factual, legal, or constitutional procedural error; and are devoid of the chaotic character of current "last minute," piecemeal, state and federal reviews.

The Task Force aggressively sought input from all segments of the criminal justice system and held six days of regional, public hearings in Dallas, San Francisco and Atlanta. More than eighty witnesses, reflecting a rich sample of criminal justice experts, testified at these hearings. These witnesses included a U.S. senator, the Governor of California, state legislators, federal trial and appellate judges, state supreme court judges and justices, state attorneys general, state and federal public defenders, directors of death penalty resource centers, volunteer post-conviction counsel, representatives of victims' rights organizations, academics, and others.

Following extensive hearings and meetings, the Task Force promulgated a carefully crafted set of sixteen recommendations. Perhaps most crucial to fairness and efficiency in capital cases, Recommendations One through Six require "the provision of competent counsel to assure that the streamlined process is capable of fairly rectifying constitutional errors." The Task Force concluded that:

Capital litigation in the United States today too often begins with poor legal representation. Thereafter, the petitioner, the state, and society pay the price as each successive stage of the case becomes more complicated, more protracted, and more costly. Poor representation after the trial is also not uncommon, and it, too, imposes costs—in terms of both efficiency and fairness—at each successive stage of the litigation. The goals of better, more efficient, and more orderly justice can be achieved when the quality of legal representation at all stages of capital cases is improved.

The Task Force considered the provision of competent counsel to be the "keystone of the American Bar Association's recommendations." Although the Task Force focused mainly on poor trial counsel, it also recommended that competent counsel be provided "at all stages of capital cases."

The recommended standards for counsel in capital cases, ultimately adopted by the ABA, are actually far more stringent than those proposed by the Task Force. Nonetheless, the ABA's recommended standards have largely been ignored.

The Task Force also addressed three other critical deficiencies in the legal processes employed in capital cases. First, the Task Force received testimony from prosecutors and defense attorneys alike about the "frenzied and scrambled litigation that occurs after an execution date has been set." There was broad agreement that valuable resources were squandered needlessly in litigating artificial execution dates, designed merely to move the cases along. The Task Force recommended that a death row inmate should be entitled to a stay of execution in order to pursue one round of post-conviction litigation in state and federal court.

Second, the Task Force Report examined the doctrine of procedural default
in capital cases. The federal courts and most state courts have contemporaneous objection rules or other rules that preclude a court from considering a legal issue that was not properly raised at trial or on appeal. Consequently, many meritorious legal issues go unaddressed in capital cases because of the failure of counsel to raise the issue at all, or in a timely fashion, or in the proper manner. As a result, often capital defendants are put to death without any examination of serious constitutional defects in either the guilt or sentencing phase. To avoid manifest injustice of this sort, the Task Force recommended that federal courts be required to consider issues that were not properly raised in state court if the reason for the prisoner's default was the ignorance or neglect of his attorney.

Finally, the Task Force canvassed the law regarding second or successive habeas petitions. On this point, the Task Force recommended that a prisoner should be permitted to file a successive habeas petition, providing the prisoner raises a new claim that undermines confidence in his or her guilt.

These three critical recommendations have met the same fate as the Task Force's recommendations regarding counsel: none have been adopted. To the contrary, rather than embrace these recommendations, the Supreme Court has only made things worse for habeas petitioners. Presently, death row prisoners are not automatically entitled to even a single stay of execution to permit them to pursue post-conviction remedies. Federal courts are prohibited from considering claims not properly raised in state court, even if counsel's ignorance or neglect will mean the execution of an inmate with serious constitutional defects in his trial or sentencing hearing. And even prisoners who are able to produce colorable evidence of actual innocence are prohibited from filing more than one habeas petition. Indeed, since the Task Force Report was published, the standards for successor petitions have been dramatically altered to extinguish the right of prisoners to file a second petition seeking judicial consideration of their claims. The Court has fashioned a new and more difficult rule for harmless error in habeas cases, and it has become far more difficult for a death row prisoner to get an evidentiary hearing in federal court.

4. Teague v. Lane

In October 1989, the ABA Task Force issued its recommendations and final report. That same year, the Supreme Court decided Teague v. Lane, and sharply curtailed the availability of habeas corpus relief to death row inmates whose convictions or sentences or both were infected with serious constitutional errors. According to the Teague doctrine, subject to two extremely narrow exceptions, a "new rule" of law may not become the basis for federal habeas relief. The Court defined "new rule" broadly to mean one that "was not dictated by precedent existing at the time the defendant's conviction became final." For purposes of Teague, a defendant's conviction becomes final after all direct appeals are exhausted and when either the time for filing a petition for certiorari on direct review has lapsed, or the Supreme Court has denied a petition for certiorari on direct review. It has been noted that this standard "invites federal courts to find that virtually any holding in a case decided after a petitioner has exhausted his direct appeals is a 'new rule' that cannot be applied retroactively." The ABA has formally opposed the Teague nonretroactivity principle and, in testimony before both Houses of Congress, ABA representatives have urged that Teague be legislatively overruled. Nonetheless, Congress has failed to follow the ABA's strong recommendation, and Teague remains a formidable barrier to habeas relief in capital cases.
5. Herrera v. Collins

The Supreme Court has so drastically curtailed access to federal habeas corpus relief that federal courts are significantly restricted from sparing from execution prisoners who produce evidence of their innocence. In Herrera v. Collins, the Court held that a capital prisoner's claim of actual innocence did not entitle him to federal habeas relief. According to the majority, "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." Justice Blackmun had this to say about the Herrera case:

The Court's refusal [in 1993] to afford Leonel Torres Herrera an evidentiary hearing, despite his colorable showing of actual innocence, demonstrates just how far afield the Court has strayed from its statutorily and constitutionally imposed obligations. In Herrera, only a bare majority of this Court could bring itself to state forthrightly that the execution of an actually innocent person violates the Eighth Amendment. This concession was made only in the course of erecting nearly insurmountable barriers to a defendant's ability to get a hearing on a claim of actual innocence. Certainly there will be individuals who are actually innocent who will be unable to make a better showing than what was made by Herrera without the benefit of an evidentiary hearing. The Court is unmoved by this dilemma, however; it prefers "finality" in death sentences to reliable determinations of a capital defendant's guilt. Because I no longer can state with any confidence that this Court is able to reconcile the Eighth Amendment's competing constitutional commands, or that the federal judiciary will provide meaningful oversight to the state courts as they exercise their authority to inflict the penalty of death, I believe that the death penalty, as currently administered, is unconstitutional.

6. Innocence and the Death Penalty

There is "a quietly acknowledged danger in the American judicial system: the virtual certainty of sometimes executing innocent people." Recently passed habeas reform legislation imposes rigid time limits on the ability of death-sentenced inmates to seek review of constitutional claims. Without sufficient time for review, more innocent persons will undoubtedly die.

The probability of convicting, sentencing to death, and actually executing innocent people is substantially increased by the draconian rules that govern procedural default and abuse of the writ. Moreover, claims of innocence based on newly discovered evidence do not, by themselves, state a ground for federal habeas relief.

Notwithstanding procedural and substantive safeguards designed to protect against mistakes, human error is inevitable. And in capital cases, human error can be fatal. As Justice Thurgood Marshall observed, "No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony and human error remain all too real. We have no way of judging how many innocent persons have been executed, but we can be certain that there were some."

According to a study published in 1987, more than 350 people in this century have been erroneously convicted in the United States of crimes potentially punishable by death. Of these, 116 were sentenced to death and twenty-three were actually executed. A 1993 Staff Report issued by the House Judiciary Subcommittee on Civil and Constitutional Rights identified forty-eight people who were released from prison since 1973 after serving time on death row. Noting that four former death row inmates were released during the first half of 1993 after their innocence became apparent, the Report concluded, "there is a real danger of innocent people being executed in the United
States." As the Supreme Court has warned,

To identify before the fact those characteristics of criminal homicides which call for the death penalty, and to express these characteristics in language which can fairly be understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.269

7. Recent Examples of Innocent People Released from Death Row

At least four former death row inmates from three different states won freedom in 1995 after establishing their innocence. Rolando Cruz was twice tried and sentenced to die for the 1983 abduction, rape, and killing of a ten-year-old girl in Illinois. Following a third trial, a judge ordered Cruz’s acquittal on November 3, 1995. At the last trial, two officers again testified that Cruz had described to them a vision Cruz had in which he killed the girl. The prosecutor’s case fell apart when the officers’ supervisor admitted that he had lied when he testified that the officers had told him of Cruz’s vision.270

On December 8, 1995, prosecutors dropped charges against Cruz’s codefendant, Alejandro Hernandez, who had also been sentenced to die for the murder. Hernandez spent more than a decade in prison, including several years on death row.271

An Arizona death row inmate, Robert Charles Cruz, walked off of death row when he was acquitted at his fifth trial for the 1980 contract killing of a printshop owner and his mother-in-law.272 Cruz, who spent more than fourteen years in prison, won acquittal in June 1995.273

That same year, Oklahoma death row inmate Adolph Munson was acquitted following a retrial for the murder of a convenience store clerk.274 The Oklahoma Court of Criminal Appeals granted Munson a retrial after finding that the state had deliberately withheld a mountain of exculpatory evidence during the original trial in 1985.275 On April 5, 1995, the jury found Munson not guilty after deliberating a mere three hours. Munson had spent nearly ten years awaiting lethal injection.276

In another Illinois case, Joseph Burrows spent nearly six years awaiting execution for the farmhouse murder of an eighty-eight-year-old man.277 Burrows was released on his own recognizance in September 1994 after the principal witnesses against him recanted their testimony and one confessed to the crime.278

During the first six months of 1993, four death row inmates from four different states were freed after establishing their innocence of the crimes for which they were condemned to die.279 In Maryland, Kirk Bloodsworth was sentenced to die for the rape and murder of a young girl. After serving two years on death row, Bloodsworth was granted a new trial and received a life sentence. Bloodsworth spent nine years in prison before DNA testing confirmed his innocence and he was released.280

In Texas, Federico Martinez-Macias left death row after the United States Court of Appeals for the Fifth Circuit upheld the award of habeas corpus relief on the ground of ineffective assistance of counsel.281 Assisted by effective lawyers for the first time, Macias was set free on June 23, 1993 after a grand jury refused to reindict him for the 1984 murders.282 Before his release, Macias spent nearly nine years on death row.

In Alabama, Walter McMillian was freed after three witnesses recanted their testimony and prosecutors admitted that they had withheld evidence favorable to the defense.283 It took only two days for McMillian—a black man—to be tried, convicted, and sentenced to death for the 1986 murder of a white female clerk at a dry cleaning store.284 Before his release on March 2, 1993, McMillian spent six years awaiting execution. Even before his trial began, McMillian was imprisoned on Alabama’s death row.285
Finally, in Oklahoma, Greg Wilhoit, who had been convicted of the 1987 murder of his estranged wife, was acquitted during a March 1993 retrial. At Wilhoit’s trial, eleven forensic experts testified that a bite mark found on Wilhoit’s dead wife did not belong to him. These examples of persons wrongfully condemned and belatedly exonerated do not prove—as some suggest—that the system works. As Justice Blackmun observed, “[t]he problem is that the inevitability of factual, legal and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.”

8. The Anti-Terrorism and Effective Death Penalty Act of 1996

Notwithstanding the steady and precipitous decline of due process protections in capital cases over the past several decades, Congress recently attempted to eviscerate the Great Writ. In a rush to respond to the important issue of terrorism, Congress fashioned legislation intended in large part to expedite the review process in capital cases. In doing so, Congress ignored the well-considered recommendations that emerged from the ABA Task Force’s intensive study of much-needed habeas reform.

Congress’ efforts culminated on April 26, 1996. On that day, barely a year after the Oklahoma City bombing, President Clinton signed into effect the Anti-Terrorism and Effective Death Penalty Act of 1996, thus changing the face of federal habeas corpus in this country. The Anti-Terrorism Act brings significant and dramatic changes to federal habeas review while endangering the freedoms of all Americans.

The Anti-Terrorism Act represents a political response to the complicated issues of terrorism and crime and reflects the contradictions and struggles of the fierce political battle over federal habeas that has been waged in Congress for the past forty years. The Act is poorly drafted and will add confusion and uncertainty in cases pending before federal courts on habeas review. Moreover, portions of the statute appear to overrule, undermine or contradict existing case law, including such key cases as Rose v. Lundy, Townsend v. Sam, Keeney v. Tamayo-Reyes, McCleskey v. Zant, Schlup v. Delo, Granberry v. Greer, and Teague v. Lane. Undoubtedly, the newly minted Anti-Terrorism Act will demand a substantial amount of time and resources to clarify and unravel.

The long-term effects of the Anti-Terrorism Act and the changes it will impose on capital litigation are unknown. Nonetheless, it appears evident that the new legislation will undermine a defendant’s ability not only to litigate valid constitutional issues but also to raise claims of actual innocence. The key features of the new law include:

1. restricting the ability of federal courts to entertain a successive habeas corpus petition and requiring any prisoner seeking to file a successive habeas petition to first obtain permission from a panel of the court of appeals;
2. imposing a statute of limitations for filing habeas petitions;
3. amending the requirements for exhausting state remedies;
4. altering the rules governing evidentiary hearings;
5. changing the standard of review for any issue or claim “adjudicated on the merits” in state court proceedings;
6. restricting the ability of a prisoner to appeal to the federal court of appeals by replacing the “certificate of probable cause” with the “certificate of appealability”; and
(7) adding to Title 28 of the United States Code a new chapter setting forth "Special Habeas Corpus Procedures in Capital Cases." 303

Among the critical changes worked by the Anti-Terrorism Act is the effect that federal courts must acquiesce to state court decisions regarding federal constitutional claims. 304 In a sharp departure from previous federal habeas law, 305 Section 2254(d) now provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Under this provision, even if a federal court concludes that a state court is wrong as a matter of law and that a defendant's federal constitutional rights were violated, the federal court would be barred from granting relief. Rather, before relief may be granted, the federal court must determine whether the state court's erroneous application of the law was "unreasonable." Thus, not only must the state court be wrong, it must be unreasonably wrong before a federal court may grant relief to the aggrieved defendant. 306

In addition, the statute places new burdens on the ability of federal courts to review factual findings. Under 28 U.S.C. § 2254(e)(1), "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." The Act also severely circumscribes the availability of evidentiary hearings in federal habeas to develop and review factual questions. Section 2254(e)(2) now provides:

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the fact underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

This provision significantly changes the availability and role of evidentiary hearings in federal habeas proceedings. "Read literally [the new statute] eliminates any federal standards for the fact-finding process in state court and thus ostensibly establishes a presumption in favor of a state finding of fact, without regard for the process from which it generated." 307 "In effect, only prisoners who can make a persuasive showing of factual innocence can obtain a federal evidentiary hearing into facts that may support a constitutional claim." 308 Serious due process problems are raised by such a system of review; 309 and these substantive changes run counter to the merits of constitutional claims.

Other provisions of the Anti-Terrorism Act focus on procedural changes...
The Anti-Terrorism Act dramatically changes federal habeas review and the independence of the federal judiciary. Not only do the changes brought about by the Anti-Terrorism Act raise grave concerns about the future ability of federal courts to assure that the death penalty is carried out in accordance with due process and the Constitution, but also the new legislation marks a dangerous path endangering the freedom of all Americans.

D. Discrimination on the Basis of the Race of the Victim and the Race of the Defendant Still Infects a Very Large Number of Capital Cases

1. The ABA Policy

The ABA is clearly and firmly on record as opposing discrimination in capital sentencing. In August 1988, the ABA adopted the following policy:

Be It Resolved, that the American Bar Association opposes discrimination in capital sentencing on the basis of the race of either the victim or the defendant.

Be It Further Resolved, that the American Bar Association supports the enactment of federal and state legislation which strives to eliminate any racial discrimination in capital sentencing which may exist.

2. Legal Defense Fund Statistics

That race continues to play a major role in determining who shall live and who shall die is confirmed by an examination of the racial composition of death rows throughout the country and the defendant-victim racial combinations in offenses that have resulted in death sentences. Currently, although blacks comprise roughly twelve to thirteen percent of our country’s population, more than forty percent of America’s death row population is black. When other members of minority groups are included, more than half of America’s death row population consists of people of color. Of those defendants executed since the 1976 reinstatement of capital punishment, nearly thirty-nine percent were black.

Defendant-victim racial combinations likewise illustrate that the longstanding patterns of racial discrimination “that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious as they were in their original form.” Fully eighty-three percent of persons condemned to die were convicted of murdering white victims. By contrast, only twelve percent of persons condemned to die were convicted of murdering black victims.

3. Prosecutorial Discretion

Federal prosecutorial power derives from Article II, Section 3 of the United States Constitution, which provides that the executive branch “shall take Care that the Laws be faithfully executed.” Most state constitutions contain similar provisions.

Prosecutors enjoy broad discretion in making critical decisions. Perhaps most important is the charging decision: “the determination whether a particular person should formally be accused of a crime and, if so, on precisely what charge or charges.” These decisions are unlikely to be disturbed. As the Supreme Court stated in Bordenkircher v. Hayes, [S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or
bring before a grand jury, generally rests entirely in his discretion.

Nonetheless, prosecutorial discretion is not wholly unfettered. In certain situations, the Constitution itself may constrain a prosecutor's power. For example, discriminatory prosecutions are prohibited by the Equal Protection Clause, and vindictive prosecutions may violate the Due Process Clause.

According to Richard Burr, former director of the NAACP Legal Defense and Educational Fund, Inc.'s Capital Punishment Project, racial bias often plays a role in the exercise of prosecutorial discretion.

The first issue is that racial bias has very frequently influenced the prosecutor's judgment to seek death and the ability to obtain it. Racial bias works in a couple of ways; it creates an inflated concern for the value of white people's lives who are victims of murder and a corresponding lack of concern for the lives of black people who are the victims of murder. The white victim [of] murder is invariably the more politically popular murder to prosecute in any jurisdiction in this country.

Additionally, racial bias impacts the sentencing process by influencing the prosecutor's evaluation of a crime, apart from the race of the victim. There are still many racist assumptions that work against black defendants. Unfounded presumptions about violent behavior and tendencies . . . can lead to a skewed view of whether someone is guilty or whether they have been so closely related to a horrendous murder that death is the appropriate punishment. If one takes a cross-section of death row cases, race issues have permeated at least three-fourths of that cross-section in some way or another. This will be true whether the defendant is white or black, but particularly if the defendant is black.

Justice Thurgood Marshall's Furman opinion was characteristically more blunt.

Regarding discrimination, it has been said that "[i]t is usually the poor, the illiterate, the underprivileged, the member of the minority group—the man who, because he is without means, and is defended by a court-appointed attorney—who becomes society's sacrificial lamb . . . ." Indeed, a look at the bare statistics regarding executions is enough to betray much of the discrimination. A total of 3,859 persons have been executed since 1930, of whom 1,751 were white and 2,066 were Negro. Of the executions, 3,334 were for murder; 1,664 of the executed murderers were white and 1,630 were Negro; 455 persons, including 48 whites and 405 Negroes, were executed for rape. It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population. Studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination . . . . In McGautha v. California, 402 U.S. at 207, this Court held "that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is [not] offensive to anything in the Constitution." This was an open invitation to discrimination.

As discussed below, the ABA strongly supported the Racial Justice Act, a measure designed to rectify some of these problems.

4. The Baldus Study

Numerous studies on the imposition of capital punishment under current statutes reveal racial discrimination based on the race of the victim and, to a lesser extent, the race of the defendant. Perhaps the best known of these studies was conducted by University of Iowa Law Professor David Baldus. Using a staff of law students and relying primarily on official Georgia state records, Baldus examined all homicides committed in Georgia between 1973 and 1979. Using this pool of more than 2000 murders, Baldus identified and coded 230 non-racial variables.
With meticulous care, Baldus analyzed and then re-analyzed the vast information his team collected on Georgia homicides in search of any explanation—other than race—that might account for the stark inequalities in the operation of Georgia’s capital sentencing system. He found none.

Baldus’ data indicated that defendants charged with killing white persons received the death penalty in eleven percent of the cases, but defendants charged with killing blacks received the death penalty in only one percent of the cases. The Baldus study also divided the cases according to the combination of the race of the defendant and the race of the victim. The study found that the death penalty was assessed in twenty-two percent of the cases involving black defendants and white victims; eight percent of the cases involving white defendants and white victims; one percent of the cases involving black defendants and black victims; and three percent of the cases involving white defendants and black victims.

According to the study, prosecutors sought the death penalty in seventy percent of the cases involving black defendants and white victims; thirty-two percent of the cases involving white defendants and white victims; fifteen percent of the cases involving black defendants and black victims; and nineteen percent of the cases involving white defendants and black victims.

The disturbing conclusion of the Baldus study—that in Georgia, a killer of a white person was 4.3 times more likely to be sentenced to death than someone who killed a black person—is consistent with statistics from many other jurisdictions throughout the country. For example, in Louisiana, defendants in white victim cases are twice as likely to be sentenced to death than are defendants in black victim cases. In Florida, defendants in white victim cases are 3.4 times more likely to be sentenced to death than are defendants in black victim cases. The multiplier in Arkansas is 3.5; in Illinois, 4; in Oklahoma, 4.3; in North Carolina, 4.4; in Mississippi, 5. Finally, in Maryland, defendants in white victim cases are 7.3 times more likely to be sentenced to death than are defendants in black victim cases.

5. McCleskey v. Kemp

Warren McCleskey, a black man sentenced to death for killing a white police officer in Georgia, urged the Court to find that the Baldus study demonstrated that Georgia’s capital sentencing procedures discriminated on the basis of race in violation of the Eighth and Fourteenth Amendments. In a five-to-four decision, the Court refused.

McCleskey argued that the Baldus study’s conclusion that killers of white victims are 4.3 times more likely to be sentenced to death than killers of black victims proved discrimination on the basis of race, in violation of the Equal Protection Clause. In addition, the Baldus study showed that blacks who kill whites were sentenced to death “at nearly 22 times the rate of blacks who kill blacks, and more than 7 times the rate of whites who kill blacks.” Although the Court “acknowledge[d] that McCleskey ha[d] demonstrated a risk that racial prejudice plays a role in capital sentencing in Georgia,” it nonetheless denied relief. Fatal to McCleskey’s equal protection claim, according to the bare majority, was McCleskey’s failure to prove that either the Georgia legislature or a decisionmaker in his case acted with a discriminatory purpose.

McCleskey’s Eighth Amendment argument that his death sentence was arbitrary and capricious, and therefore excessive, because racial considerations influenced capital sentencing decisions in Georgia was likewise rejected. According to the Court, “[a]t most the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system.” Thus, although the Baldus study identified a serious risk that racial preju-
dice influences capital sentencing, the risk was not "constitutionally unaccept-
able." In denying relief, Justice Powell, writing for the five-member majority, observed that McCleskey's arguments "are best presented to the legislative bodies."340

6. Justice Powell's Change of Heart

The fragile distinction between life and death decisionmaking in Warren McCleskey's case became apparent years later. Justice Lewis Powell, the author of the five to four majority opinion that sealed McCleskey's fate, retired within months of the decision. Four years later, in the summer of 1991, Powell was asked whether he would change his vote in any case. According to Powell's biographer, the retired justice responded, "Yes, McCleskey v. Kemp." Powell had come to believe that capital punishment should be abolished. No doubt this change of heart would have provided cold comfort to Warren McCleskey, who died in Georgia's electric chair on September 25, 1991.343

7. The 1990 General Accounting Office Study

A 1990 report by the General Accounting Office (GAO) reviewed twenty-eight different empirical studies that examined the effects of race in capital cases. The GAO Report concluded that these studies clearly documented a pattern "indicating racial disparities in the charging, sentencing and imposition of the death penalty." Of the twenty-eight empirical studies reviewed by GAO, eighty-two percent concluded that the "race of [the] victim . . . influence[d] the likelihood of being charged with capital murder or receiving the death penalty."346

In an ABA-sponsored program, Paul Kamenar, Executive Legal Director for the Washington Legal Foundation, a conservative public interest group, attacked the methodology and conclusions of the Baldus study. Kamenar explained his group's position:

Our position is that there is really no convincing evidence—you just heard some anecdotal evidence—of racial bias in the criminal justice system in general and the death penalty in particular.348

Kamenar took particular issue with the use of the Baldus study in the McCleskey case. Kamenar complained,

In the McCleskey case, McCleskey murdered a white person, and the fact of the matter was that the person happened to be a police officer, and 85% of the police that are murdered are white. Therefore, there are other factors counted in there. So, again, it just seems difficult even to try to make some sense out of that.

Kamenar's criticism of the Baldus study reveals a profoundly disturbing lack of familiarity with the methodology used by Baldus' team. The strength of the Baldus study derives in substantial part from the fact that the study took into account 230 nonracial variables, including the very factors that Kamenar suggested were not considered. Indeed, after performing its own re-analysis of the methodology used, the GAO found the Baldus study "to be quite robust in terms of its findings."352

8. Donald "Pee Wee" Gaskins, Kermit Smith, Thomas Grasso, and Robert O'Neal

Executions resumed almost immediately following the 1976 Gregg decision. Gary Gilmore, a white man convicted of murdering a white victim, waived all appeals and died before Utah's firing squad on January 17, 1977. The next inmate executed was John Spenkelink, a white man convicted of murdering another white man. Spenkelink died in Florida's electric chair on May 25, 1979. However, not until late 1991, fourteen years after executions resumed, was a white inmate actually executed for the murder of a black victim. After an unsuccessful suicide attempt, Donald "Pee Wee" Gaskins, a white death row inmate
in South Carolina, was electrocuted on September 6, 1991 for the murder of a fellow black inmate.

Prior to Gaskins, the last white person put to death in this country for killing a black person died in Kansas in 1944. South Carolina had not executed a white person convicted of killing a black person since 1880.

Since Gaskin's electrocution, only three other white death row inmates have been put to death for the murder of a black person. Kermit Smith died by lethal injection in North Carolina on January 24, 1995.358 Thomas Grasso, who waived all appeals and sought death, was killed by lethal injection in Oklahoma on March 20, 1995.354 Finally, Robert O'Neal of Missouri's death row died by lethal injection on December 6, 1995.355

9. The Racial Justice Act

Despite strong statistical evidence of racial discrimination in capital cases, the Supreme Court in McCleskey v. Kemp denied relief, in part because the problems of racism in capital cases "are best presented to the legislative bodies."356 Since McCleskey, the ABA has consistently supported legislation directed towards eradicating racism in capital cases. All proposed bills that address the problems identified in McCleskey have failed to become law.357

Congress came closest to remediating the situation in 1994. That year, the House of Representatives passed the Racial Justice Act as part of the omnibus crime bill.358 The Racial Justice Act enjoyed the strong support of the ABA. Under the Racial Justice Act, proof of significant racial discrimination in the administration of the death penalty would have required the prosecutor to demonstrate a non-race-based explanation for the resulting death sentence.359 Although the measure passed the House, Senate Republicans threatened to filibuster if the omnibus crime bill included the Racial Justice Act. In July 1994, the White House withdrew support for the Racial Justice Act and it was deleted from the crime bill.

Contrary to assertions by its opponents, the Racial Justice Act would not have abolished the death penalty or prevented its imposition.360 Rather, the Act provided that no person shall be put to death under federal or state law if the sentence was imposed because of the race of the defendant or the race of the victim. A defendant challenging a death sentence under the Act would be required to prove a pattern of racially discriminatory death sentences in the particular jurisdiction in which he was tried and sentenced to die. Merely showing that blacks are sentenced to death more frequently than whites for the same type of offense would not entitle a defendant to relief. Instead the defendant would have to show bias in the particular sentence being challenged.361

10. Justice Harry Blackmun's Views on Racism in Capital Cases

Racism as an ineradicable feature of capital punishment prompted Justice Harry Blackmun—after thirty-five years of deciding capital cases—to conclude that the death penalty was in all cases unconstitutional.362 Justice Blackmun squarely and thoroughly addressed the issue of race in his dissent in Callins v. Collins.363

The arbitrariness inherent in the sentencer's discretion to afford mercy is exacerbated by the problem of race. Even under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die. Perhaps it should not be surprising that the biases and prejudices that infect society generally would influence the determination of who is sentenced to death, even within the narrower pool of death-eligible defendants selected according to objective standards. No matter how narrowly the pool of death-eligible defendants is drawn according to objective standards, Furman's promise still will go unfulfilled so long as the sen-
tencer is free to exercise unbridled discretion within the smaller group and thereby to discriminate. “The power to be lenient [also] is the power to discriminate.” McCleskey v. Kemp, 481 U.S. at 312, quoting K. Davis, Discretionary Justice 170 (1973).

A renowned example of racism infecting a capital-sentencing scheme is documented in McCleskey v. Kemp, 481 U.S. 279 (1987). Warren McCleskey, an African-American, argued that the Georgia capital-sentencing scheme was administered in a racially discriminatory manner, in violation of the Eighth and Fourteenth Amendments. In support of his claim, he proffered a highly reliable statistical study (the Baldus study) which indicated that, “after taking into account some 230 nonracial factors that might legitimately influence a sentencer, the jury more likely than not would have spared McCleskey’s life had his victim been black.” 481 U.S. at 325 (Brennan, J., dissenting). The Baldus study further demonstrated that blacks who kill whites are sentenced to death “at nearly 22 times the rate of blacks who kill blacks, and more than 7 times the rate of whites who kill blacks.” Id. at 327.

Despite this staggering evidence of racial prejudice infecting Georgia’s capital-sentencing scheme, the majority turned its back on McCleskey’s claims, apparently troubled by the fact that Georgia had instituted more procedural and substantive safeguards than most other States since Furman, but was still unable to stamp out the virus of racism. Faced with the apparent failure of traditional legal devices to cure the evils identified in Furman, the majority wondered aloud whether the consistency and rationality demanded by the dissent could ever be achieved without sacrificing the discretion which is essential to fair treatment of individual defendants:

“[I]t is difficult to imagine guidelines that would produce the predictability sought by the dissent without sacrificing the discretion essential to a humane and fair system of criminal justice... The dissent repeatedly emphasizes the need for ‘a uniquely high degree of rationality in imposing the death penalty’... Again, no suggestion is made as to how greater ‘rationality’ could be achieved under any type of statute that authorizes capital punishment... Given these safeguards already inherent in the imposition and review of capital sentences, the dissent’s call for greater rationality is no less than a claim that a capital punishment system cannot be administered in accord with the Constitution.” Id. at 314-315 n.37.

* * *

The fact that we may not be capable of devising procedural or substantive rules to prevent the more subtle and often unconscious forms of racism from creeping into the system does not justify the wholesale abandonment of the Furman promise. To the contrary, where a morally irrelevant—indeed, a repugnant — consideration plays a major role in the determination of who shall live and who shall die, it suggests that the continued enforcement of the death penalty in light of its clear and admitted defects is deserving of a “sober second thought.” Justice Brennan explained:

“Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society’s demand for punishment. It is the particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life. The Court thus fulfills, rather than disrupts, the scheme of separation of powers by closely scrutinizing the imposition of the death penalty, for no decision of a society is more deserving of the ‘sober second thought.’ Stone, The Common Law in the United States, 50 Harv. L. Rev. 4, 25 (1936).” Id. at 343.

In the years since McCleskey, I have come to wonder whether there was truth in the majority’s suggestion that discrimination and arbitrariness could not be purged from the administration of capital punishment without sacrificing the equally essential component of
The Court has retreated from the field, allowing relevant mitigating evidence to be discarded, vague aggravating circumstances to be employed, and providing no indication that the problem of race in the administration of death will ever be addressed.

Viewed in this way, the consistency promised in Furman and the fairness to the individual demanded in Lockett are not only inversely related, but irreconcilable in the context of capital punishment. Any statute or procedure that could effectively eliminate arbitrariness from the administration of death would also restrict the sentencer’s discretion to such an extent that the sentencer would be unable to give full consideration to the unique characteristics of each defendant and the circumstances of the offense. By the same token, any statute or procedure that would provide the sentencer with sufficient discretion to consider fully and act upon the unique circumstances of each defendant would “throw open the back door to arbitrary and irrational sentencing.” Graham v. Collins, 113 S. Ct. at 912 (Thomas, J., concurring). All efforts to strike an appropriate balance between these conflicting constitutional commands are futile because there is a heightened need for both in the administration of death.

But even if the constitutional requirements of consistency and fairness are theoretically reconcilable in the context of capital punishment, it is clear that this Court is not prepared to meet the challenge. In apparent frustration over its inability to strike an appropriate balance between the Furman promise of consistency and the Lockett requirement of individualized sentencing, the Court has retreated from the field, allowing relevant mitigating evidence to be discarded, vague aggravating circumstances to be employed, and providing no indication that the problem of race in the administration of death will ever be addressed. In fact some members of the Court openly have acknowledged a willingness simply to pick one of the competing constitutional commands and sacrifice the other. . . . These developments are troubling, as they ensure that death will continue to be meted out in this country arbitrarily and discriminatorily, and without that “degree of respect due the uniqueness of the individual.” Lockett, 438 U.S. at 605. In my view, the proper course when faced with irreconcilable constitutional commands is not to ignore one or the other, nor to pretend that the dilemma does not exist, but to admit the futility of the effort to harmonize them. This means accepting the fact that the death penalty cannot be administered in accord with our Constitution.364

E. Persons with Mental Retardation Are Being Sentenced to Death and Executed

1. The ABA Policy

In February 1989, the ABA established a firm policy prohibiting the execution of persons who are “mentally retarded” as defined by the American Association of Mental Retardation.365 The ABA policy provides as follows:

Be It Resolved, that the American Bar Association urges that no person with mental retardation, as defined by the American Association on Mental Retardation, should be sentenced to death and executed; and

Be It Further Resolved, that the American Bar Association supports enactment of legislation barring the execution of defendants with mental retardation.366

Notwithstanding these clear pronouncements of ABA policy, twenty-eight capital jurisdictions currently permit the execution of mentally retarded persons.367 Recent research suggests that between twelve and twenty percent of the death row population in this country consists of persons with mental retardation.368 And, as is true of so many other ABA policies, the Supreme Court’s interpretation of the Constitution as permitting the execution of mentally retarded offenders flies in the face of ABA policy.

2. Penry v. Lynaugh369

In Penry v. Lynaugh370—decided just four months after the ABA adopted a resolution prohibiting the execution of mentally retarded persons—the Supreme
Court refused to hold that the execution of a mentally retarded prisoner violated the Eighth Amendment. Although several states proscribe executing mentally retarded persons, most do not.

Penry v. Lynaugh involved a challenge to Texas’ death penalty statute. While on parole from a rape conviction, Johnny Paul Penry was charged with the brutal rape and murder of Pamela Carpenter. At trial, Penry raised an insanity defense and presented the testimony of a psychiatrist, Dr. Jose Garcia. Dr. Garcia testified that Penry suffered from organic brain damage and moderate retardation. As a result, Penry had poor control over his impulses and was unable to learn from experience. According to Dr. Garcia, Penry’s brain damage was probably caused at birth but may have been caused by beatings and multiple injuries to the brain at an early age. In Dr. Garcia’s judgment, Penry was suffering from an organic brain disorder at the time of the offense that made it impossible for him to appreciate the wrongfulness of his conduct or to conform his conduct to the law.

Penry argued that under Texas law the sentencing jury was prevented from giving full mitigating effect to his evidence of child abuse and mental retardation. ‘Texas’ sentencing statute then required the jury, during a separate sentencing phase, to answer three questions. The answers to these questions would determine whether the defendant would be sentenced to death. Only one of the three questions—whether the defendant posed a “continuing threat to society”—was related to Penry’s mitigating evidence. But Penry’s evidence of child abuse and mental retardation was double-edged: “it may diminish his blameworthiness for his crime even as it indicated that there [was] a probability that he [would] be dangerous in the future.” Because a reasonable juror could have believed that the Texas statute prohibited a sentence less than death based upon Penry’s mitigating evidence, the Court reversed Penry’s death sentence.

As Justice Blackmun recognized, Penry exemplifies the “paradox underlying the Court’s post-Furman jurisprudence.” The Court earlier had held that Texas had complied with Furman by carefully channeling the sentencer’s discretion. Indeed, Texas had channeled discretion by requiring that a jury unanimously answer three questions affirmatively before a defendant would be sentenced to death. Yet those same limitations placed upon the sentencer’s discretion rendered Penry’s death sentence unconstitutional.

The ABA policy against executing mentally retarded offenders recognizes the dual nature of evidence of retardation in a capital sentencing context. Even though most courts and legislatures consider mental disorders a mitigating factor that lessens an offender’s culpability, jurors are susceptible to viewing a mental disorder solely as an aggravating factor, particularly in jurisdictions that employ future dangerousness as an aggravating factor. The risk, then, becomes that a jury will sentence a defendant to die not in spite of the fact that he is mentally retarded, but rather because he is mentally retarded.

3. Examples of Mentally Retarded People Who Have Been Executed

Like children, mentally retarded adults are easily led, susceptible to influence, and ill-equipped to defend themselves. These characteristics were particularly true of Barry Fairchild, a mentally retarded black man condemned to die in Arkansas for the 1983 kidnaping, rape, and murder of Marjorie Mason, a white nurse. The bulk of the evidence against Fairchild consisted of a videotaped interrogation during which Fairchild admits to being an accomplice, but said that he was sitting in a car when someone else—whom he refused to identify—killed Ms. Mason. Fairchild, whose head is bandaged from injuries, is clearly shown on the videotape glancing away from the
camera towards an apparent coach as he incriminates himself. On IQ tests administered to Fairchild years after his trial, he scored a Full Scale IQ of 63, a Verbal IQ of 69, and a Performance IQ of 61. Nonetheless, relying on some higher test scores that the state's psychologist attributed to Fairchild, the federal district court judge concluded that he was not retarded. Although the threshold for retardation in Arkansas was an IQ of 70, and the evidence in Fairchild's case "was mixed," the Eighth Circuit affirmed the district court's conclusion that Fairchild was not retarded. An Arkansas statute, passed the year before Fairchild's execution, prohibited the execution of anyone with an IQ under 65. Because Fairchild was sentenced to die before the statute was enacted, it did not apply to him. Fairchild died by lethal injection on August 31, 1995.

Morris Mason, a black farmworker in Virginia, was sentenced to die for the murder of an elderly white woman. Mason's long history of mental illness earned him commitments in three state mental institutions. In addition to paranoid schizophrenia, Mason suffered from mental retardation. Diagnoses revealed that Mason's mental age was eight, and his IQ was 66. Although three psychiatrists independently determined that Mason suffered from paranoid schizophrenia over an eight-year period prior to his 1978 trial, the trial court denied Mason's request for the assistance of a psychiatrist to evaluate his sanity. After exhausting judicial remedies, Mason's lawyers appealed to the governor of Virginia for clemency on the grounds of Mason's mental retardation and history of mental illness. The governor refused to grant clemency, and Mason was executed on June 25, 1985.

When Kathryn Stryker, a fifty-five-year-old white woman, was brutally murdered in Columbus, Georgia in 1976, police arrested sixteen-year-old James Graves, a black juvenile. Graves gave a statement implicating twenty-four-year-old Jerome Bowden, a black man, and Bowden was also arrested and charged. Graves, the juvenile, was convicted and sentenced to life. Later, Graves was adjudicated insane and was committed to the Georgia state hospital for the criminally insane. Although no physical evidence linked Bowden to the murder, Bowden was convicted, largely because he signed a confession drafted for him by the police. Bowden was sentenced to death, just fifty-six days following his arrest.

At age fourteen, Bowden scored "a full scale IQ of 59 on the Wechsler Intelligence Scale for Children." Shortly before his execution, Bowden was again tested. This time he scored "a verbal IQ of 71, a non-verbal IQ of 62 and a full scale IQ of 65." Remarkably, the psychological examiner suggested that Bowden would need an IQ of 45 or less to be spared. In one of his final telephone calls to his attorneys, Bowden discussed the IQ test he had taken a few hours earlier. Bowden said, "I tried real hard. I did the best I could." Bowden was electrocuted on June 24, 1986.

Perhaps because of the double-edged nature of the potential mitigating evidence in the case of Mario Marquez, his defense counsel decided not to present any evidence of his severe childhood abuse, mental retardation, and brain damage. If such evidence had been presented, the jury would have learned that since Mr. Marquez's infancy, his father had routinely "beat him mercilessly, using boards, sticks, and fists[,]... whip[ping] him with a horsewhip[,] and on several occasions [binding] Mario's hands and legs and [hanging] him from a pole or tree and horsewhipp[ping] him until he was unconscious." When he was only twelve years old, Mario was abandoned by his parents and left to fend for himself and, initially, several of his younger siblings. The siblings were later removed by county authorities from the abandoned house in which they lived, but for some reason,
Report Regarding Implementation of the ABA's Recommendations and Resolutions Concerning the Death Penalty

Mario was left there without any adult supervision from that point forward. This was, in fact, true: Mario was mentally retarded, apparently from the time of his birth. Mario's childhood beatings apparently resulted from his father's belief that Mario was "slow." This was, in fact, true: Mario was mentally retarded, apparently from the time of his birth. A striking example of how his retardation had an impact on Mario's ability to think and reason occurred while he was eating the last meal before his execution. Mario set aside his dessert choice, apple pie, because he wanted to "save it for later."

Mario also was diagnosed as having severe brain damage, merely one of the effects of his father's ritual beatings that severely damaged his cerebral cortex. The combination of Mario's brain damage, mental retardation, and childhood abuse left him with the emotional and intellectual maturity of a five year old.

The difficulties of Mr. Marquez's situation were compounded during the punishment phase of his trial when, after he was involved in a minor altercation with local television cameramen outside the courtroom, the judge ordered him shackled for the remainder of that trial phase. The jury, which was responsible for assessing whether Mr. Marquez would be a danger to the community in the future, could visibly see that even in a place as "secure" as the courtroom, Mr. Marquez had to have his hands cuffed behind his back, his legs bound with leg irons, and one leg immobilized by a clamp that prevented knee movement. Not surprisingly, that same jury voted for death.

Television news personality, Ted Koppel, among others, witnessed the execution of Mario Marquez on January 18, 1995.

4. The Execution of Other Mental Defectives

Since 1986, the Supreme Court has prohibited the execution of persons found to be insane. Nonetheless, inmates who suffer profound mental defects that fall short of insanity are routinely executed. Here are several examples.

a. Rickey Ray Rector

Rickey Ray Rector shot and killed a police officer, then shot himself through the forehead. The bullet tore completely through the front of Rector's skull and lodged under the skin above his right ear. Rector underwent emergency brain surgery, during which three inches of frontal brain tissue were removed from his head. Although Rector survived, the damage to his brain was so severe that the surgery amounted to "a classic prefrontal lobotomy." A journalist characterized Rector's post-operative mental condition as follows:

The clinical effect of such a substantial destruction of frontal brain tissue is that Rector, as it was presented in testimony over the ensuing months, would suffer from "gross memory loss," and particularly that when dealing with "content and meaning" he was "severely impaired," and would have a near-total inability to conceptualize beyond a response to immediate sensations or provocations; in fact, he "seemed unable to grasp either the concept of past or future." A state psychologist also noted that he had "difficulty maintaining concentration and attention to a task." In addition, although Rector did "demonstrate ... some abilities to handle his day-to-day life in terms of actions which are repetitive," he also demonstrated what is know as a flat affect, meaning that "when it comes down to the issues of emotion ... Rickey has absolutely no involvement in any of the dire circumstances of his life." In fact, the Little Rock clinical neuropsychologist found him to be "lacking a will or an understanding of a way to fight his present dilemma."

Following a pretrial competency hearing, which produced expert testimony a higher court would later characterize as "hopelessly in conflict," Rector was deemed fit to be tried. He stood trial and was convicted and sentenced to die.
Rector devoured all of his last meal except for dessert, a large portion of pecan pie. As was his habit, Rector put his dessert aside to be eaten later—after the execution. He died by lethal injection on January 24, 1992.

b. David Funchess

David Funchess, a black man, enlisted in the Marines at age eighteen. Two years later he was sent to South Vietnam, where he was involved in some of the most intensive combat of the war. Funchess was severely injured from a land mine explosion and spent three months recovering in a naval hospital in Japan.

Funchess was sentenced to die for killing two white people during a 1974 robbery of a bar. Years later, Funchess was diagnosed as suffering from Post Traumatic Stress Disorder (PTSD), a psychiatric disorder now known to afflict a significant number of Vietnam war veterans. However, at the time of Funchess’ trial and early appeals, PTSD had not yet been recognized as a clinically identifiable disorder.

In 1982, a psychologist and leading expert on PTSD examined Funchess in prison and found that he suffered from a particularly severe case of the disorder. According to the psychologist, PTSD was produced by massive internalized stress, which could erupt, on occasion, into uncontrollable outbursts of aggressive behavior.

Factual investigation, conducted for the first time by Funchess’ newly-appointed post-conviction lawyers confirmed the origins and documented the symptoms of the disorder. Family and friends testified that:

[D]espite a very poor and often brutal family background, [Funchess] had been a quiet, intelligent and ambitious teenager, who did well at school. He joined the Marines shortly after graduating from high school, apparently believing that a career in the [military] would enable him to progress in life. Described by his sisters as having had a bright and easygoing personality, he returned from Vietnam “shell-shocked.” He was unable to tolerate noise, suffered from frequent “flashbacks,” sleeplessness and recurring nightmares. His family said that he would not enter a house or room without first crouching down with an imaginary machine-gun as if ready for combat. Unable to spend time indoors he would often build what his sister described as “foxholes” and sleep in them under the house. Later he took to sleeping in cars. His family and friends believed that part of his drug addiction was due to the continuing pain from his war injury (prison medical records indicate that he still suffered some pain from this years later). Unable to find regular employment after leaving the [service], he drifted into vagrancy and petty crime.

Funchess was executed on April 22, 1986.

c. Arthur Frederick Goode

Arthur Frederick Goode began exhibiting symptoms of mental disturbance when he was three years old. By age
fifteen, Goode was receiving injections of Depo-Provera to help control his sexual urges. By the time he turned eighteen in 1972, Goode had been arrested for pedophilia. Eventually, Goode was committed to a mental hospital, but he escaped in 1976 and fled to Florida, where he raped, tortured, and killed a ten-year-old boy. A psychiatrist examined Goode before trial and found him to be mentally incompetent. Nonetheless, three court-appointed psychiatrists found Goode competent and he stood trial in 1977. Although Goode had a court-appointed attorney, he represented himself at trial. Goode “brought out evidence to assure his own conviction, testified in gory detail as to his guilt, and argued to the jury that he should be convicted and sentenced to death.” Goode got his wish.

Although the Eleventh Circuit Court of Appeals expressed “serious doubts as to Goode’s competence,” the court upheld Goode’s conviction and death sentence. Goode’s severe mental impairment persisted in prison.

The men who ran the prison agreed that Goode was mad. “I saw Arthur every month,” warden Dave Brierton said. “He would come in for a talk, and it was always the same: He couldn’t understand why society didn’t allow him to have sex with boys. I tried explaining the historical development of sexual taboos, but it never sank in. He would start crying and asking why he couldn’t have a boy in his cell. He was one of a kind, impossible. ‘So-and-so didn’t go to sleep last night,’ he’d say. Or, ‘Your officer only checked the cell block four times, not five.’ Or, ‘I couldn’t get Channel Six last night. I got snow on my TV set.’ One time he comes in and says, ‘I don’t want to live here anymore.’”

He didn’t want to live there anymore. Goode didn’t get the picture, he missed the point of punishment; as his father put it, “He had no understanding.” That was the State’s own test of sufficient sanity to be executed. A prisoner had to understand what was happening to him and why. “I don’t think Arthur ever understood that when you’re executed, we can’t come back the next day and talk about it,” said Richard Dugger, Brierton’s successor as warden. “It was like dealing with a child. He could make a rational appearance. He could answer your questions and appear to carry on a conversation. But he just didn’t understand what you were saying.”

Three court-appointed psychiatrists found that Goode was mentally fit to be executed, and he was electrocuted on April 5, 1984.

d. Johnny Frank Garrett

At the age of seventeen, Johnny Frank Garrett was convicted of capital murder in Texas and sentenced to death. After his arrival on death row in 1982 for a crime he could not remember having committed, Mr. Garrett was diagnosed with paranoid schizophrenia; among his symptoms were auditory and visual hallucinations, including conversations with a dead aunt. Uncontroverted evidence indicated that Mr. Garrett had experienced these psychotic symptoms since childhood. During all but two months of his entire nine-year period of incarceration, prison doctors prescribed for Mr. Garrett substantial doses of Stelazine, an antipsychotic drug.

In 1986, Mr. Garrett was evaluated by Dr. Dorothy Otnow Lewis, a psychiatrist participating in a 1986 research project on the characteristics of juveniles sentenced to death in the United States. After performing a comprehensive examination of Mr. Garrett, Dr. Lewis concluded that he was “one of the most psychiatrically disturbed inmates [she] had interviewed over the past 10 years.”

Dr. Lewis reevaluated Mr. Garrett in 1992, once again finding that he suffered from auditory and visual hallucinations, delusional beliefs, paranoid ideation, and a sense of being controlled by
Despite the arguments of his attorneys that, among other things, Mr. Garrett's severe mental illness prevented him from adequately communicating with them and understanding the nature of his punishment, Johnny Frank Garrett was executed by the state of Texas on February 11, 1992.

Dr. Lewis also diagnosed, for the first time, Mr. Garrett's severe dissociative disorder, which resulted from repeated sexual abuse he endured as a young child. This illness apparently was made manifest through Mr. Garrett's hallucinations and his regular conversations with his dead Aunt Barbara. Moreover, Dr. Lewis found that Mr. Garrett had multiple, independent personalities and personality fragments, an illness often produced by extreme abuse—particularly of a sexual nature—during childhood.

Windell L. Dickerson, Ph.D., a psychologist and former head of Mental Health Services at the Texas Department of Corrections, came to similar conclusions after examining Mr. Garrett in 1986. Dr. Dickerson determined that Johnny Garrett was "one of the most pervasively psychologically impaired individuals [he] had encountered in over 28 years of practice." As reported by Dr. Dickerson, Mr. Garrett's mental illness included paranoid ideation, delusional thought, and misinterpretation arising from neurological limitations. Dr. Dickerson also determined that along with Mr. Garrett's hallucinations in which he spoke with his dead Aunt Barbara, Mr. Garrett also held the delusional belief that this aunt would save him from the effects of the lethal injection at his execution.

Despite the arguments of his attorneys that, among other things, Mr. Garrett's severe mental illness prevented him from adequately communicating with them and understanding the nature of his punishment, Johnny Frank Garrett was executed by the state of Texas on February 11, 1992.

The ABA policy against executing mentally retarded persons is based in part on the fact that mentally retarded persons have the mental ages of children. Thus they are more vulnerable to be led to falsely confess and are less equipped to assist in their defense. As the ABA policy on the execution of juvenile offenders is discussed immediately below.

F. Children Under the Age of 18 Are Being Sentenced to Death and Executed.

1. The ABA Policy

Be It Resolved, That the American Bar Association opposes, in principle, the imposition of capital punishment upon any person for any offense committed while under the age of eighteen (18).

There are many reasons underlying the ABA's position regarding the execution of juveniles. Children and adolescents are widely recognized as less responsible for their actions than adults, and more amenable to rehabilitation. Thus, the death penalty is particularly inhuman as applied to juveniles.

In addition, other arguments typically mustered in support of capital punishment lose force when applied to juvenile offenders.

Children and adolescents are more liable than adults to act on impulse, or under the influence or domination of others, with little thought for the long-term consequences of their actions, and they are unlikely to be deterred by the penalty. Many young people who commit brutal crimes themselves come from brutalizing and deprived backgrounds. To impose the death penalty in such cases, whether as retribution or as an intended deterrent, violates basic principles of decency.
2. Historical Background of Capital Punishment for Children

The historical background of capital punishment for children predates colonization. According to Professor Victor Streib:

The United States inherited the bulk of its criminal law, including the tradition of capital punishment, primarily from England but also from other European countries. A fundamental premise of this criminal jurisprudence was then and is now that persons under age seven were conclusively presumed to be incapable of entertaining criminal intent and thus could not have criminal liability imposed upon them. For persons from age seven to age fourteen, the presumption of inability to entertain criminal intent was rebuttable, and if rebutted, such a person could be convicted of a crime and be sentenced to death. No such presumption applied to persons age fourteen or over. This view of children's liability in the criminal justice system was accepted by the United States Supreme Court in In re Gault [387 U.S. 1 (1967)]: “At common law, children under seven were considered incapable of possessing criminal intent. Beyond that age, they were subjected to arrest, trial, and in theory to punishment like adult offenders [387 U.S. at 16 (1967)].”

In 1988, in Thompson v. Oklahoma, a bare plurality of the Supreme Court held that the Constitution forbids the execution of one who commits a capital offense while under the age of sixteen. William Wayne Thompson was sentenced to die for a murder committed when Thompson was fifteen years old. Along with three adult men, Thompson kidnapped and then killed Charles Keene, Thompson's former brother-in-law, who had been abusing Keene's former wife, Thompson's half-sister. Thompson was certified to stand trial as an adult as permitted by an Oklahoma statute. Relying on many of the same reasons that undergirded the ABA resolution against the execution of persons under age eighteen, the Thompson plurality found that the execution of someone who commits a capital offense under sixteen years of age is "nothing more than the purposeless and needless imposition of pain and suffering" and is therefore unconstitutional.

The following Term, the Court held in Stanford v. Kentucky that the Eighth Amendment did not prohibit the execution of an individual who committed a capital offense at sixteen years of age. Kevin Stanford was approximately seventeen years and four months old when he committed murder. Stanford, like Thompson, was certified to stand trial as an adult, and was convicted and sentenced to die. Stanford's case was consolidated with that of Heath Wilkins, who at age sixteen committed a murder to which he later pleaded guilty. Wilkins was likewise certified as an adult and was sentenced to death.

Thus, Supreme Court precedent, which draws the line of death eligibility at age sixteen, squarely conflicts with ABA policy, which draws the line at age eighteen. According to the most recent statistics available, forty juvenile offenders currently await execution in this country.


In 1988, in Thompson v. Oklahoma, a bare plurality of the Supreme Court held that the Constitution forbids the execution of one who commits a capital offense while under the age of sixteen. William Wayne Thompson was sentenced to die for a murder committed when Thompson was fifteen years old. Along with three adult men, Thompson kidnapped and then killed Charles Keene, Thompson's former brother-in-law, who had been abusing Keene's former wife, Thompson's half-sister. Thompson was certified to stand trial as an adult as permitted by an Oklahoma statute. Relying on many of the same reasons that undergirded the ABA resolution against the execution of persons under age eighteen, the Thompson plurality found that the execution of someone who commits a capital offense under sixteen years of age is "nothing more than the purposeless and needless imposition of pain and suffering" and is therefore unconstitutional.

The following Term, the Court held in Stanford v. Kentucky that the Eighth Amendment did not prohibit the execution of an individual who committed a capital offense at sixteen years of age. Kevin Stanford was approximately seventeen years and four months old when he committed murder. Stanford, like Thompson, was certified to stand trial as an adult, and was convicted and sentenced to die. Stanford's case was consolidated with that of Heath Wilkins, who at age sixteen committed a murder to which he later pleaded guilty. Wilkins was likewise certified as an adult and was sentenced to death.

Thus, Supreme Court precedent, which draws the line of death eligibility at age sixteen, squarely conflicts with ABA policy, which draws the line at age eighteen. According to the most recent statistics available, forty juvenile offenders currently await execution in this country.

4. Modern Executions of Juveniles

Notwithstanding ABA policy, since 1972, nine juveniles condemned to die for crimes committed while under age...
eighteen have been put to death.\textsuperscript{476} Of the forty jurisdictions that permit capital punishment, fourteen have selected age eighteen as the minimum age for death eligibility.\textsuperscript{477} Five others have selected age seventeen.\textsuperscript{478} Twenty-one death penalty jurisdictions (fifty-two percent) permit the execution of sixteen-year-olds.\textsuperscript{479} Consequently, twenty-six out of forty death penalty jurisdictions (sixty-five percent) are not in compliance with the ABA policy.

5. Examples of Children Who Have Been Executed

On September 11, 1985, Texas became the first state to execute a juvenile in this country since 1964.\textsuperscript{480} Charles Rumbaugh had been sentenced to death for a crime committed while he was seventeen years old.\textsuperscript{481} After more than eight years on death row, Rumbaugh dropped his final appeals and died by lethal injection.\textsuperscript{482} The next juvenile to be executed, James Terry Roach, died in South Carolina's electric chair on January 10, 1986.\textsuperscript{483} In 1977, at age seventeen, Roach pleaded guilty to the murders of two white teenagers. An older codefendant, also sentenced to die, was executed in January 1985. A third codefendant who, like Roach, was a juvenile when the murders occurred, turned in state's evidence and was rewarded with a life sentence.\textsuperscript{484} Although the trial judge found that Roach acted under the domination of his older codefendant, and despite psychiatric evidence that Roach had the mental age of a twelve-year-old and suffered a personality disorder, he was sentenced to death.\textsuperscript{485}

Several weeks before Roach was executed, a neurologist discovered that Roach exhibited symptoms of Huntington's Disease, a hereditary illness that causes mental deterioration.\textsuperscript{486} Expert testimony established that this disease, which was not detected at the time of Roach's trial, could well have affected his mental state when the crime was committed.\textsuperscript{487} Seven other juveniles have been put to death in this country since 1985.\textsuperscript{488}

6. International Treaties and Norms

Toward the end of James Terry Roach's appeals, his attorneys raised objections to his execution under international law. For example, a complaint filed with the Inter-American Commission on Human Rights (IACHR) alleged that Roach's execution would violate the obligations of the United States under international customary law and the human rights charter of the Organization of American States (OAS).\textsuperscript{489} The Commission asked the U.S. government and the Governor of South Carolina to grant Roach a stay of execution while the complaint was being considered.\textsuperscript{490} Similarly, on January 9, 1986, the General Secretary of the OAS appealed to the Governor of South Carolina to "follow the current tendency of almost all countries of this hemisphere" and stay Roach's execution.\textsuperscript{491} Both requests failed, and Roach was put to death.

Although Roach's appeal to the U.S. government and the Governor of South Carolina fell on deaf ears, it is evident that the execution of juveniles is an aberration in the international community and is contrary to international law.\textsuperscript{492} As of 1991, only seven countries were known to have executed juveniles in recent history.\textsuperscript{493} These countries include: Barbados, which executed one juvenile and has since raised the minimum age for executions to eighteen; Nigeria, which executed one juvenile; Pakistan, which executed three young people; Bangladesh, which executed one juvenile, although the government disputes the age of the person executed; and the United States, which leads the group with its execution of four young people.\textsuperscript{494} Iran and Iraq also have executed an undetermined number of young people.\textsuperscript{495} The International Covenant on Civil and Political Rights (ICCPR)\textsuperscript{496} prohibits the imposition of the death penalty...
on persons who commit a death-eligible offense when they were under the age of eighteen. On June 8, 1992, the United States ratified the ICCPR but with certain reservations, understandings, declarations, and provisos. In ratifying the ICCPR, the United States specifically rejected the ICCPR's prohibition of the executions of juveniles. This rejection places the United States not only at odds with international law and treaties, but also places the United States outside the norm of recognized international human rights.

III. PROPOSAL THAT THERE BE A MORATORIUM ON THE IMPOSITION AND ENFORCEMENT OF THE DEATH PENALTY.

The language of the ABA's Final Resolution, as adopted February 3, 1997, by a vote of 280 to 119, follows:

RECOMMENDATION

RESOLVED, that the American Bar 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:


(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).

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.

RESOLVED, that the American Bar Association calls upon each jurisdiction that imposes capital punishment not to carry out the death penalty.

APPENDIX

AMERICAN BAR ASSOCIATION POLICY RECOMMENDATIONS ON DEATH PENALTY HABEA CORPUS

AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATIONS

BE IT RESOLVED, That the American Bar Association urges that the following measures be taken in the litigation of death penalty cases:

(1) Because the defects and delays in habeas corpus procedure are due to the fact that the accused was not represented by competent counsel, particularly at the trial level, the state and federal governments should be obligated to provide competent and adequately compensated counsel for capital defendants/appellants/petitioners, as well as to provide sufficient re-
Jurisdictions that have the death penalty should establish and fund organizations to recruit, select, train, monitor, support, and assist attorneys involved at all stages of capital litigation and, if necessary, to participate in the trial of such cases.

(2) The individual or organization responsible for appointing counsel should enlist the assistance of the local bar association and resource center to seek the best qualified attorneys available.

(3) Jurisdictions that have the death penalty should establish and fund organizations to recruit, select, train, monitor, support, and assist attorneys involved at all stages of capital litigation and, if necessary, to participate in the trial of such cases.

(4) New counsel should be appointed to represent the death-sentenced inmate for the state direct appeal unless the appellant requests the continuation of trial counsel after having been fully advised of the consequences of his or her decision, and the appellant waives the right to new counsel on the record.

(5) To avoid the delay occasioned by the appointment of new counsel for post-conviction proceedings and to assure continued competent representation, state appellate counsel who represented a death-sentenced inmate should continue representation through all subsequent state, federal, and United States Supreme Court proceedings.

(6) To assure that the state provides competent representation and to avoid procedural delays as well as multiple review of the same issues, the following procedural barriers to federal habeas corpus review should not apply with respect to any state court proceeding at which the state court, in deprivation of the right to counsel recognized in paragraph “1” above, failed to appoint competent and adequately compensated counsel to represent the defendant/appellant/petitioner:

(a) exhaustion of state judicial remedies;

(b) procedural default rules; and

(c) the presumption of correctness of state court findings of fact.

(7) Federal courts should not rely on state procedural bar rules to preclude consideration of the merits of a claim if the prisoner shows that the failure to raise the claim in a state court was due to the ignorance or neglect of the prisoner or counsel or if the failure to consider such a claim would result in a miscarriage of justice.

(8) State appellate courts should review under a knowing, understanding, and voluntary waiver standard all claims of constitutional error not properly raised at trial and on appeal and should have a plain error rule and apply it liberally with respect to errors of state law.

(9) On the initial state post-conviction application, state post-conviction courts should review under a knowing, understanding, and voluntary waiver standard all claims of constitutional error not properly preserved at trial or on appeal.

(10) The federal courts should adopt rules designed to facilitate both the presentation of all available claims in the first habeas corpus petition and the prompt exhaustion of any unexhausted claims in order to eliminate the problem of procedurally forced successive petitions.

(11) A rational process of review will be facilitated by a stay of execution that remains in force until the completion of the initial round of state and federal post-conviction review. Therefore, unless the state courts grant a stay of
execution, the federal courts, in preservation of their habeas corpus jurisdiction, should grant a stay of execution to run from the initiation of state post-conviction proceedings through the completion for the initial round of federal habeas corpus proceedings, and should be empowered to do so.

(12) The petitioner should have a right of appeal from denial of an initial federal habeas corpus petition without the need to obtain a certificate of probable cause.

(13) A one-year limitations period should be employed as a substitute mechanism to move the case toward reasonably prompt completion, but only with adequate and sufficient tolling provisions to permit full and fair consideration of a petitioner's claims in state court, federal court, and the United States Supreme Court. The sanction for failure to comply with the time requirements should be dismissal, except that the time requirements should be waived where the petitioner has presented a colorable claim, which has not been presented previously, either of factual innocence or of the petitioner's ineligibility for the death penalty.

(14) A federal court should entertain a second or successive petition for habeas corpus relief if:
(a) the request for relief is based on a claim not previously presented by the prisoner in the state and federal courts and the failure to raise the claim is the result of state action in violation of the Constitution or laws of the United States, the result of Supreme Court recognition of a new federal right that is retroactively applicable, or based on a factual predicate that could not have been discovered through the exercise of reasonable diligence; or
(b) the facts underlying the claim would be sufficient, if proven, to undermine the court's confidence in the jury's determination of guilt on the offense or offenses for which the death penalty was imposed; or
(c) consideration of the requested relief is necessary to prevent a miscarriage of justice.

(15) The standard for determining whether changes in federal constitutional law should apply retroactively should be whether failure to apply the new law would undermine the accuracy of either the guilt or the sentencing determination.

(16) To afford the states a reasonable time to adopt and implement rules and procedures pursuant to these Recommendations, the proposed federal statutory and rule changes should take effect upon adoption by the states of provisions in accordance with these Recommendations, but not later than two years from the date of enactment of federal legislation.

NOTES

1 Brief of the ABA as Amicus Curiae at 2, Giarrettano v. Murray, 448 U.S. 923 (1988) (No. 88-411). See generally ABA CONST art. 1, § 1.2. Indeed, since the ABA's inception over a century ago, it has taken an active interest in promoting the availability and effectiveness of counsel in our adversary system of criminal justice.

2 Brief of the ABA as Amicus Curiae at 2, Giarrettano (No. 88-411).

3 For example, in 1979, the ABA proposed "that the U.S. Supreme Court adopt a rule providing for appointment of counsel to prepare petitions for discretionary review of state court convictions, including appropriate post-conviction or clemency petitions, if necessary, in death penalty cases where the defendant can not afford to hire counsel." ABA, SUMMARY OF ACTION OF THE HOUSE OF DELEGATES, 1979 MIDYEAR MEETING 22 (Feb. 12-13, 1979) [hereinafter THE HOUSE OF DELEGATES (1979)]. In 1982, the ABA resolved to "support the prompt availability of competent counsel for both state and federal court proceedings" in post-conviction and habeas corpus. ABA, SUMMARY OF ACTION OF THE HOUSE OF DEL-
JUSTICE, from or connected with a criminal case, should be provided in all proceedings arising from criminal cases. Standard 5-4.2 states that "counsel should be provided 'at all stages of capital... litigation," including trial, direct appeal, collateral proceedings in both state and federal court, and certiorari proceedings in the Supreme Court. ABA, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, 1990 MIDYEAR MEETING 15 (Feb. 12-13, 1990) [hereinafter THE HOUSE OF DELEGATES (1990)]. For further discussion, see infra notes 78-79, 158, 159, and 366 and accompanying text.


5 See, e.g., Brief of the ABA as Amicus Curiae, Giarratano (No. 88-411); Brief of the ABA as Amicus Curiae, Sawyer v. Smith, 110 S. Ct. 2922 (1990) (No. 89-5809); Brief of the ABA as Amicus Curiae, Wright v. West, 505 U.S. 277 (1992) (No. 91-542); Brief of the ABA as Amicus Curiae, McFarland v. Collins, 114 S. Ct. 2568 (1994) (No. 95-1954).


7 See, e.g., SPANGENBERG GROUP, ABA STUDY: AN UPDATED ANALYSIS OF THE RIGHT TO COUNSEL AND THE RIGHT TO COMPENSATION AND EXPENSES IN STATE POST-CONVICTION DEATH PENALTY CASES (1993) [hereinafter SPANGENBERG GROUP].

8 ABA TASK FORCE ON DEATH PENALTY HABEAS CORPUS, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES, A REPORT CONTAINING THE AMERICAN BAR ASSOCIATION'S RECOMMENDATIONS CONCERNING DEATH PENALTY HABEAS CORPUS AND RELATED MATERIALS FROM THE AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION'S PROJECT ON DEATH PENALTY HABEAS CORPUS 59 (1990) [hereinafter TASK FORCE REPORT]. For a more complete discussion of the TASK FORCE REPORT, see infra section II.C.3.

9 Id.


11 Alex Kozinski & Sean Gallagher, For an Honest Death Penalty, N.Y. TIMES, Mar. 8, 1995, at A21.

12 Id.

13 Id.

14 Id.

15 Symposium, Politics & the Death Penalty, supra note 6, at 250.

16 Id. at 251.

17 Symposium, Capital Punishment: Is There Any Habeas Left in This Corpus?, supra note 6, at 602.
Johnson's refusal, Pataki replaced Johnson as D.A. Over Death Penalty, Attorney Johnson has paid dearly for his opposition to the reinstatement of capital punishment in New York. Morgenthau explained that when he became District Attorney in 1975, there were 648 homicides in Manhattan. In 1994, there were 330. "The number has been cut virtually in half without executions—proof to me that they are not needed to continue that trend." Id.

Morgenthau, supra note 18, at A25. Prosecutor Morgenthau wrote to explain his opposition to the reinstatement of capital punishment in New York. Morgenthau explained that when he became District Attorney in 1975, there were 648 homicides in Manhattan. In 1994, there were 330. "The number has been cut virtually in half without executions—proof to me that they are not needed to continue that trend." Id.


Professors Carol S. Steiker and Jordan M. Steiker provide the following assessment of modern death penalty jurisprudence:

Virtually no one thinks that the constitutional regulation of capital punishment has been a success. But oddly, and we think significantly, critics of the Court’s death penalty jurisprudence fall into two diametrically opposed camps. On the one hand, some critics claim that the Court’s work has burdened the administration of capital punishment with an overly complex, absurdly arcane, and minutely detailed body of constitutional law that, in the words of Learned Hand in a slightly different context, “obstructs, delays, and defeats” the administration of capital punishment. This set of critics notes the sheer volume of death penalty litigation, the labyrinthine nature of the doctrines that such litigation has spawned, the frequency with which federal courts overturn state-imposed death sentences, and the lengthy delays that occur between the imposition of death sentences and their execution. On the other hand, a different set of critics claims that the Supreme Court has in fact turned its back on regulating the death penalty and no longer even attempts to meet the concerns about the arbitrary and discriminatory imposition of death that animated its “constitutionalization” of capital punishment in Furman. These critics note that the Court’s intervention has done little or nothing to remedy the vast overrepresentation on death row of the young, poor, and mentally retarded or the continuing influence of race on the capital sentencing decision. Under this view, in the anguished words of Justice Blackmun, who twenty years after his dissent in Furman radically changed course and argued for the abolition of the death penalty altogether under the Eighth Amendment, the Court has done no more than “‘tinker with the machinery of death.’”

* * *

We conclude that both sets of criticisms of the Court’s work are substantially correct: the death penalty is, perversely, both over- and under-regulated. The body of doctrine produced by the Court is enormously complex and its applicability to specific cases difficult to discern; yet, it remains unresponsive to the central animating concerns that inspired the Court to embark on its regulatory regime in the first place. Indeed, most surprisingly, the overall effect of twenty-odd years of doctrinal head-banging has been to substantially reproduce the pre-Furman world of capital sentencing.

Steiker & Steiker, supra note 10, at 357-59 (footnotes omitted).

Douglas W. Vick recently suggested that full implementation of the procedural and substantive protections erected by the Supreme Court in capital cases might achieve the same result. Vick concluded, however, that these procedural and substantive protections—much like the ABA policies and recommendations—are rarely implemented. Vick, Underfunded Indigent Defense, supra note 22, at 338.

See infra section II.
This section draws in large part upon RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 51-52, 91-121 (1994).

408 U.S. 238 (1972).


Id. at 87-88.

Id. at 99.

Id. at 100-01.

Id. at 101.

See, e.g., MARK TUSHNET, CONSTITUTIONAL ISSUES: THE DEATH PENALTY 16 (1994).


Id. at 196.

Id. at 204.

408 U.S. 238 (1972).

Id. at 239.

Id. at 238.

Id. at 239-40. Although the judgment of the Court was announced in a terse per curiam opinion, all nine justices wrote opinions setting forth their disparate views on the subject. Justices Brennan and Marshall concluded that the death penalty was unconstitutional regardless of how it was administered. According to Justice Brennan:

Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment. The function of these principles is to enable a court to determine whether a punishment comports with human dignity. Death, quite simply, does not.

Id. at 305.

Justice Marshall found that the death penalty constituted cruel and unusual punishment on two independent grounds. First, "it is excessive and serves no valid legislative purpose." In Justice Marshall's view, the death penalty was no more effective a deterrent than life imprisonment. Second, Justice Marshall considered the death penalty to be "abhorrent to currently existing moral values." Id. at 331-33, 357-60.

The other three members of the Furman majority, Justices Stewart, Douglas, and White, agreed that the systems of capital punishment then in existence were unconstitutional. However, these justices reserved judgment on whether capital punishment could be constitutionally administered under some other system.

Justice Douglas' concurring opinion focused on the discriminatory effect of the discretionary statutes. He wrote: "[T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments." Id. at 256-57.


Id. at 188.


Gregg, 428 U.S. at 204.


Proffitt, 428 U.S. at 258.

These capital offenses are: [1] "murder of a peace officer or fireman; [2] murder committed in the course of kidnapping [sic], burglary, robbery, forcible rape or arson; [3] murder committed for remuneration; [4] murder committed while escaping or attempting to escape from a penal institution; and [5] murder committed by a prison inmate when the victim is a prison employee." During the guilt and innocence stage of the capital trial, the jury is required to determine whether the state proved beyond a reasonable doubt that the defendant committed one of the enumerated capital offenses. Jurek, 428 U.S. at 268-69.

If the jury found the defendant guilty of a capital offense, Texas required the jury, in a separate sentencing proceeding, to answer three questions to determine whether a defendant would be allowed to live in prison or be put to death:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

TEX. CODE CRIM. PROC. ANN. art. 37.0711 (West 1997).
without possibility of parole as a matter of state law [Simmons v. South Carolina, 114 S. Ct. 2187, 2193-94 (1994)]. The Court also has invoked the “death is different” doctrine in post-trial proceedings to overturn a sentence based on a prior conviction that was later invalidated [Johnson v. Mississippi, 486 U.S. 578, 584-87 (1988)], and to suggest that some post-trial judicial consideration of newly-discovered evidence of innocence may be mandated when the inmate makes a “truly persuasive” showing of actual (as opposed to legal) innocence [Herrera v. Collins, 506 U.S. 390, 417].

Steiker & Steiker, supra note 10, at 397.

Callins v. Collins, 114 S. Ct. at 1132-33 (Blackmun, J., dissenting from denial of certiorari).

Id.


Id. at 604-05 (emphasis in original).

Id.


U.S. CONST. amend. VI.

TASK FORCE REPORT, supra note 8, at 8.

The HOUSE OF DELEGATES (1990), supra note 3, at 15. Later that same year, the National Law Journal (NLJ) published the results of a comprehensive six-month, six-state study of capital defense in the South. After examining thousands of pages of trial transcripts in nearly 100 capital cases; conducting in-depth interviews with scores of attorneys who tried and lost capital cases; and questioning judges, prosecutors and experts in capital cases; the NLJ reported the following “key findings”: The trial lawyers who represented death row inmates in the six states [Alabama, Georgia, Florida, Louisiana, Mississippi, and Texas] have been disbarred, suspended or otherwise disciplined at a rate three to 46 times the discipline rate for those states.

More than half the defense counsel questioned in an NLJ survey said they were handling their first capital trials when their clients, now on death row, were convicted. Wholly unrealistic statutory fee limits on defense representation—such as Mississippi’s flat, unwaivable $1,000 cap, equivalent to a fee of about $5 per hour for many lawyers—act as disincentives to thorough trial investigation and preparation.

Inadequate or non-existent standards for appointment of counsel can result, for example, in an oil and gas lawyer handling a capital trial as his or her first criminal case. Statutory standards that do exist for appoint-
ment of counsel are routinely ignored by trial judges and violations are viewed on appeal as "harmless error."

Capital trials often are completed in one to two days—in contrast to the two-week to two-month trials in some regions where sophisticated indigent defense systems operate.

Penalty phases—the capital trial's most important part—usually start immediately after a guilty verdict and last only several hours and in at least one case just 15 minutes.

Little effort—and in at least one-fourth of the cases the NLJ examined, no effort—was expended to present mitigating evidence at the penalty phase.

Judges routinely deny lawyers' requests for expert/investigative fees.

State criminal justice systems are ill-equipped to deal with mentally ill or retarded defendants unable to aid their defense attorneys.

And finally, compounding all of these problems, the U.S. Supreme Court decision that lays out the test for ineffective assistance of counsel is itself ineffective, according to capital law experts and defense lawyers. The test has made it all but impossible for death-sentenced inmates to challenge the performance of their trial lawyers.

Marcia Coyle et al., 


79 GUIDELINES, supra note 3.


81 GUIDELINES, supra note 3, at 79.

82 ABA, STANDARDS FOR CRIMINAL JUSTICE § 4-1.2 (3d ed. 1991).

83 AD HOC COMM. ON FEDERAL HABEAS CORPUS IN CAPITAL CASES, REPORT ON FEDERAL HABEAS CORPUS IN CAPITAL CASES, 45 Crim. L. Rep. (BNA) 3239 (Sept. 27, 1989) [hereinafter POWELL COMM. REP.].


85 POWELL COMM. REP., supra note 83, at 4.

86 Donald P. Lay, The Writ of Habeas Corpus: A Complex Procedure for a Simple Process, 77 MINN. L. REV. 1015, 1057 (1993). As Chief Judge A. Leon Higginbotham, Jr., of the Third Circuit observed: "[i]t is at the trial and direct appeal stage—not in state collateral proceedings—where ineffectual counsel do the most damage to their clients' rights and to the integrity of the judicial process." Id. at 1057-58. More recently, Judge Joseph W. Bellacosa of the New York Court of Appeals noted that there is "a death row counsel crisis in this country." Joseph W. Bellacosa, Ethical Impulses From the Death Penalty: "Old Sparky's" Jolt to the Legal Profession, 14 FED. L. REV. 1, 13 (1994).


88 Id.

89 Id. at 687.

90 Id. at 694.

91 Id. at 696. An attorney's errors do not violate the right to counsel unless the attorney's performance as a whole falls outside the "wide range of reasonable professional assistance." Id. at 689. Under Strickland, courts must "judge ... counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690.

92 Id. at 689.

93 Id. at 707.

94 Id. at 710-11.

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

96 For a sampling of various horror stories regarding counsel in capital cases, see infra sections II.A.6 and II.A.7.


98 Two justices of the Florida Supreme Court would have held that Moran was ineffective during trial. Coyle et al., supra note 78, at 30.


100 Id. at 380 (Stevens, J., dissenting).

101 Id. at 372.

102 A recent ABA-sponsored symposium addressed the political pressures that confront elected state judges who overturn death sentences because of serious constitutional errors. Symposium, Politics and the Death Penalty, supra note 6. During that program, James Exum, Jr., Chief Justice of the North Carolina Supreme Court, described how the way he voted in capital cases became a central issue during the judicial elections. Id. at 270-73.


105 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.
judgment comes to bear in "mitigating the Death Sentence not for the Worst Crime but for the Worst and cruel and unusual punishment violative of
stated that "[a] penalty with such negligible sentencing authority of juries, where community
imposed has all but nullified its intended effects. This phenomenon, White felt, emerged from the infrequency with which the death penalty is future similar conduct by other individuals, the goal of punishment is specific deterrence of

system of criminal justice, in which one primary

voters speak loudly enough, even the judiciary
observed, 'One thing it shows is that when the
bend to political pressures" have lost their posi-
tions on the bench).

[113] Id. "A law professor who watches the court observed, 'One thing it shows is that when the voters speak loudly enough, even the judiciary listens.' " Id. (quoting Professor Clark Kelso) (citation omitted).

[114] See generally id.

[115] Id. at 760-61.

[116] Id. at 761.

[117] Id. "A law professor who watches the court observed, 'One thing it shows is that when the voters speak loudly enough, even the judiciary listens.' " Id. (quoting Professor Clark Kelso) (citation omitted).

[118] Id. at 761.

[119] Id. See generally id.

[120] Id. at 760.

[121] Id. at 760.

[122] Id. at 1851-52 (citations omitted). Consider the following description of the current system of indigent defense:

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 these programs. All of these approaches have several things in common. They evince the gross underfund-
ing that pervades indigent defense. They are unable to attract and keep experienced and qualified attorneys because of lack of compensa-
tion 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, inexperi-
enced 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 pro-
vided 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.

It should be obvious that even if experienced and competent counsel are available in capital cases, inadequate representation can still result due to inadequate funding. Ample funds are essential, not just to cover the reasonable cost of attorneys' fees, but to pay for critical services rendered by investigators and experts.

Nationwide, examples of inadequate fund-
ing abound. Attorneys appointed to repre-
sent capital defendants in certain rural coun-
ties in Texas receive no more than $800 for their services. Marianne Lavelle, Strong Law Thwarts Lone Star Counsel, Nat'l L.J., June 11, 1990, at 3.

An Alabama attorney appointed to represent a capital defendant in a widely publicized case in Alabama was allotted $500 for his services and those of investigators and experts. Bright, Counsel for the Poor, supra note 117, at 1847 (citing Deposi-

[124] 755 F.2d 741 (11th Cir. 1985) (per curiam), cert. denied, 474 U.S. 1026 (1985). The Circuit court, in applying the test enunciated in Strickland v. Washington, upheld the district court ruling that Shirley Tyler received ineffective assistance of counsel for failure to present mitigating evidence at the sentencing phase. The two-part test announced in Strickland first asks, “did counsel in fact render a deficient performance?” The Supreme Court said that this “test must be whether counsel’s conduct fell below an objective standard of reasonableness.” “In order to make the second determination, it must be shown that the acts of counsel that were outside the range of competence were actually prejudicial.” Id. at 744.

[125] 954 F.2d 1483 (9th Cir. 1992), vacated, 507 U.S. 1026 (1993), on remand 20 F.3d 950 (9th Cir. 1994). Defendant appealed, citing numerous errors relating to ineffective assistance of counsel. The Circuit Court, after conducting a de novo review of this Sixth Amendment issue, found that “Paradis has failed to demonstrate that his trial counsel’s performance was ineffective because of his inexperience.” While recognizing that counsel had been admitted to the bar only six months before the murder trial, the Circuit Court noted that counsel “had been a police officer for many years before he attended law school. [Counsel] had extensive background in law enforcement investigations and the court system. The record also shows that [counsel] had previously tried some misdemeanor cases for the prosecutor’s office.” Id. at 491.

[126] 692 F.2d 999 (5th Cir. 1982), cert. denied, 464 U.S. 843 (1983). “[Defendant] argue[d on appeal] that his trial counsel was unqualified because he had never defended a criminal case all the way to a jury verdict and because he had only recently graduated from law school.” Id. at 1008. The circuit court affirmed the district court’s rejection of the defendant’s argument. The circuit court noted that “a defendant is not entitled to ‘errorless counsel,’ but to ‘counsel reasonably likely to render and rendering reasonably effective assistance.’” Id. (citing Washington v. Watkins, 655 F.2d 1346, 1356 (5th Cir. 1981)). Additionally, the court noted that defense counsel had interned in the district attorney’s office as a law student, had handled criminal cases for a respected law firm, had previously worked on a number of civil cases, and had enlisted the help of two experienced criminal lawyers while preparing defendant’s case. Id. at 1008-09.

[127] 548 So. 2d 389 (Miss. 1989).


[129] 974 F.2d 348 (3d Cir. 1992), cert. denied, 507 U.S. 954 (1993). The court of appeals found that defense counsel’s reliance on an unconstitutional death penalty statute during the penalty phase constituted ineffective assistance under the first prong of the Strickland test: “petitioner must show that . . . the attorney’s representation fell below an objective standard of reasonableness.” Id. at 358. However, the court noted that petitioner’s argument failed prong two of the Strickland test in that it demonstrated no actual prejudice.

[130] We simply cannot conclude that there is any “reasonable probability” that, with effective assistance of counsel, Frey’s jury would have found that the balance of mitigating and aggravating factors tipped the other way. [Defense counsel’s] misstatements about the statute were corrected. All the evidence was before the jury, which was properly instructed. . . . [T]he jury concluded that the mitigating factors paled in comparison to the horrible nature of the contract killing.

Id. at 369.

[131] 393 S.E.2d 244 (Ga. 1990) (per curiam). The Georgia Supreme Court held that the defendant had received ineffective assistance of counsel, citing numerous problems with the defense team and the defenses presented at trial. Among those factors found dispositive to its ruling were the following:

(1) “Indicating its belief that [retained counsel’s] advanced age made him unable to handle the unified appeal procedure, the trial court appointed an attorney to assist.”

(2) The two defense attorneys never discussed their theory of the case until after the state had rested its case in chief.

(3) Retained counsel placed defendant on the stand without any preparation for examination and over objection of appointed counsel. Defendant subsequently contradicted eyewitness and circumstantial evidence linking him to the crimes.

(4) Defense attorneys presented mutually exclusive defense theories during closing arguments: Retained counsel “asked the jury to acquit based on reasonable doubt that petitioner committed the crimes, while appointed counsel continued to advance two theories involving mental illness as well as arguing the sufficiency of the evidence.”
would not seek the death penalty against John E. 

Left in This Corpus, inadequate counsel in capital cases, see Scharlette

131 For other examples of woefully 

132 The circuit court reversed the district court, reinstating the death sentence. The court based its reversal in part on the facts that defense counsel was an experienced attorney to whom the district court should have granted wide latitude, that “evidence of possible mitigating factors was before the jury,” and that defendant’s behavior during the trial did nothing to help counsel’s defense. “Indeed, at trial the lawyer found his client laughing in the presence of the jury at the grisly details of the slaying.” Id. at 877.


134 Id.


136 Morgan v. Zant, 743 F.2d 775, 780 (11th Cir. 1984).

137 Id.

138 That money matters in capital cases was confirmed again on March 12, 1996. On that date, prosecutors in Delaware announced that they would not seek the death penalty against John E. DuPont, a millionaire charged with shooting to death Dave Schultz, a former Olympic wrestler. Prosecutors Will Not Seek Death Penalty for DuPont, REUTERS N. AM. WIRE, Mar. 12, 1996.


140 Id. at 262-65.

141 For other examples of woefully inadequate counsel in capital cases, see Scharlette Holdman, Capital Punishment: Is There Any Habits Left in This Corpus, 27 LOY. L. REV. 560 (1996).

142 5 S.E.2d 250 (Ga. 1991).

143 979 F.2d 1067 (5th Cir. 1992).

144 Bright, Counsel for the Poor, supra note 117, at 1835.

145 Id. at 1838-39 (footnotes omitted).

146 The district attorney who eventually dropped all charges against Nelson noted, “[T]here is no material element of the state’s case in the original trial which has not subsequently been determined to be impeached or contradicted.” Jingle Davis & Mark Curriden, Man Condemned for Murder of Girl Is Freed, ATLANTA CONST., Nov. 7, 1991, at O6.


148 See generally Bright, Counsel for the Poor, supra note 117, at 1859-60.


152 Id. Bright observed that the second person executed in Georgia following Gregg suffered similar injustice in his case. According to Bright, Ivon Stanley, a mentally retarded offender:

[W]as denied relief despite a jury instruction which unconstitutionally shifted the burden of proof on intent because his attorney did not preserve the issue by raising an objection at trial. His more culpable codefendant was granted a new trial on the unconstitutional instruction. Again, a switch of the lawyers would have reversed the outcomes of the two cases.


154 See Caldwell v. Mississippi, 472 U.S. 320, 330 (1985) (capital sentencing jury must recognize the gravity of its task and proceed with the appropriate awareness of its “truly awesome responsibility”).

155 Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified sub. nom, Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987).

157 See supra note 82 and accompanying text.

158 Guidelines, supra note 3, at 79; see also The House of Delegates (1990), supra note 3.

159 Guidelines, supra note 3, at 3, 41.

160 See infra notes 184-97 and accompanying text.

161 Texas alone reportedly has 75 unrepresented inmates on death row. Special Comm. on Capital Representation and the Comm. on Civil Rights, Ass'n of the Bar of the City of New York, The Crisis in Capital Representation 1 (1996) [hereinafter Crisis in Capital Representation].

162 155 U.S. 684 (1894).


166 See Whitebread & Slobochin, supra note 164, at 691-92.


168 U.S. Const. amend. VI.


171 466 U.S. 668 (1984). For a discussion of how the ABA policies on counsel exceed the minimum requirements imposed by Strickland v. Washing- ton, see supra notes 78-86 and accompanying text.

172 See Crisis in Capital Representation, supra note 161, at 9-10.


175 Id. at 556-57.


177 Id. at 8-10.

178 Brief for ABA as Amicus Curiae at 4-5, Giarra- tano (Nos. 87-71518, 87-7519).


181 Id.

182 Bonin v. Vasquez, 999 F.2d 425 (9th Cir. 1993).

183 Section 848(q)(4)(B) of Title 21 of the United States Code provides:

In any post conviction proceeding under section 2254 or 2255 of title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert or other reasonably neces- sary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accord- ance with paragraphs (5), (6), (7), (8), and (9).


184 Task Force Report, supra note 8, at 16.


187 Task Force Report, supra note 8, at 59.


190 Crisis in Capital Representation, supra note 161, at 28.

191 Reske, supra note 189, at 20.

192 Id.

193 Crisis in Capital Representation, a joint report of two committees of the Bar of the City of New York, described the decision to defund PCDOs as “deplorab[le]” and noted that “[w]ithout the PCDOs, the shortage of competent counsel will worsen, as lawyers decline or drop cases for lack of support services.” Crisis in Capital Representation, supra note 161, at 2.

194 Marcia Coyle, Republicans Take Aim at Death Row Lawyers, Nat'l L. J., Sept. 18, 1995, at A1, A25 (citing David Sellers of the Administrative Office of the United States Courts) [hereinafter Coyle, Republicans Take Aim]. During an ABA-sponsored program, Andrea Lyon, Director of the Illinois Capital Resource Center stated, “we were . . . defunded because we were not supposed to win.” Panel Discussion, Capital Punishment: Is There Any Habeas Left in This Corpus?, supra note 6, at 523, 588. Lyon elaborated:

Prosecutors have what they call “The Fryers Club.” 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.

Id. at 590.

195 Coyle, Republicans Take Aim, supra note 194, at A25.

196 The Crisis in Capital Representation, supra note 161, at 30-31 (arguing that without PCDOs, innocent prisoners would have been executed).


198 Id. at 665-67.


200 TASK FORCE REPORT, supra note 8, at 5.

201 Id.

202 Berger, supra note 199, at 1684. The key recommendations of the Task Force are discussed infra section II.C.3.

203 For a discussion of recent habeas reform legislation, see infra section II.C.8.

204 This section draws heavily on COYNE & ENTZEROTH, supra note 27, at 495-97.

205 See infra notes 291-310 and accompanying text.

206 WILLIAM S. CHURCH, THE WRIT OF HABEAS CORPUS, §§ 38-45 (San Francisco, Bancroft-Whitney 1893); A.H. Carpenter, Habeas Corpus in the Colonies, 8 AM. Hist. REV. 18 (1902).


208 5 WILLIAM BLACKSTONE, COMMENTARIES *129.

209 U.S. CONST. art. I, § 9, cl. 2.

210 LAFAVE & ISRAEL, supra note 163, at 1178. “The common law writ of habeas corpus, simply defined, is a judicial order directing a person to have the body of another brought before a tribunal at a certain time and place. The writ apparently takes its name from its directive, originally stated in Latin, that the court would ‘have the body.’ ” Id.

211 Act of September 24, 1789, ch. 20, § 14, 1 Stat. 81-82.

212 44 U.S. (3 How.) 103 (1845).

213 Id. at 105. “Neither this nor any other court of the United States, or judge thereof, can issue a habeas corpus to bring up a prisoner, who is in custody under a sentence or execution of a state court, for any other purpose than to be used as a witness. And it is immaterial whether the imprisonment be under civil or criminal process. As the law now stands, an individual, who may be indicted in a Circuit Court for treason against the United States, is beyond the power of federal courts and judges, if he be in custody under the authority of a state.” Id.

214 28 U.S.C. § 2254(a) (1994). “The Supreme Court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgement of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” Id.


216 WHITEBREAD & SLOBOGIN, supra note 164, at 831 (citing Frank v. Mangum, 237 U.S. 309 (1915); Brown v. Allen, 344 U.S. 443 (1953)).

217 WHITEBREAD & SLOBOGIN, supra note 164, at 831-32.

While the Warren Court appeared to distrust either the competence or the willingness of state courts to enforce constitutional guarantees, the Burger Court evidenced a desire to reinvigorate the parallel state system. This ‘New Federalism’ has several motivations. First is a greater faith in the capabilities of the state courts. Relatedly, the Court wishes to promote ‘comity’ between the federal and state systems by according judgments made by the latter system greater respect. The Court has also stressed the need for finality in the review process and the burden that habeas petitions place on the federal courts.

Id.


220 Id. at 537. At the time Justice Jackson complained about the “flood” of habeas petitions, state inmates filed 541 petitions in federal court. Id. at 536 n.8. By 1961, there were 1020 habeas petitions filed; and by 1970, there were 9063. In 1991, state prisoners filed 10,325 habeas petitions. 1991 DIRECTOR OF THE ADMIN. OFFICE OF THE UNITED STATES COURTS ANN. REP. 191. Although the number of habeas petitions filed has increased substantially over the years, the error rate, particularly in capital cases, remains alarmingly high.


222 Id. at 2789 (Blackmun, J., dissenting). Moreover, “the total reversal rate of capital cases at all stages of review during the same time period was
estimated at 60% or more... This Court itself frequently has granted capital defendants relief in federal habeas corpus proceedings." Id. See generally, The Crisis in Capital Representation, supra note 161, at 32-41. "Reports illustrate the range and variety of substantive claims in more than 250 cases in which federal habeas corpus relief was granted in capital and non-capital cases between 1959 and 1994. What kinds of federal constitutional violations have led to the surprisingly high success rate in habeas corpus for death row inmates? Certainly not technicalities." Id.

225 See Motion for Leave to File Brief and Brief Amici Curiae of Benjamin R. Civiletti in Support of the Respondent at 21, Wright v. West, 505 U.S. 277 (No. 91-542) (1992). "The rate of reversible constitutional error found on habeas review of state capital judgements has remained constant over the period—42 percent between 1976 and 1984 and 41 percent between 1985 and 1991. The annual rate has never gone below 28 percent." Id. The actual rate of constitutional error detected in capital cases is actually much higher. Not included in the 40 percent figure are the very many cases in which federal judges have identified constitutional errors but have found them to be harmless. See Brecht v. Abrahamson, 507 U.S. 619 (1993). See also Death Penalty Information Center, 1995 Year End Report 2. In addition, "five inmates were released from death row in 1995 after being acquitted at re-trial or after charges were dropped. This brings the total number of death row inmates released since 1973 because of evidence of their innocence to 59." Id.

226 These examples are taken from Crisis in Capital Representation, supra note 161, at 13-18. The report lists 28 cases involving instances of egregious constitutional error in the past 15 years. Id.

227 TASK FORCE REPORT, supra note 8, at 6.

228 Id. at 5.

229 Id. "The composition of the Task Force was balanced to include experts with many different perspectives on the substance and process of capital litigation." Id. at 45.

230 Id. at 5.

231 Id. at 46. The report stressed that it was "particularly important to address the chaotic character of... last minute... reviews in death penalty cases," because they "present unique problems and require special solutions." Id. at 5.

232 Id. at 45 n.121. These hearings were held in 1989 during the months of May (Dallas), June (San Francisco), and August (Atlanta). Id. Following each regional hearing, the Task Force met as a deliberative body. In addition, the Task Force convened on three other occasions. These additional meetings took place in Washington D.C. (December 1989) and New Orleans (April 1989 & October 1989). Id. at 46 n.123.

233 Id. at 45-46.


235 TASK FORCE REPORT, supra note 8, at 6. The Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848 (1994), somewhat ameliorated the failure of most jurisdictions to provide competent counsel in all stages of capital cases by providing death row petitioners a statutory right to counsel in federal habeas corpus proceedings. Of course, by the time competent counsel has been provided in federal habeas proceedings, the often fatal damage of incompetent counsel has been done. And, significantly, the Supreme Court has held that there is no constitutional right to an effective lawyer beyond the direct appeal stage.

236 TASK FORCE REPORT, supra note 8, at 17.

237 Id.

238 Id. at 119-20. For example, Caprice Cosper, an Assistant District Attorney in Houston, remarked that the setting of execution dates "is perhaps the single most substantial impediment to the orderly administration of capital habeas cases in Texas... It makes a chaotic mess out of the system of administering these cases." Id. at 118.

239 Id. at 26-27.

240 A narrow exception to the procedural default rule generally exists for those errors that, although not preserved for review, are considered "fundamental." E.g., Murray v. Carrier, 477 U.S. 496 (1986). Because so very few trial errors are considered "fundamental," this exception permits review of procedurally defaulted constitutional claims in only the rarest of cases. Id.

241 TASK FORCE REPORT, supra note 8, at 76.

242 This recommendation espoused a return, in part, to the doctrine of Fay v. Noia, 372 U.S. 391 (1963). Noia held that a prisoner who had failed to comply with state procedural rules in raising claims of error could nonetheless seek relief in federal court based on those same claims, provided that the prisoner did not "deliberately bypass" the state procedure. Beginning with Wainwright v. Sykes, the Court retreated from the deliberate bypass rule and significantly increased the burden on all inmates seeking to avoid application of the procedural default doctrine.
433 U.S. 72 (1977). In Sykes, the Court held that procedurally defaulted claims could only be considered by federal courts if the prisoner could demonstrate both "cause" for not complying with the state procedure and actual "prejudice" resulting therefrom. Id.


246 Id.


248 See infra section II.C.8.

249 See supra section II.C.1. and II.C.2.


251 Although Teague was not a capital case, the Court ruled in Penry v. Lynaugh, 492 U.S. 502 (1989), that Teague's restrictive principles would apply with equal force in capital cases.


253 489 U.S. at 301.

254 See, e.g., Hearings Before the Subcomm. On Civil and Const. Rights of the House Comm. On the Judiciary, 102d Cong. 443-501 (1991) (statement of John R. Curtin, Jr., president, ABA, and James S. Liebman, professor of law, Columbia University School of Law) for statements by ABA President Curtin urging Congress to overrule Teague, at least in capital cases. The ABA has not been alone in urging that Teague be legislatively overruled. Former Chief Judge of the United States Court of Appeals for the Eighth Circuit, Donald P. Lay, has stated:

There are many criticisms of Teague. For one, the new principles of retroactivity have spawned a debate over whether a contention is a "new rule," once again requiring excessive examination and inefficiency in federal habeas procedures. In addition, Teague undermines the historical development of the writ of habeas corpus, which, by its very nature, assumes disruption of conventional notions of finality. Perhaps Justice Brennan best summed up the pernicious effect of Teague in the final sentence of his dissent, when he stated that "the plurality would deprive us of the manifold advantages of deciding important constitutional questions when they come to us first or most cleanly on collateral review.


256 Id.

257 Id. at 507-08.

258 506 U.S. at 390.

259 Id. The Court suggested that executive clemency was the appropriate remedy for claims of innocence like those of Herrera. Id. at 417.


261 See supra note 86, at 1042.

262 See supra section II.C.1. and II.C.2.

263 Herrera v. Collins, 506 U.S. at 404-05.


266 innocence and the Death Penalty: Assessing the Danger of Mistaken Executions, 103d Cong., 1st Sess., Oct. 21, 1993 (identifying as reasons for wrongful convictions in capital cases racial prejudice, the pressure to prosecute, inadequate counsel, and official misconduct) [hereinafter Inno-
See also EXECUTING THE INNOCENT: EXECUTIVE SUMMARY, DEATH PENALTY INFORMATION CENTER (1992) [hereinafter EXECUTING THE INNOCENT].

For a discussion of recent examples of innocent people released after serving time on death row, see infra notes 271-90 and accompanying text.


Death Row Inmate Acquitted at 3rd Trial, DALLAS MORNING NEWS, Nov. 5, 1995, at 9A.


Id.


Inmate Freed After 5 Years on Death Row, N.Y. TIMES, Sept. 12, 1994, at A11.

Id.

Innocence and the Death Penalty, supra note 267, at 7-8.

Id. at 7. Unlike most wrongfully condemned inmates who gain their freedom, Bloodsworth was awarded $300,000 from the State of Maryland after Governor William Donald Schaefer pardoned him. Paul W. Valentine & Richard Tasscott, Maryland to Give Cleared Man $300,000, WASH. POST, June 23, 1994, at B1.

Innocence and the Death Penalty, supra note 267, at 7.

Id.

Id.


Innocence and the Death Penalty, supra note 267, at 8.

Id.


Id. at 1138 n.8 (Blackmun, J., dissenting from denial of certiorari) (citations omitted). In an interview with Nina Totenberg of National Public Radio, broadcast shortly after his Callins dissents were published, Justice Blackmun addressed the inevitability of human error and the imperfections in the criminal justice system. He acknowledged that he believed it possible that, during his tenure as Justice, "genuinely innocent people" whose cases came before the Court had been executed. All Things Considered: Blackmun Dissents in Death Penalty Case (National Public Radio broadcast, Feb. 22, 1994).


No fewer than four attorneys general warned that the habeas corpus provisions of the anti-terrorism bills were unconstitutional. Letter of Dec. 8, 1995, to President William J. Clinton, from Benjamin R. Civiletti, Jr., Edward H. Levi, Nicholas deB. Katzenbach, and Elliot L. Richardson.


Id.

Id. For an in-depth analysis of the effects of the Anti-Terrorism Act on existing Supreme Court precedent, see id.

455 U.S. 509 (1982).


See generally Yackle, supra note 292.

COYNE & ENTZEROTH, supra note 27, at 101 (Supp. 1996-1997); Yackle, supra note 292.

Yackle, supra note 292.

Previously, 28 U.S.C. § 2254(d) provided that: In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless
the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the state court hearing;
(2) that the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing;
(3) that the material facts were not adequately developed at the State court hearing;
(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
(6) that the applicant did not receive a full, fair, and adequate hearing in the state court proceeding; or
(7) that the applicant was otherwise denied due process of law in the State court proceeding;
(8) or unless the part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concluded that such factual determination is not fairly supported by the record;

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the evidence of one or more of the circumstances respectively set forth in paragraphs number (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

306 This limitation on the power of federal courts appears to be a clear violation of due process. As the Supreme Court has observed, the test is whether a measure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Palko v. Connecticut, 302 U.S. 319, 325 (1937).


EXECUTION UPDATE, supra note 315, at 1.


Blackledge v. Perry, 417 U.S. 21 (1974). Charles Black argues that each step in the criminal justice system presents an opportunity for the exercise of broad discretion. CHARLES L. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (2d ed. 1981). In Black's view, arrest, conviction, sentencing, appeal, and the exercise of clemency are equally subject to the application of inexact standards of decision-making. The inevitable result is a high degree of arbitrariness in the determination of who is ultimately executed. Black concludes that the possibility of mistake in the infliction of the death penalty and the presence of standardless arbitrariness in its imposition are ineradicable features of death penalty administration. Id.


See supra notes 357-62 and accompanying text.


The U.S. Supreme Court, which considered the Baldus study in McCleskey v. Kemp, 481 U.S. 286 (1987), described Baldus' work as "sophisticated." Id. at 291 n.7. A 1990 report of the General Accounting Office (GAO) referred to the Baldus study as a "high quality" study. Former federal prosecutor, U.S. Senator Brock Adams, called the Baldus study "the most sophisticated statistical study ever done" on racial discrimination in capital sentencing. See 136 Cong. Rec. S6875, 6893 (daily ed. May 24, 1990) (statement of Senator Adams). The year following the McCleskey decision, Professor Baldus was appointed by the New Jersey Supreme Court to review the effect of racism on that state's capital sentencing statute. See Order, New Jersey Supreme Court, July 29, 1988. See also Tabak, Is Racism Irrelevant?, supra note 324, at 781 nn.11-12.


McCleskey, 481 U.S. at 286.

Id.

Id. at 287.

DOUBLE JUSTICE: RACE AND CAPITAL PUNISHMENT (Diann Y. Rust-Tierney & Kerima Wicks 1993). One commentator has attempted to place these statistics in perspective:

[S]mokers are 1.7 times more likely to die of coronary artery disease than nonsmokers of similar ages. Thus, while smoking cigarettes greatly increases the risk of dying from heart disease, the impact of smoking is considerably less than the race-of-victim effect on capital punishment.

Tabak, Is Racism Irrelevant?, supra note 324, at 781.


In 1978, Warren McCleskey was convicted in Fulton County, Georgia, of robbing a furniture store and killing Frank Schlatt, a white police officer. McCleskey's jury, composed of 11 whites and one black, sentenced him to life for the robbery and death for the murder. McCleskey, 481 U.S. at 283-85.

481 U.S. at 327 (Brennan, J., dissenting).

Id. at 324 (Brennan, J., dissenting).

Id. at 292-93. The requirement that McCleskey show that a particular actor in his case—prosecutor, judge or juror—acted with a discriminatory purpose is at odds with the historic Furman decision. In that case, Anthony Amsterdam demonstrated a pattern of arbitrary and capricious capital sentencing. He was not required to nor did he show that a particular legislator, prosecutor, judge or juror acted in Furman's case in an arbitrary or capricious manner. Furman v. Georgia, 408 U.S. 238 (1972). As the McCleskey majority acknowledged, the Court has accepted statistics as proof of intent to discriminate in other contexts, including a state's selection of the jury venire and statutory violations of Title VII of the Civil Rights Act of 1964. Id. at 293-94.

Id. at 308.
The Baldus study indicates that, after taking into account some 230 nonracial factors that might legitimately influence a sentencer, the jury more likely than not would have spared McCleskey's life had his victim been black. . . . Furthermore, even examination of the sentencing system as a whole, factoring in those cases in which the jury exercises little discretion, indicates the influence of race on capital sentencing. For the Georgia system as a whole, race accounts for a six percentage point difference in the rate at which capital punishment is imposed. Since death is imposed in 11% of all white-victim cases, the rate in comparably aggravated black-victim cases is 5%. The rate of capital sentencing in a white-victim case is thus 120% greater than the rate in a black-victim case. Put another way, over half—55%—of defendants in white-victim crimes in Georgia would not have been sentenced to die if their victims had been black. Of the more than 200 variables potentially relevant to a sentencing decision, race of the victim is a powerful explanation for variation in death sentence rates—as powerful as nonracial aggravating factors such as a prior murder conviction or acting as the principal planner of the homicide.

These adjusted figures are only the most conservative indication of the risk that race will influence the death sentences of defendants in Georgia. Data unadjusted for the mitigating or aggravating effect of other factors show an even more pronounced disparity by race. The capital sentencing rate for all white-victim cases was almost 11 times greater than the rate for black-victim cases. Furthermore, blacks who kill whites are sentenced to death at nearly 22 times the rate of blacks who kill blacks, and more than 7 times the rate of whites who kill blacks. In addition, prosecutors seek the death penalty for 70% of black defendants with white victims, but for only 15% of black defendants with black victims, and only 19% of white defendants with black victims. Since our decision upholding the Georgia capital-sentencing system in Gregg, the State has executed seven persons. All of the seven were convicted of killing whites, and six of the seven executed were black. Such execution figures are especially striking in light of the fact that, during the period encompassed by the Baldus study, only 9.2% of Georgia homicides involved black defendants and white victims, while 60.7% involved black victims.

Id. at 325-27 (Brennan, J., dissenting).

For an argument that five of the McCleskey justices—the four dissenters plus Justice Scalia—agreed that the Baldus study successfully proved racial discrimination in the administration of the death penalty, see Erwin Chemerinsky, Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act, 35 Santa Clara L. Rev. 519, 527-28 (1995).

McCleskey, 481 U.S. 279.


Id.

Although Justice Powell confessed his belief that the death penalty should be abolished in 1991, his change of heart on the issue of capital punishment was not widely known until the 1994 publication of John C. Jeffries' book, Justice Lewis F. Powell Jr., supra note 23.

U.S. Gen. Accounting Office, Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities (1990) [hereinafter GAO Report]. Although the GAO considered conducting its own empirical studies, it decided to perform "an evaluative synthesis—a review and critique of existing research." Id. at 1.

Id. at 5.

Id. at 5. The GAO Report described the studies' conclusions regarding race-of-defendant discrimination as "equivocal." Id. at 6.


Id. at 328.

Id. at 347.

Id. at 336.

McCleskey, 481 U.S. at 925.

Conference, Death Penalty, supra note 347, at 347.

Death Row USA, supra note 156, at 8.


McCleskey, 481 U.S. at 319.
Justice Act would have added to Title 28, United States Code, a new chapter 177: "Racially Discriminatory Capital Sentencing."


Conservative commentator George F. Will claimed that "the real purpose of the [Racial Justice Act] is to end all executions." George F. Will, Racial Justice Act is Play to Kill Death Penalty, CHI. SUN TIMES, May 19, 1994, at 31. But, as Professor Chemerinsky replied:

[T]his is no more true than the contention that allowing statistical proof of discrimination in employment cases is meant to end all hiring. The Racial Justice Act would allow executions to continue unless the defendant can prove discrimination, and the court finds the proof to be statistically significant, and the prosecutor fails to offer sufficient racially neutral explanations for the discriminatory pattern.

Chemerinsky, supra note 339, at 533.


Id. at 1135-37 (Blackmun, J., dissenting from denial of certiorari).


Id. Additionally, Mental Health Standards promulgated by the ABA state that an individual should not be executed if:

As a result of mental illness or mental retardation, . . . [the individual] cannot understand the nature of the proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment [or] lacks sufficient competence to recognize or understand any fact which might exist which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court.

ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-5.6(b) (1983) (emphasis added).

The ABA Resolutions and Mental Health Standards that address mental retardation are based on a definition that describes "mentally retarded persons" as having "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the development period."

AMERICAN ASSOCIATION ON MENTAL DEFICIENCY (now Retardation), CLASSIFICATION IN MENTAL RETARDATION 1 (H. Grossman ed. 1983). According to Professor James Ellis, a leading expert on mental retardation, all 12 jurisdictions that prohibit the execution of mentally retarded persons utilize this definition. Telephone Interview with James Ellis, Professor of Law, University of New Mexico School of Law (Feb. 10, 1997) (memorandum on file with the Georgetown Journal on Fighting Poverty).

In 1992, the American Association of Mental Retardation adopted a revised definition of "mentally retarded person." The 1992 definition provides:

Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly sub-average intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.


Telephone Interview with James Ellis, Professor of Law, University of New Mexico School of Law (Feb. 10, 1997) (memorandum on file with the Georgetown Journal on Fighting Poverty). Ellis reports that 11 death penalty states, plus the federal government, prohibit the execution of mentally retarded persons. However, of the states with the largest death row populations and highest execution rates, only Georgia has a statute that exempts mentally retarded persons from capital punishment. Id.


ment for a class of defendants because of their principles to capital cases without the benefit of briefing and oral argument. The Court should not apply

Teague's nonretroactivity doctrine in cases on collateral

matter. Under

Teague, "new rules" may not generally be applied or announced in cases on collateral review. 489 U.S. 288 (1989). Justice Blackmun also joined the entirety of Justice Stevens' opinion concurring in part and dissenting in part. 492 U.S. 349 (1994). These two justices agreed that the

Penry was not seeking a "new rule" in the face of a constitutional challenge. Consequently, Penry was not seeking a "new rule" which, under Teague v. Lane, 489 U.S. 288 (1989), would not be cognizable in federal habeas corpus. Under Teague, "new rules" may not generally be applied or announced in cases on collateral review. 489 U.S. 288 (1989). Justice Blackmun also joined the entirety of Justice Stevens' opinion concurring in part and dissenting in part. 492 U.S. at 349. These two justices agreed that the Court should not apply Teague's nonretroactivity principles to capital cases without the benefit of briefing and oral argument. Id. Moreover, even if Teague were held to apply to capital cases, Justices Stevens and Blackmun agreed that an exception to the retroactivity doctrine applied. In their view, rules prohibiting a certain category of punishment for a class of defendants because of their status or offense are excepted from Teague's draconian doctrine. Id. Justice Brennan's opinion, joined by Justice Marshall, suggested that the execution of mentally retarded offenders was always unconstitutional. Id. at 341. Thus, Justice Blackmun and three others (Brennan, Marshall and Stevens) concluded that executing mentally retarded persons is unconstitutional. A bare majority (Justices O'Connor, Rehnquist, Scalia, White and Kennedy) held otherwise.


Consider the following account from a local newspaper in South Carolina:

Down in Conway, a circuit judge has handed down a no-nonsense decision upholding law and order... The case involves convicted killer Limmie Arthur, 28, who has the social intelligence of a 10- to 12-year-old and the mental ability of a 7-year-old. This was enough sense to enable him to kill William "Cripple Jack" Miller in 1984. ... It appears to us that there is all the more reason to execute a killer if he is also insane or retarded. Killers often kill again; an insane or retarded killer is more to be feared than a sane or normal killer. There is also far less possibility of his ever becoming a useful citizen.


Earl Washington, a mentally retarded black man from Virginia, fit this profile perfectly. In 1982, Rebecca Lynn Williams was raped and murdered in Culpepper, Virginia. One year later, Washington was arrested in Warrenton, twenty miles away, for assaulting his brother-in-law. Washington, who had an IQ of 69, had been up all night drinking, and was interrogated for two days. Although the assault charges were dropped, during this interrogation, Washington confessed to a variety of other crimes, including the rape of a Warrenton woman. Officials investigated each of these crimes and concluded that Washington could not have committed them. Because he believed that Washington was keeping something from him, an officer asked: "Earl, did you kill that girl in Culpeper? ... I mean the woman you stabbed in Culpeper?" Washington "shook his head yes and started crying." Washington never mentioned rape.

As Washington volunteered certain "facts" about
the crime, he was repeatedly corrected. For example, Washington said that Ms. Williams was black. She was white. Although Washington said his victim was "kind of short," Ms. Williams was 5'8" tall. Washington claimed that he gained entry by kicking in a door, but the door was not damaged. Washington said he had stabbed her between one and three times. Ms. Williams had 38 stab wounds. Washington claimed that the victim was alone, but police who arrived shortly after the murder found a baby in a playpen and Ms. Williams' three-year-old daughter. Officers drove Washington by the crime scene three times. Twice he failed to identify it. The third time, an officer asked, "Earl, isn't this the place?" and Washington said yes. Although numerous fingerprints were found in the victim's home, none matched Washington's.

Washington's trial attorney received no psychiatric or psychological assistance in preparing Washington's defense. Washington was sent to the state mental hospital, which certified his competence to stand trial and to waive his Miranda warnings. Soon thereafter, Washington was convicted and sentenced to die.


385 John Brummett, The Fairchild Issue Won't Die, ARK. DEMOCRAT-GAZETTE, Aug. 29, 1995, at 7B.
386 Id.
387 Id.
389 Id. at 1461. The state's psychological examiner used a revision of the antiquated Beta examination, and claimed that Fairchild's IQ was actually 87. The Beta is a picture test used for World War I draftees who were unable to read or write. PERSKE, supra note 384, at 102.
390 Fairchild, 900 F.2d at 1295.
391 Murderer Executed in Arkansas, CHARLESTON GAZETTE, Sept. 1, 1995, at 5B.
392 Id.
393 DEATH ROW USA, supra note 156, at 9.
394 AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: THE DEATH PENALTY 82 (1987) [hereinafter THE DEATH PENALTY].
Report Regarding Implementation of the ABA’s Recommendations and Resolutions Concerning the Death Penalty

412 Id. at 6 (citing State Court Finding of Fact No. 1, Claim 1).
414 Petition for Writ of Certiorari at 7, Marquez, 115 S. Ct. 215 (citing State Court Finding of Fact 3-14, Claim 1). Mario also suffered from brain damage because of an addiction to sniffing spray paint that developed shortly after being abandoned at the age of twelve. This addiction acted as a psychological anesthetic for Mario. Id.
415 Id. His mental deficiencies rendered Mario incapable of exercising judgment or learning from past mistakes and behaviors, and impaired his control over strong emotions, especially in stressful situations. Id.
416 Id. at 9-10 (citing Vol. XXVIII at 7, 9; Vol. XXVII at 105, 191). This altercation took place as Mario was taken to the jail for lunch. Three cameramen were walking directly in front of Mario, were shining lights into his eyes from three or four feet away, and were pointing cameras at his face. Mario responded by spitting on one of the cameramen and by knocking the camera off another’s shoulder. As Mario was restrained, one bailiff testified that Mario said something to the effect that “Next time I’ll just run so you all can shoot me.” The judge’s ruling came without any effect that “Next time I’ll just run so you all can shoot me.”
417 See, e.g., Nat Hentoff, Executing the Retarded in Our Name, VILLAGE VOICE, Feb. 21, 1995.
418 Ford v. Wainwright, 477 U.S. 399 (1986). Several rationales have been offered in support of the Supreme Court’s ruling that the Eighth Amendment prohibits the execution of insane persons:

(1) executing insane persons offends humanity;
(2) executing insane persons does not further the penological goals of deterrence or retribution;
(3) insanity itself is adequate punishment;
(4) it is unfair to execute someone who cannot appreciate the moral significance of the relationship between his crime and her punishment; and
(5) it is unfair to execute someone who cannot prepare for her death.

Id. at 407-09. See COYNE & ENTZEROTH, supra note 27, at 199.
420 Id. at 111.
421 Id. The damage to the brain resulted in diffuse impairment involving both hemispheres.
422 Id. One study characterizes front-lobotomy patients as appearing like a mature adult but existing as a very young child.
423 Id. at 115. The medical specialist for the defense testified that Rector was manifestly incapable of assisting his attorneys in any real way. A neuropsychologist testified that there was no possibility that Rector was shamming them during their examination and that he was trying to do the best he could on those tests. Some of the prosecutor’s specialists did not read the surgeon’s report on Rector’s operation until the morning of their testimony. One specialist had no idea how much brain tissue had been removed and based his testimony on a brief examination of medical records and a 20-minute interview with Rector. Id. at 114.
424 Id. at 115. The all-white jury took only 15 minutes to find Rector guilty of capital murder.
425 Id. at 122-23. Rector claimed to his guards that Cold Duck had been a hit man 12 times in prison and that Rector used to run with him. Rector said that he sure would like to see him again. Id.
426 Id. at 123.
427 Id. at 105.
428 Id. at 122.
429 Id. at 128. It was Rector’s habit to put his dessert aside and eat it just before going to bed.
430 DEATH ROW USA, supra note 156, at 7.
431 THE DEATH PENALTY, supra note 394, at 84.
432 Id.
433 Post-traumatic stress disorder (PTSD) was first recognized as a clinically identifiable disorder in 1980. That same year it was included in the American Psychiatric Association (APA) Diagnostic Standards Manual, 3d ed. THE DEATH PENALTY, supra note 394, at 84 n.16.
434 THE DEATH PENALTY, supra note 394, at 85. The PTSD was a result of his war time experiences, the murder of his brother shortly before his tour in South Vietnam, and certain other incidents in his childhood.
435 Id. In addition to Vietnam veterans, others particularly susceptible to PTSD include hostage and kidnap victims.
436 Funchess’ trial lawyer conducted no investigation of his client’s history or background because he mistakenly believed that the Florida statute then in effect prohibited a lawyer from presenting this type of mitigating evidence to a capital sentence. Id. at 86.
437 Id. at 85-86.
438 DEATH ROW USA, supra note 156, at 5.
Features

439 THE DEATH PENALTY, supra note 394, at 81.
440 Id.
441 Defendant's Appellate Brief, Goode v. Wainwright, 704 F.2d 593, 601 (11th Cir. 1983).
442 Goode, 704 F.2d at 599.
444 THE DEATH PENALTY, supra note 394, at 82. According to Richard Dugger, the warden who presided over Goode's execution:

Arthur Goode was the hardest. I had some real reservations about that [execution]. Let's face it—he was a nut. Geez, he didn't trust anybody but me. And I was the one who was going to make sure he was gonna die. He was sure I would take care of him.

AMONG THE LOWEST, supra note 443, at 235.

447 Id. at 5 (citing 1992 State Habeas Petition, Exhibits 3, 6, 10, and 22).
448 Id. at 5 (citing 1992 State Habeas Petition, Exhibit 10).
449 Id. at 5-6 (citing 1992 State Habeas Petition, Exhibit 12).
450 Id. (citing 1992 State Habeas Petition, Exhibit 13).
451 Id. at 7 (citing 1992 State Habeas Petition, Exhibit 12 (Dr. Dorothy Lewis' 1992 Report)).
452 Id.
453 Id. (citing 1992 State Habeas Petition, Exhibit 12 and Exhibit 19 (Affidavit of Windell L. Dickerson)).
454 Id. at 6 (citing 1992 State Habeas Petition, Exhibit 17).
455 Id. at 7.
456 Id. (citing 1992 State Habeas petition, Exhibit 17 and Appendix 19 (Affidavit of Dr. Windell Dickerson)).
458 THE DEATH PENALTY, supra note 394, at 67.
459 Id. at 68.
461 Letter to the House of Delegates by the Criminal Justice Section of the ABA 9 (Aug. 1983). Professor Streib claims that 192 juveniles were executed during this period. Streib, supra note 460, at 619.

462 See infra notes 480-88 and accompanying text.
465 487 U.S. 815.
466 Id. at 838. Justice Stevens' opinion was joined by Justices Brennan, Marshall, and Blackmun. Justice O'Connor concurred in the result.
467 Id. at 819.
468 In the certification order, the judge stated that "there are virtually no reasonable prospects for rehabilitation of William Wayne Thompson within the juvenile system and that William Wayne Thompson should be held accountable for his acts as if he were an adult and should be certified to stand trial as an adult." Id. at 819-20.
469 See supra notes 458-59.
470 487 U.S. at 838.
472 Id. at 366.
473 Id. at 367.
474 Id. at 366-67.
475 DEATH ROW USA, supra note 156, at 45. The number of persons under 18 sentenced to death increases each year. See, e.g., RAYMOND PASTERNOS-rys, CAPITAL PUNISHMENT IN AMERICA 95 (1991) (reporting that near the end of 1990, there were 32 death row prisoners who were under 18 years of age at the time of their offenses).
476 VICTOR L. STREIB, THE JUVENILE DEATH PENALTY TODAY: PRESENT DEATH ROW INMATES UNDER JUVENILE DEATH SENTENCES AND EXECUTIONS FOR JUVENILE CRIMES, JANUARY 1, 1973, TO SEPTEMBER 15, 1995 3 (1995). The nine juvenile offenders executed during this period are: Charles Rumbaugh (Texas); J. Terry Roach (South Carolina); Jay Pinkerton (Texas); Dalton Prejean (Louisiana); Frederick Lashley (Missouri); Johnny Garrett (Texas); Curtis Harris (Texas); Ruben Cantu (Texas); and Chris Burger (Georgia). All nine were age 17 at the time of the offense for which they were sentenced to die. Id.
477 Id. at 5. These jurisdictions are California, Colorado, Connecticut, Illinois, Kansas, Maryland, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, Tennessee, and the U.S. government. Id.
478 These jurisdictions are Georgia, New Hampshire, North Carolina, Texas, and the U.S. military. Id.
These jurisdictions are Alabama, Arizona, Arkansas, Delaware, Florida, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nevada, Oklahoma, Pennsylvania, South Carolina, South Dakota, Utah, Virginia, Washington, and Wyoming. Id.

Dealth Row USA, supra note 156, at 4; The Death Penalty, supra note 394, at 71.

The Death Penalty, supra note 394, at 71-72.

Although Roach's mother suffered from this disease, Roach's trial attorney apparently failed to discover this fact or present it as mitigating evidence. Id.

Amnesty International also filed a complaint with the IACHR, additionally alleging that Roach's execution would violate treaties signed by the U.S. government. The Death Penalty, supra note 394, at 72. For a more recent argument that American executions violate customary international law, see Viktor Mayer-Schoenberger, Crossing the River of No Return: International Restrictions on the Death Penalty and the Execution of Charles Coleman, 43 Okla. L. Rev. 677 (1990).

Comment, The U.S. Death Penalty Reservation to the Intentional Covenant on Civil and Political Rights, supra note 492.

This excerpt is taken from Task Force Report, supra note 8, at 1-3 (footnotes omitted).