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The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty

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THE EXECUTION OF INJUSTICE: A COST AND LACK-OF-BENEFIT ANALYSIS OF THE DEATH PENALTY*

*Ronald J. Tabak** and J. Mark Lane****

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* This Article was prepared for New York Lawyers Against the Death Penalty, an organization of over 1,000 members of the New York Bar, as a memorandum in opposition to legislation which would restore the death penalty in New York State. That legislation was passed by both houses of the New York State Legislature in early 1989, but was vetoed by Governor Mario Cuomo. In June 1989, when it became apparent that the veto could not be overridden in the regular 1989 session, the legislature adjourned without a vote on the proposed override. The proposed legislation is expected to be reintroduced in the 1990 session. This memorandum has been updated and modified since its initial distribution in Spring 1989. The authors would like to thank the following people, all of whom provided substantial assistance in the preparation of the memorandum upon which this Article is based: James Pitofsky, Martin I. Rosenbaum, Maura Barry, Tanya Coke, Jeffrey Trachtman, Jonathan E. Gradess, Stephen Gillers, Channing Kury, Jonathan Lang, Arthur C. Helton, Peter Neufeld, Howard Schrader, Stephen Latimer, Tom Terrizzi, Polly Passoneau, Holly Levine, Pamela Winnick, Leon Bijou, and Maureen O'Connor.

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I. INTRODUCTION

As Virginia Assistant Attorney General Robert Harris recently acknowledged, the more educated the public becomes about capital punishment, the more the public will oppose it.¹ The facts, readily available after a decade and a half of trials under the modern death penalty statutes, simply lend no support to the use of capital punishment.

The first six sections of this Article describe fundamental problems with the death penalty, problems that might be thought of as the social "costs" of the death penalty. Sections seven through nine correct common misconceptions that underlie current support for the death penalty. These sections illustrate that there are no real "benefits" from the death penalty. Finally, section ten describes the growing international consensus against the use of the death penalty, a consensus that, as discussed in section eleven, reflects a moral judgment that capital punishment cannot be justified.

The issues discussed herein are of national significance and the material presented covers a wide range of jurisdictions. Moreover, every problem which this memorandum describes would exist under the proposed death penalty legislation in New York if it were enacted.²

1. Makin, *Killing the Killers: Part 6*, Toronto Globe and Mail, June 12, 1987, at A3, col.

2.

2. This Article does not purport to be an exhaustive study of all the problems with the death penalty in other states. Such a study would necessarily include a variety of additional problems not discussed here because they would not arise under the death penalty bill proposed in New York. For example, this Article does not discuss judicial overrides of jury sentencing decisions. Such overrides are a serious problem in Florida, where judges frequently ignore jury recommendations of life imprisonment and impose the death penalty instead. See Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 14 N.Y.U. REV. L. & SOC. CHANGE 797, 820-22 (1986).

II. THE DEATH PENALTY IS STILL ARBITRARY AND CAPRICIOUS

A. *The Capital Punishment System Does Not Rationally Select Those Who Shall Die*

The Supreme Court struck down all existing capital punishment schemes in 1972 because they allowed the "arbitrary and capricious" imposition of death.³ Four years later, the Court approved certain new capital statutes which supposedly corrected that constitutional problem.⁴ However, after over a decade and a half of experience under the new statutes, as this Article demonstrates, the death penalty is still being applied arbitrarily and capriciously.

Of the approximately 20,000 homicide arrests in the United States each year, approximately 4,000 people are ultimately convicted of murder.⁵ Of those, approximately 250 are sentenced to death.⁶ If it could be shown that these 250 are the most heinous murderers, the most dangerous criminals confronting the criminal justice system, and that they have repeatedly killed or are likely to repeatedly kill, then some degree of rationality in imposing the death sentence might be argued. However, although the assumption that we are executing the worst killers clearly underlies public support for capital punishment, that assumption is baseless.

The so-called "guided discretion" statutes of the post-*Furman v. Georgia*⁷ era have simply not achieved the goal of carefully and rationally selecting those who die. The most heinous and dangerous criminals are not necessarily the ones sentenced to death under these schemes. In fact, some of the worst killers—such as California's notorious "Hillside Strangler"—have received life sentences or terms of years, even when the death penalty was sought.⁸ Meanwhile, many sentenced to death row are

3. See *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

4. See, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976). The new statutes supposedly corrected the arbitrary and capricious imposition of the death penalty by, among other things, bifurcating the trial and requiring jury findings of certain aggravating factors before the death penalty could be imposed.

5. AMNESTY INTERNATIONAL USA, *THE DEATH PENALTY: CRUEL & INHUMAN PUNISHMENT* 27 (1987) (based on statistical averages for 1979-1985).

6. *Id.*

7. 408 U.S. 238 (1972).

8. After sentencing Angelo Buono, Jr., the "Hillside Strangler," to life in prison without possibility of parole, one member of the jury explained that the death penalty would have been "too good" for him, and that "he should suffer like the women he killed." *Juror Says Death Would Have Been Too Good For Buono*, Associated Press, Nov. 20, 1983 (LEXIS, Nexis library, Omni file). Similarly, after sentencing Joe Hunt to life imprisonment for two gruesome killings in California, one juror commented, "The death penalty is too quick for Joe Hunt. He

first-time criminal offenders,⁹ ninety percent have never killed before,¹⁰ and the vast majority are extremely unlikely to kill again.¹¹ Some committed crimes of passion or desperation. Others were mere accomplices, and have never directly harmed or intended bodily harm against another human being.¹² Some are mentally retarded or seriously mentally ill.¹³ Virtually all are poor and uneducated,¹⁴ and some are undoubtedly innocent.¹⁵

Even among those sentenced to death, only a relatively small number are likely to be executed. As of July 14, 1989, there had been 115 executions in the thirteen years since the death penalty was reinstated.¹⁶ At that same date, 2,210 men, women and children were on death row.¹⁷ Many of the 115 who have been executed had been convicted or sentenced unconstitutionally, but were executed nonetheless, either (a) because the Supreme Court declined to review lower courts' erroneous rejections of their constitutional claims but then, after their executions, held that identical claims of unconstitutionality were meritorious,¹⁸ or (b) because the federal courts refused to rule on their meritorious claims of unconstitutionality, due to their lawyers' failures to object

needs to have time to think about the murders he committed." Chambers, *Jury Recommends Life Term for Leader of California Club*, N.Y. Times, June 5, 1987, at A19, col. 1. See also Tabak, *supra* note 2, at 843 n.329 (describing several additional brutal murder cases where the jury imposed a life sentence instead of death). Moreover, Ted Bundy, one of the most notorious mass-murderers of modern history, would never have received the death penalty if he had accepted the prosecution's offer of a life sentence, under an elaborate plea bargain involving two jurisdictions. See Carter, *Does Second Washington Student Share Another Ted Bundy Trait?*, Nat'l L.J., Aug. 21, 1989, at 4, col. 3.

9. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 1987 8, Table 7 (July 1988).

10. *Id.*

11. See Marquart & Sorensen, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 LOY. L.A.L. REV. 5 (1989); see also, J. Marquart, S. Elkand-Olson & J. Sorensen, *Gazing Into the Crystal Ball: Can Jurors and Psychiatrists Accurately Predict Future Dangerousness in Capital Cases* (unpublished manuscript on file at Loyola of Los Angeles Law Review) (study of post-*Furman* death sentenced inmates in Texas who had their sentences commuted to life imprisonment).

12. See *infra* notes 279-89 and accompanying text.

13. See *infra* notes 251-78 and accompanying text.

14. See *infra* note 63 and accompanying text.

15. See *infra* notes 290-389 and accompanying text.

16. NAACP LEGAL DEF. AND EDUC. FUND, INC., DEATH ROW USA 5 (July 14, 1989).

17. *Id.* at 1.

18. For example, the vast majority of those executed in Florida prior to the decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), were sentenced on the basis of jury instructions essentially identical to those found unconstitutional in *Hitchcock*. In *Hitchcock*, the jury instructions only allowed consideration of mitigating circumstances enumerated in the statute. *Id.* at 398-99.

early enough in their proceedings.¹⁹

Executing every man, woman and child on death row would, at the current sentencing rates, mean at least one execution every day for the rest of the century.²⁰ That would be a bloodbath of historic proportions which would place us further in line with Iran, South Africa, the USSR, China, Cuba and other nations whose inhumanity we often denounce, rather than with the western democracies with which we normally align ourselves.²¹ Indeed, "[i]f U.S. courts continue to invoke the penalty at the same rate, the only way to break the cycle will be to deprive convicts of their legal rights of appeal or to embark on an execution spree of epic proportions."²²

As the following discussion shows, capital punishment remains a cruel lottery because in each stage, from the initial decision whether to seek the death penalty, through the trial, appeals, post-conviction proceedings and the clemency process, a defendant's chances of being given the death penalty depend to an astonishing degree on arbitrary and capricious circumstances rather than on the defendant's criminal and moral culpability. This system, permeated with unfairness from beginning to end, is so flawed as to be unjustifiable.

B. Overzealous Prosecutors Improperly Seek and Obtain Death Sentences

In many cases, prosecutors initially seek and ultimately obtain the death penalty for improper reasons and by improper means. This may result from local political pressures,²³ racial prejudice,²⁴ an overzealous desire to secure convictions, or a variety of other factors.²⁵

Although they may confront very similar crimes, prosecutors in

19. See *infra* notes 193-220 and accompanying text.

20. Makin, *Killing the Killers: Part 1*, Toronto Globe and Mail, June 6, 1987, at A1, col. 1.

21. See *infra* notes 525-54 and accompanying text.

22. Makin, *supra* note 20, at A2, col. 1; see also F. ZIMRING & G. HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 97 (1986) ("[A]pparently the choice is between a permanent Reign of Terror or an execution policy that makes a mockery of the legal standards governing the use of the death penalty.").

23. For example, Louisiana's St. Tammany Parish District Attorney, Marion Farmer, was severely criticized for not seeking the death penalty in some cases, and, although he subsequently sought the death penalty more often, he was defeated for reelection in 1984. See DeParle, *A Matter of Life and Death*, New Orleans Times-Picayune, Apr. 7, 1985 (Special Report), at 6, col. 3.

24. See *infra* notes 28-31 and accompanying text.

25. The Georgia Pardon and Parole Board's Tommy Morris openly acknowledges: When you look at death versus life cases, there's not a heck of a lot of difference in most of them. There are so many life cases that very well could have been death

some counties seek the death penalty far more often than those in other counties in the same state. For example, according to a recent New Jersey study, "[a] defendant in a death-possible case in Monmouth County has a seventy percent chance of being prosecuted for capital murder, while a defendant in an analogous case in Hudson County has a 19 percent chance of having his case designated capital."²⁶ This may result from, among other things, varying and inconsistent interpretations of a state's death penalty statute which fails to provide guidelines for the exercise of prosecutorial discretion.²⁷

The wide discretion afforded to prosecutors under the proposed death penalty statute in New York would undoubtedly result in similar disparities, as a prosecutor in one of the state's sixty-two counties would seek a death sentence whereas in another county, in a case with similar facts, the prosecutor would not. Indeed, since prosecutors in New York State are elected, local political pressures may lead some of them to seek the death penalty out of fear that to do otherwise would lead to defeat at the polls.

Local pressures and unchecked prosecutorial discretion often lead to racially discriminatory patterns in seeking the death penalty. If an alleged murderer was black and the victim white, the chances that the prosecution will seek the death penalty initially are many times greater than in the reverse situation.²⁸ In South Carolina, for example, over a four year period, prosecutors sought the death penalty in thirty-eight percent of murder cases involving white victims and black defendants but in only thirteen percent of such cases involving white defendants and black victims.²⁹ A study of over 2,000 murder cases tried in Georgia in the 1970s revealed that the prosecutor sought the death penalty in seventy percent of the cases involving white victims and black defendants, but in only nineteen percent of cases involving black victims and white defendants.³⁰ Recent studies of the New Jersey capital scheme show that

cases if somebody had prosecuted them that way, and there are others on death row because they were prosecuted by an overzealous prosecutor.

See Thompson, *Once 'Unfit to Live,' Ex-death-row Inmates Winning Parole*, Atlanta Const., Mar. 12, 1987, at A1, col. 1.

26. See Bienen, *Of Race, Crime and Punishment*, N.Y. Times, June 21, 1987, § 11, at 22, col. 1.

27. See *infra* notes 53-55 and accompanying text.

28. Bienen, *supra* note 26.

29. GEORGIA CLEARINGHOUSE ON PRISONS AND JAILS, ATLANTA, GEORGIA, 1985 REPORT (1985).

30. See *McCleskey v. Kemp*, 481 U.S. 279, 287 (1987) (discussing Baldus, Pulaski & Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983)). The Supreme Court acknowledged that

such racial patterns also exist in the Northeast.³¹

Some prosecutors with less than clear cases as to guilt seek the death penalty so that they may challenge for cause jurors who oppose capital punishment and thereby secure a "prosecution prone" jury.³² This increases the chances of a conviction in what may be a questionable case. Bob Wilson, the District Attorney for Dekalb County, Georgia, has openly conceded that he seeks the death penalty in order to increase his likelihood of securing a conviction.³³ Unfortunately, the defendants in such cases may end up not only convicted, but also executed.

The death penalty is also improperly used by some prosecutors as a tactic to extract convictions via plea bargaining. For example, a Louisiana prosecutor followed a policy of giving every person charged with a capital crime two choices: either plead guilty to second-degree murder and get a life sentence or plead innocent, "roll the dice," and face the death penalty.³⁴ If acting rationally, those clearly guilty of the most heinous crimes would be more likely to accept such offers and avoid the danger of a death verdict, whereas those with a real chance of exoneration would be more likely to refuse such offers and thereby ironically become more likely to be sentenced to die.³⁵

In many cases, those who have refused offers of life sentences under proposed plea bargains, preferring to assert their innocence before a jury, have ultimately been convicted and sentenced to death.³⁶ In fact, it has been estimated that well over half of those sentenced to die in the post-

Baldus' study was highly sophisticated and assumed that the study's findings were statistically valid. *Id.* at 291 n.7.

31. See Bienen, Weiner, Denno, Allison, & Mills, *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 *RUTGERS L. REV.* 27, 327 (1988) ("The results reported here indicate clear and significant discrepancies in the treatment of potentially capital cases when cases were differentiated by race of defendant and victim and county of jurisdiction"); Bienen, *supra* note 26. See *infra* text accompanying notes 222-50 for a discussion of the racially discriminatory operation of the death penalty.

32. See Bentele, *The Death Penalty in Georgia: Still Arbitrary*, 62 *WASH. U.L.Q.* 573, 620 & n.218 (1985). In *Lockhart v. McCree*, the Court, in holding that states may exclude from capital juries those who would never be able to vote for the death penalty, considered it constitutionally insignificant that such exclusions produce conviction-prone juries. 476 U.S. 162, 173 (1986).

33. See Bentele, *supra* note 32, at 620 & n.218.

34. See DeParle, *supra* note 23 (quoting Quchita Parish District Attorney Johnny Carl Parkerson).

35. See generally W. WHITE, *THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* 40 (1987).

36. See DeParle, *supra* note 23, discussing the case of Timothy Baldwin, who maintained his innocence rather than accept the prosecution's plea offer. Baldwin was convicted and subsequently executed in September 1984. *Id.* See also *Louisianan Who Killed Neighbor Executed After Appeal Is Refused*, *N.Y. Times*, Sept. 10, 1984, at A10, col. 1.

Furman cases were offered (and refused to accept) life sentences under proposed plea bargain agreements prior to trial.³⁷

Experience in death penalty jurisdictions also shows that overzealous prosecutors often mislead juries. For example, in closing arguments prosecutors may tell the jury that the death penalty deters crime,³⁸ even though, unbeknownst to the jury, such claims are insupportable.³⁹ The defense is generally not allowed to introduce evidence to refute such an argument. At most, the defense counsel, not as esteemed by juries as the prosecutor, is left with an opportunity to disagree with the prosecutor's bald assertions.

Prosecutors also often egregiously distort religious scripture in trying to justify the death penalty⁴⁰ and make various other highly improper arguments before the jury, including gross misrepresentations of the law. In *Willie v. Maggio*,⁴¹ for example, the prosecutor argued that the jurors should return a death sentence because, had they caught the defendant in the process of committing the crime, they supposedly would have been legally justified in killing him.⁴² Such improper arguments, although frequently ignored or found harmless by the courts, may be the basis of the decision to execute the defendant.⁴³

Various other egregious forms of prosecutorial misconduct have resulted in death verdicts. For example, a Georgia prosecutor surreptitiously instructed the jury commissioners on how to exclude blacks and other minorities from the jury pool.⁴⁴ Evidence exposing this plan was only discovered accidentally, after defendant Tony Amadeo was already on death row, by attorneys investigating a totally unrelated civil case.⁴⁵

37. See Tabak, Book Review, 33 N.Y.L. SCH. L. REV. 173, 179 & n.32 (1988)(reviewing W. WHITE, *THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* (1987)). The last man executed in New York's electric chair, Lee Mays, was offered and refused to accept a plea bargain to a lesser charge. See Giordano, *Showdown on the Chair*, Newsday, June 19, 1989, at 33, col. 2.

38. See W. WHITE, *supra* note 35, at 91, 97-98, 102.

39. See *infra* notes 390-421 and accompanying text.

40. See *infra* notes 555-80 and accompanying text.

41. 737 F.2d 1372 (5th Cir.), *cert. denied*, 469 U.S. 1002 (1984).

42. *Id.* at 1390.

43. The Fifth Circuit considered the prosecutor's closing argument at trial in *Willie* highly improper and inaccurate, but refused to order a new sentencing hearing because the defendant assertedly failed to demonstrate that he would not have received the death penalty but for the improper argument. *Id.* at 1391. Yet, at oral argument, the prosecutor's office maintained that it was necessary to make such arguments in order to obtain the death penalty because the jury might not impose death otherwise. Tabak, *supra* note 2, at 843 n.327. Indeed, Willie's co-defendant, in whose trial the prosecutor had not used this improper final argument, did not receive the death penalty. See *id.* at 843.

44. *Amadeo v. Zant*, 108 S. Ct. 1771, 1779 (1988).

45. *Id.* at 1774.

Had it not been for this fortuity, Amadeo—who had been sentenced to death by a jury selected from the unconstitutional jury pool—almost surely would have been executed.

Prosecutors have also secured death verdicts by using illegally obtained evidence, such as evidence unconstitutionally secured by jailhouse informants. On the CBS television broadcast "60 Minutes" on February 26, 1989,⁴⁶ former jailhouse informant Leslie Vernon White admitted that he had committed perjury on numerous occasions by fabricating jailhouse confessions of others in exchange for lenient treatment.⁴⁷ According to the broadcast, at least sixteen people who had been tried, convicted, and sentenced to the gas chamber in California were convicted in whole or in part on the basis of questionable testimony from jailhouse informants.⁴⁸ Because of White's admissions, California authorities are investigating at least 200 murder cases in which informants were used.⁴⁹ A recent post-conviction investigation in the Georgia case of Warren McCleskey revealed that the state had unconstitutionally planted a witness in the cell next to McCleskey and actively solicited information from the witness long after McCleskey had obtained counsel.⁵⁰

In other cases, the prosecution has illegally withheld evidence useful to the defendant, such as the fact that it has made deals with key witnesses, often co-defendants.⁵¹ Death sentences may be returned and the convicted person actually executed before such misconduct is discovered, if it is ever discovered at all.⁵²

Currently, states provide no meaningful guidelines as to when prosecutors should seek the death penalty.⁵³ Consequently, even conscientious prosecutors who earnestly desire not to be arbitrary in making such decisions remain directionless. This so frustrated the State Attorney of Montgomery County, Maryland that he wrote an article in his state's bar

46. *60 Minutes: The Snitch* (CBS television broadcast, Feb. 26, 1989)(transcript on file at Loyola of Los Angeles Law Review).

47. *Id.* at 2-3.

48. *Id.* at 6.

49. See also Curriden, *No Honor Among Thieves*, 75 A.B.A. J., June 1989, at 52, 55; Reinhold, *California Shaken Over an Informer*, N.Y. Times, Feb. 17, 1989, at A1, col. 1.

50. *McCleskey v. Kemp*, No. C87-1517A (N.D. Ga. Dec. 23, 1987).

51. See, e.g., *Brown v. Wainwright*, 785 F.2d 1457 (11th Cir. 1986) (prosecutor withheld existence of agreement with key prosecution witness after witness testified that no agreement had been made); *Lindsey v. King*, 769 F.2d 1034 (5th Cir. 1985) (conviction and death sentence reversed upon discovery that prosecution withheld evidence that key witness had told police that he could not identify assailant).

52. See *infra* notes 290-389 and accompanying text (most cases discussed there involved some form of prosecutorial misconduct, often the withholding of exculpatory evidence).

53. See, e.g., *DeGarmo v. Texas*, 474 U.S. 973, 974-75 (1985) (Brennan, J., dissenting from denial of certiorari).

journal urging courts to provide guidance on the exercise of prosecutorial discretion.⁵⁴ No guidance, however, has been forthcoming.⁵⁵

The proposed New York death penalty bill would conform to this pattern by giving no real guidance to prosecutors. If it is passed, New York will be subject to the same problems of prosecutorial misconduct, political pressure, and unchecked and unguided discretion that have arisen elsewhere.

C. *Ineffective Defense Renders Capital Trials Unfair*

State capital trials are so often constitutionally flawed that federal habeas relief is granted in one-third to one-half of all cases, even though federal courts are highly deferential to state-court proceedings.⁵⁶ Additional capital verdicts are reversed in the state courts. Indeed, in New Jersey, which has had a fully functioning death penalty scheme since 1982, the state supreme court has yet to affirm even one death sentence.⁵⁷

The serious constitutional flaws in capital trials, which often result in expensive and difficult retrials and additional collateral litigation, are frequently the result of ineptitude of defense counsel.⁵⁸ Capital trials are highly complex and require a tremendous amount of time and resources,⁵⁹ neither of which is available to the average practitioner representing an indigent defendant in a capital case. The reality is that the difficulties of providing effective defense counsel for those accused of capital crimes have frequently been insurmountable obstacles, making the chances of a fair trial for an indigent defendant highly unlikely.⁶⁰ Moreover, as Supreme Court Justice Thurgood Marshall has observed, many capital defense lawyers are unaware of the legal principles and rapid de-

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

55. In *McCleskey v. Kemp*, the Supreme Court attacked the idea of providing such guidance. 481 U.S. 279, 296 (1987).

56. See Godbold, *Pro Bono Representation of Death Sentenced Inmates*, 42 REC. N.Y. CITY B.A. 859, 873 (1987).

57. Kerr, *Proponents of Death Penalty Seek to Limit Jersey Appeals*, N.Y. Times, Feb. 17, 1989, at B1, col. 2.

58. For example, in one case a federal appellate court found that a court-appointed Texas attorney was either completely unaware of, or misunderstood, an important five-year old Supreme Court decision. *Jurek v. Estelle*, 593 F.2d 672, 682 (5th Cir. 1980), cert. denied, 450 U.S. 1001 (1981). The attorney lived more than one hundred miles from the nearest public copies of the Court's opinions. See Tabak, *supra* note 2, at 801-10 for other examples of ineffective assistance of defense counsel in capital trials.

59. See SPANGENBERG GROUP, ANALYSIS OF COSTS OF COURT-APPOINTED COUNSEL IN VIRGINIA, FINAL REPORT 55 (April 1985); Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 356 (1983).

60. See generally Tabak, *supra* note 2, at 801-10.

velopments in the complex law affecting death penalty cases.⁶¹ Trial counsel's failure to make objections creates major problems for capital defendants who try to raise valid claims on appeal, even where the failure to object is due to defense counsel's ineptitude.⁶²

It has been estimated that approximately ninety percent of those on death row could not afford to hire a lawyer when they were tried,⁶³ thus requiring appointment and compensation of counsel by the state. Often, attorneys available for appointment to capital cases are inexperienced, overworked, and inadequately funded.⁶⁴ Indeed, the Florida Supreme Court has twice been forced to recognize that the Florida scheme for funding capital defense counsel is inadequate under the state's constitution.⁶⁵ New York, which is unable to adequately deal with indigent defense even under existing law,⁶⁶ is no exception, and the proposed death penalty legislation in New York contains no provision for correcting the already inadequate public-defense program.⁶⁷

Yet, the need for properly funded, competent counsel is greater in capital cases than in other cases. Trial counsel in capital cases must prepare not just for the guilt phase, as in other cases, but also for the separate sentencing phase, at which the defense is entitled to present any evidence which the jury may conclude is mitigating with respect to punishment.⁶⁸ But, due to lack of support staff and time, most attorneys

61. Marshall, J., Remarks on the Death Penalty at the Judicial Conference of the Second Circuit, reprinted in 86 COLUM. L. REV. 1 (1986). See also Godbold, *supra* note 56, at 873. Judge Godbold, former Chief Judge of the 11th Circuit Court of Appeals, noted, "the body of law that exists is complex. It's difficult. It's changeable. And it's very hard to apply." *Id.* at 865. Judge Godbold has also observed that death penalty law "is the most complex area of the law that I deal with." "You Don't Have to Be a Bleeding Heart," *Representing Death Row: A Dialogue Between Judge Abner J. Mivka and Judge John C. Goodbold*, 14 HUM. RTS., Winter, 1987, at 22, 24.

62. See *infra* notes 193-220 and accompanying text.

63. Conyers, *The Death Penalty Lottery*, N.Y. Times, July 1, 1985 at A15, col. 1.

64. See Tabak, *supra* note 2, at 801.

65. *White v. Board of County Comm'rs*, 537 So. 2d 1376 (Fla. 1989); *Makemson v. Martin County*, 491 So. 2d 1109 (Fla. 1986), *cert. denied*, 479 U.S. 1043 (1987). The *White* court acknowledged that appointed counsel, because inadequately funded, may spend less time than required on the case or may accept a plea that is not in the client's interest, thus recreating "the very injustice appointed counsel was intended to remedy." *White*, 537 So. 2d at 1380.

66. See Hall & Gradess, *Determining Client Eligibility For Appointed Counsel: A Strategy For Reform in New York State*, 14 N.Y.U. REV. L. & SOC. CHANGE 119 (1986).

67. In New Jersey, which has at great expense attempted to provide for adequate defense in capital cases, no death verdicts were imposed at initial trials in 1988. Presentation of Dale Jones, New Jersey Office of the Public Advocate (Jan. 19, 1989) (sponsored by the Criminal Justice Section of the New York State Bar Association) [hereinafter Jones Presentation].

68. See Tabak, *supra* note 2, at 803-04. All states that provide for capital punishment have now adopted a bifurcated trial procedure. Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing*, 94 YALE L.J. 351, 366 (1984). Under this proce-

handling capital cases at trial are unable to undertake the comprehensive investigations necessary to effectively represent the defendant at what are essentially two trials.⁶⁹ Often, no investigation at all is conducted with respect to the sentencing phase, so that exculpating or mitigating evidence is never discovered or presented.⁷⁰

For example, the jury which tried James Messer in Georgia was not told that Messer had never previously been arrested and had served honorably in the military.⁷¹ Messer was executed in July 1988.⁷² The Mississippi jury which sentenced Larry Jones to death never knew that Jones was mentally retarded, because his attorney presented no mitigating evidence.⁷³ Similarly, evidence that the defendant was abused as a child, which may sway many jurors,⁷⁴ is often not uncovered and presented.⁷⁵ Such failures to present exculpating or mitigating evidence undermine the constitutional requirement of reliability in capital sentencing verdicts.⁷⁶

Counsel's problems in trying to properly represent murder defendants are often compounded by racial, cultural and class differences between such attorneys and their clients. In a 1985 murder case, the court-appointed attorney representing a Vietnamese refugee did not even know that the person sitting next to him during the trial was not the defend-

dure there must be a "two-phased" trial. The question of guilt or innocence is argued and decided separately from the question of what sentence should be imposed. Once a defendant is found guilty of a capital offense the trial court must conduct a separate sentencing hearing in which both sides may present evidence as to the appropriate sentence. *See Gregg v. Georgia*, 428 U.S. 153, 190-92 (1976).

69. Tabak, *supra* note 2, at 803-04.

70. *See, e.g., House v. Balkcom*, 725 F.2d 608 (11th Cir.) (defense counsel was unaware of and failed to prepare for sentencing phase), *cert. denied*, 469 U.S. 870 (1984); *Young v. Zant*, 677 F.2d 792 (11th Cir. 1982) (defense counsel unaware of Georgia's bifurcated trial procedure failed to show defendant's favorable background as mitigating evidence during death penalty phase).

71. *Messer v. Kemp*, 760 F.2d 1080, 1096 (11th Cir. 1985) (Johnson, J., dissenting), *cert. denied*, 474 U.S. 1088 (1986).

72. *Newsday*, June 20, 1989, at 17, col. 1.

73. *See Jones v. Thigpen*, 555 F. Supp. 870, 878-79 (S.D. Miss. 1983), *modified*, 741 F.2d 805 (5th Cir. 1984), *vacated on other grounds*, 475 U.S. 1003 (1986). Public opinion polls show that the vast majority of people do not favor execution of the mentally retarded. Patrick H. Caddell Enterprises, New York Public Opinion Poll, The Death Penalty: An Executive Summary (May 19, 1989) (unpublished poll results on file at Loyola of Los Angeles Law Review) [hereinafter Opinion Poll]. *See infra* text accompanying notes 251-78.

74. A recent poll of New Yorkers showed that 42% oppose the death penalty for a defendant who was abused as a child. *See Opinion Poll, supra* note 73, at 3.

75. *See Tabak, supra* note 2, at 805.

76. *See, e.g., Gardner v. Florida*, 430 U.S. 349 (1977) (requirement of reliability in determining that death is appropriate punishment).

ant.⁷⁷ The error was pointed out only by the third witness who testified at the trial.⁷⁸ New York, with its extremely diverse population, will confront tremendous problems with the adequacy of trial counsel in capital cases if it enacts the death penalty.

Counsel in capital cases may fail, under these typical adverse circumstances, to aggressively plea bargain and get their clients to accept offers of life sentences. A case may go to trial and result in a death verdict because defense counsel failed to properly handle an offer of a plea bargain or failed to seek such an offer from the prosecutor. In some cases, death penalties will result although no one—prosecutor, judge, or even jury—really wants the defendant to be executed.⁷⁹

Attorneys handling capital cases often fail to effectively assist their clients in pretrial proceedings. Some fail to file change of venue or suppression motions which are crucial to the client's case.⁸⁰ In some cases, attorneys fail to raise valid constitutional claims for fear their practices will be hurt if they zealously represent an accused murderer.⁸¹ Some attorneys fail to raise such claims because they fear adverse community reaction will prejudice their clients.⁸²

Trial attorneys sometimes fail to adequately question potential ju-

77. Clendinen, *Race and Blind Justice Behind Mixup in Court*, N.Y. Times, Nov. 3, 1985, § 1, at 26, col. 1.

78. *Id.* See also Dolman, *Georgia's System of Justice Shortchanges the Penniless*, Atlanta Const., Nov. 22, 1985, at 31, col. 1.

79. See *infra* text accompanying notes 131-47 for a discussion of jurors' misconceptions regarding the meaning of sentencing alternatives.

80. See Petitioner's Brief, *Willie v. Maggio*, 737 F.2d 1372 (5th Cir.) (No. 84-3219), *cert. denied*, 469 U.S. 1002 (1984).

81. See *Winters v. Cook*, 489 F.2d 174, 192 (5th Cir. 1973) (Godbold, J., dissenting); *Whitus v. Balkcom*, 333 F.2d 496, 498, 505-07 (5th Cir.) (court noted that attorneys in counties dominated by segregation may fail to raise issue of jury exclusion of blacks because of potential reprisals against attorney's business), *cert. denied*, 379 U.S. 931 (1964).

82. The former Fifth Circuit acknowledged the prevalence of this practice, especially in small towns and rural areas where the defense lawyer is known by the whole community. See *Whitus*, 333 F.2d at 498, 505-08; *Goldsby v. Harpole*, 263 F.2d 71, 82 (5th Cir.), *cert. denied*, 361 U.S. 850 (1959). This remains a problem, as illustrated by *Gates v. Zant*, 863 F.2d 1492 (11th Cir. 1989). The lawyer for a black defendant failed to challenge the racially-discriminatory method used to select the panel from which the jury was chosen, even though this led to an all-white jury in a community that was 30% black. Petitioner's Opening Brief at 7 n.3, *Gates v. Zant*, 863 F.2d 1492 (11th Cir. 1989) (No. 87-8870). The trial lawyer said that he did not raise the challenge because he felt that a successful challenge would have biased jurors against his client. *Gates*, 863 F.2d at 1497, 1499. However, the Eleventh Circuit held that the lawyer's conduct was effective, and refused to rule on what it acknowledged to be a *prima facie* showing of unconstitutional racial discrimination. *Id.* at 1497-98. Instead, it affirmed the district court's denial of habeas relief. *Id.* at 1503. See also *Goodwin v. Balkcom*, 684 F.2d 794, 805-10 (11th Cir. 1982), *cert. denied*, 460 U.S. 1098 (1983).

rors during the jury selection process.⁸³ For example, counsel frequently fail to ask potential jurors whether, if they find the accused guilty of murder, they would automatically impose the death penalty; an affirmative answer would give the defendant the right to strike such jurors from the venire for cause.⁸⁴ The failure to ask such questions undoubtedly leads to death verdicts and executions imposed by jurors whose prejudices go undetected.

Some of the most significant mistakes made by attorneys in capital cases are based on misunderstandings regarding the highly complex bifurcated trial.⁸⁵ Many lawyers concentrate almost exclusively on the guilt/innocence phase of the trial, and entirely neglect to prepare for the crucial sentencing phase, even though there may be little hope of avoiding a conviction but a substantial possibility of avoiding imposition of the death sentence.⁸⁶ For example, the attorney who represented Joseph James Blake did not prepare for the sentencing phase because he thought he would avoid a conviction by presenting an insanity defense; he chose not to "prepare for losing" the guilt phase by preparing for the sentencing phase.⁸⁷ Further, defense counsel often present no evidence whatsoever in mitigation of sentence,⁸⁸ although at least some favorable evidence about the defendant is almost always available.⁸⁹

Defense counsel must not only develop evidence for use in the penalty phase but must also consider how their penalty-phase strategy impacts the guilt phase.⁹⁰ Many defense lawyers are so myopic during the guilt phase that they make arguments in the guilt phase which are totally inconsistent with their subsequent arguments in the penalty phase.⁹¹ Such inconsistency can fatally undermine their credibility before juries.

The problems of ineffective counsel are endemic to the complex capital punishment system and are not alleviated by the mere appointment

83. Tabak, *supra* note 2, at 803.

84. See *Wainwright v. Witt*, 469 U.S. 412 (1984) (trial court shall exclude for cause juror whose views would prevent or substantially impair performance of duties).

85. See *supra* note 68 for a discussion of the bifurcated trial.

86. In fact, in some cases, counsel admitted to not knowing a separate sentencing trial would take place until the trial judge announced its commencement. *House*, 725 F.2d at 613. See also *Young*, 677 F.2d at 797-99.

87. *Blake v. Kemp*, 758 F.2d 523, 533 (11th Cir.), *cert. denied*, 474 U.S. 998 (1985).

88. See Tabak, *supra* note 2, at 805-06.

89. *Id.*

90. Goodpaster, *supra* note 59, at 324-25, 329-30, 333-34.

91. For example, counsel may vehemently argue the defendant's innocence during the guilt phase, but then proceed to argue during the sentencing phase that the defendant is deeply sorry for what he did. See W. WHITE, *supra* note 35, at 55-56 (defense strategy at guilt phase should be tailored to strategy that will be most persuasive at penalty phase in cases where defendant has little chance of avoiding conviction on capital charge).

of counsel, who frequently are inexperienced or otherwise inadequate.⁹² A study by the Texas Judicial Council revealed that murder defendants represented by appointed counsel were convicted ninety-three percent of the time, as opposed to sixty-five percent of the time for those represented by retained counsel.⁹³ The study also showed that those convicted of capital murder and represented by appointed counsel were sentenced to death seventy-nine percent of the time, as opposed to fifty-five percent for those represented by retained counsel.⁹⁴

A conviction or death sentence does not comport with the Constitution if the defendant received inadequate representation.⁹⁵ But current constitutional standards for determining what is "adequate" are so low as to render practically meaningless the constitutional requirement of effective counsel.⁹⁶ In one recent case, a court-appointed trial lawyer was found not to have been ineffective⁹⁷ although he: (1) failed to investigate or present a jury composition claim where a prima facie case of racial discrimination in the venire existed, and this caused the black defendant to be tried by an all-white jury for the rape and murder of a white woman;⁹⁸ (2) did not find and present *any* of the numerous readily available mitigation witnesses;⁹⁹ (3) failed to object to the prosecution's repeated improper arguments because he did not realize he was allowed to so object;¹⁰⁰ and (4) referred to his client as a "boy" six times during his closing argument.¹⁰¹ The Eleventh Circuit found that these and other actions by trial counsel did not violate the defendant's constitutional right to effective assistance of counsel.¹⁰²

The impact of the courts' current definition of constitutionally effective counsel was pointedly noted by the Fifth Circuit in *Riles v. McCot-*

92. See generally Tabak, *supra* note 2, at 801-10. In a recent development, the Kentucky Supreme Court on May 4, 1989 entered an order disbaring attorney Kevin Charters for incompetence and dishonesty. Order of Kentucky Supreme Court (May 4, 1989). Charters had been trial counsel for three of Kentucky's death row inmates. Walker, *The Death Penalty*, *The Advocate*, June 1989, at 16, col. 2. Of the 28 people on Kentucky's death row at the beginning of 1989, seven had been represented at trial by attorneys who have since been disbarred or who have resigned rather than face disbarment. *Id.*

93. *Factors That Lead to Death Row*, *Dallas Times-Herald*, Nov. 17, 1985, at 18, col. 3.

94. *Id.*

95. *Strickland v. Washington*, 466 U.S. 668, 684-87 (1984).

96. U.S. CONST. amend. VI.

97. *Gates*, 863 F.2d at 1497.

98. Petitioner's Opening Brief at 20-21, *Gates v. Zant*, 863 F.2d 1492 (11th Cir. 1989) (No. 87-8870).

99. *Id.* at 31-35.

100. *Id.* at 29-30, 35-37.

101. *Id.* at 38.

102. *Gates*, 863 F.2d at 1496-1500.

ter.¹⁰³ In *Riles*, the concurring judges stated that:

a sufficient showing has been made that trial counsel did not provide this accused with the quality of defense essential to adequate representation in any serious felony case, and particularly in a capital case. . . . Precedent requires me to agree that this is not enough to justify a certificate of probable cause. 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. . . . Ineffectiveness is not measured against the standards set by good lawyers but by the average—"reasonableness under prevailing professional norms." . . . 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.¹⁰⁴

The fundamental problem of inadequate defense may best be summarized by noting a statement by former Florida Attorney General James Smith, who is now Florida's Secretary of State. In criticizing those relatively few defense attorneys who vigorously and effectively represent their clients, Smith said, "[t]he great majority of cases just don't deserve that aggressive a defense."¹⁰⁵

D. *The Jury Selection Process Fails to Ensure Unbiased Juries*

The jury selection process has been one of the most troubling aspects of the capital trial since long before the *Furman v. Georgia*¹⁰⁶ and *Gregg v. Georgia*¹⁰⁷ opinions initiated modern capital jurisprudence. As early as the 1880s, jury composition claims were recognized as crucial to a fair trial for a black defendant in a capital case.¹⁰⁸ Since 1961, a series of cases has held that the defendant must be allowed to establish whether jurors have been prejudicially exposed to pretrial publicity.¹⁰⁹ In *Batson*

103. 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., joined by Johnson, J., concurring).

104. *Id.* (Rubin, J., concurring) (citations omitted) (emphasis in original).

105. See Milloy, *Florida's Law There to Stay*, *Newsday*, June 20, 1989, at 16, col. 2. It should be noted that the Model Code of Professional Responsibility requires that all attorneys zealously represent their clients within the bounds of the law. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1980).

106. 408 U.S. 238 (1972).

107. 428 U.S. 153 (1976).

108. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303 (1879); see also *Vasquez v. Hillary*, 474 U.S. 254 (1986) (relying on *Strauder*); *Moore v. Dempsey*, 261 U.S. 86 (1923) (Holmes, J.).

109. See *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961); *Coleman v. Kemp*, 778 F.2d 1487 (11th Cir. 1985).

v. Kentucky,¹¹⁰ the Supreme Court held that a defendant may prove purposeful discrimination by showing that his prosecutor used peremptory challenges to exclude all members of the defendant's race.¹¹¹ In *Turner v. Murray*,¹¹² the Court held that a capital defendant charged with an interracial crime must be allowed to inform prospective jurors about the race of the victim and ask them questions about any racial prejudice they may have.¹¹³

Another series of cases has dealt with the significance of juror attitudes about capital punishment. In the seminal case of *Witherspoon v. Illinois*,¹¹⁴ the Court held that the prosecution may strike for cause any juror who expresses sufficient opposition to the death penalty as to indicate that he or she would be unable to vote to impose it.¹¹⁵ On the other hand, the defendant may strike jurors who express the opinion that they would automatically impose death if the defendant is found guilty of murder.¹¹⁶

However, the various safeguards for capital defendants in jury selection are generally undermined by the failure to conduct individual sequestered voir dire.¹¹⁷ When prospective jurors must be examined in public, some bias will go undetected even though clear bias of the same jurors would be quickly apparent in private, individual questioning.¹¹⁸

Even when bias *is* detected, it is often not dealt with adequately. In the Arkansas trial of Marion Albert Pruett, potential jurors in the nearby community to which the trial was moved conceded that almost everyone in the area knew a great deal about the case.¹¹⁹ One potential juror knew the victim's sister, had heard that the defendant was later going to be

110. 476 U.S. 79 (1986).

111. *Id.* at 96-98.

112. 476 U.S. 28 (1986).

113. *Id.* at 36.

114. 391 U.S. 510 (1968).

115. *Id.* at 520.

116. *Id.* at 521. While these decisions have generally been designed to protect the defendant, they have also made the capital trial much more lengthy and expensive than the non-capital trial. See Spangenberg & Walsh, *Capital Punishment or Life Imprisonment? Some Cost Considerations*, 23 LOY. L.A.L. REV. 45 (1989). In New York, due to the unique racial diversity of the population, these difficulties will be greater than in many other parts of the country.

117. In New York, as in most states, whether to grant sequestered voir dire is left to the discretion of the trial judge. See, e.g., *People v. Pepper*, 89 A.D.2d 714, 715, 453 N.Y.S.2d 868, 870 (App. Div. 1982); *People v. Boulware*, 29 N.Y.2d 135, 272 N.E.2d 538 (1971). Nothing in the proposed New York death penalty statute would correct this problem.

118. See Tabak, *supra* note 2, at 814. In Ronald Spivey's retrial and Marion Albert Pruett's Arkansas trial, many prospective jurors who did not raise their hands in the *en masse* questioning were later excused for cause when their biases were revealed during private questioning. *Id.*

119. Trial Record, Vol. VII, at 2131, *Pruett v. State*, 287 Ark. 124, 697 S.W.2d 872 (1985).

tried in another state for the murder of his wife, and had seen the defendant on television characterizing himself as a "mad dog killer."¹²⁰ The judge refused to excuse the juror for cause.¹²¹ In the Georgia retrial of Ronald Spivey, the judge refused to excuse for cause a prospective juror who repeatedly said that the retrial was a waste of time and that the prosecution's evidence stacked up to the ceiling, and who laughed while responding to questions during jury selection.¹²² Both the Pruett and Spivey death sentences were upheld on appeal.¹²³

Although the importance to the defendant of obtaining an impartial jury is substantially magnified in a capital case, capital defendants are typically granted an inadequate number of peremptory challenges, often no more than in non-capital trials.¹²⁴ Yet, additional peremptory challenges for the defense are badly needed in capital cases for two important reasons. First, there is generally much more publicity surrounding capital cases and more challenges are needed to remove jurors who have been exposed to such publicity. Second, due to the use of bifurcated trials in capital cases, the defense must in effect select the best possible jury for two trials—the guilt trial and the sentencing trial.¹²⁵

E. Jurors in Capital Cases Are Often Misled, Misinstructed, or Incompletely Informed

As noted above, prosecutors often mislead jurors in closing arguments by referring to the supposed but non-existent deterrent effect of the death penalty,¹²⁶ by improper or inaccurate references to religious scripture¹²⁷ and by various other improper assertions.¹²⁸ There are various additional ways in which capital juries are misled or inadequately informed.

120. *Id.*, Vol. III, at 2123-28.

121. *Id.*

122. Trial Record at 665-95, *Spivey v. State*, 253 Ga. 187, 319 S.E.2d 420 (1984), *cert. denied*, 469 U.S. 1132 (1985). See also Tabak, *supra* note 2, at 812.

123. *Pruett v. State*, 287 Ark. 124, 697 S.W.2d 872 (1985); *Spivey v. State*, 253 Ga. 187, 319 S.E.2d 420 (1984), *cert. denied*, 469 U.S. 1132 (1985).

124. See, e.g., GA. CODE ANN. § 15-12-165 (1982). No additional peremptory challenges are afforded under the death penalty statute proposed in New York.

125. See generally *supra* note 68 (general discussion of bifurcated trial). This latter problem could be eliminated by the mandatory use of separate juries for the two stages of the capital trial. While the proposed New York bill allows the use of a separate jury at the penalty phase for "good cause shown" and to avoid prejudice to the defendant, the bill fails to mandate it. See S. 600, A. 1070, New York Legislature, Reg. Sess. § 8 (1989) [hereinafter PROPOSED LEGISLATION].

126. See *infra* notes 390-421 and accompanying text.

127. See *infra* notes 555-80 and accompanying text.

128. See *supra* notes 41-43 and accompanying text.

The sentencing phase of the trial is designed to provide a forum for introducing evidence and argument on the question of whether the defendant, having been convicted, should be sentenced to death or life imprisonment.¹²⁹ Jurors are often misled during this crucial phase of the trial by the failure of defense counsel to introduce evidence for mitigation of sentence.¹³⁰ Without such evidence, the jury cannot properly make the sentencing decision, because the very purpose of the sentencing trial—the individualized determination of the proper punishment—is undermined.

Jurors are also misled by improper jury instructions in the guilt phase, the sentencing phase, or both phases. Instructions may, for example, improperly shift the burden of proof on a key element of the crime,¹³¹ improperly force the jury to choose between two unacceptable alternatives,¹³² grossly undermine the jury's sense of responsibility for imposing the death penalty,¹³³ or fail to adequately inform the jury of the true meaning of its sentencing choices.

One of the most widespread and egregious problems is the failure to give juries accurate information about the life-sentence alternative, specifically about the defendant's potential for release from a life sentence.¹³⁴ Jurors have a distorted impression but actually know very little about eligibility for parole,¹³⁵ a subject they nonetheless consider highly rele-

129. See *Gregg v. Georgia*, 428 U.S. 153, 190-93 (1976).

130. See *supra* notes 70-76, 85-91 and accompanying text.

131. See, e.g., *Francis v. Franklin*, 471 U.S. 307 (1985) (instruction may not relieve prosecution of burden of proving intent).

132. In *Beck v. Alabama*, the Court invalidated a statute which forced the jury to choose between conviction of first-degree murder, which mandated the death penalty, or acquittal. 447 U.S. 625, 638 (1980). The Court held that the jury instruction unacceptably tilted the balance toward death. *Id.* at 637. Jurors may believe in many instances that the state has not provided them with sufficient alternative sentences. For additional discussion of alternative sentencing, see *infra* text accompanying notes 461-78.

133. See *Adams v. Wainwright*, 804 F.2d 1526 (11th Cir. 1986), *modified and reh'g denied sub nom. Dugger v. Adams*, 816 F.2d 1493 (1987), *rev'd on procedural grounds*, 109 S. Ct. 1211 (1989). The Eleventh Circuit recognized in *Adams* that Florida instructions deceiving the jury by saying it had no responsibility for the sentencing decision undermined the constitutionally required reliability of the capital sentencing proceeding. 816 F.2d at 1501. The United States Supreme Court later held that the Eleventh Circuit should not have reached the merits of the claim because Adams' trial attorney had not objected at what Florida sometimes deems to be the proper time. *Adams*, 109 S. Ct. at 1216, 1217 n.6; *id.* at 1220-21 (Blackmun, J., dissenting). Adams was subsequently executed in May 1989. *N.Y. Times*, May 5, 1989, at 16A, col. 1. For a discussion of the effects of procedural rules in death penalty cases, see *infra* text accompanying notes 193-220.

134. See generally Dayan, Mahler & Widenhouse, *Searching for an Impartial Sentencer Through Jury Selection in Capital Trials*, 23 *LOY. L.A.L. REV.* 151 (1989).

135. A 1975 study of public attitudes in New York found that the average person has almost no knowledge of what parole is and how it operates, and is completely unaware of the

vant to the proper performance of their duty.¹³⁶ Recent studies indicate that jurors typically believe that a life sentence in a capital case will result in parole after a relatively short period of incarceration, most commonly believed to be seven years.¹³⁷ This belief is incorrect in the vast majority of death penalty states. In a majority of states, life sentences for capital murder preclude the *possibility* of parole for as many as twenty, twenty-five, thirty or forty years,¹³⁸ or without such a possibility *ever*.¹³⁹ Yet, sentencing juries continue to return death verdicts because they incorrectly believe the defendant would be released after a short period if given a life sentence.¹⁴⁰

Juror misconceptions and inaccurate speculations regarding parole law and practice are often decisive in death sentencing. Thus, failure to give full and accurate instructions regarding the true meaning of a life sentence can mean the difference between life and death. However, in many cases, juries have been denied accurate information even after specifically requesting the court to instruct them on the meaning of a life sentence.¹⁴¹

In most states, judges are not allowed to instruct on the actual meaning of a life sentence, and defendants are precluded from introducing any evidence or argument as to their general ineligibility for parole.¹⁴² This is true even when the jury specifically requests instructions regarding parole.¹⁴³ While juries which ask questions about parole are

facts regarding the success or failure of parole. *Report on New York Parole: A Summary*, 11 CRIM. L. BULL. 273, 281 (1975).

136. See, e.g., Paduano & Stafford Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 COLUM. HUM. RTS. L. REV. 211, 252 (1987).

137. *Id.* at 221-23.

138. See *infra* note 469 and accompanying text.

139. See *infra* note 470 and accompanying text.

140. See generally Paduano & Stafford Smith, *supra* note 136. In several recent Georgia cases, post-trial interviews with jurors revealed that the death verdict was returned precisely because the jury incorrectly believed that the defendant would be released after seven years if sentenced to life imprisonment. See Note, *A Capital Defendant's Right to a Meaningful Alternative Sentence*, (forthcoming in N.Y.U. REV. L. & SOC. CHANGE, Fall 1989) (authored by J. Mark Lane).

141. A study of the trial transcripts of all 256 Georgia trials which resulted in death verdicts between 1973 and July 1988 revealed that the jury specifically inquired about the defendant's potential parole eligibility in 56 cases. Note, *supra* note 140. In many of those cases, juries returned with death verdicts within minutes after being denied the information they had requested regarding a life sentence. *Id.*

142. Paduano & Stafford Smith, *supra* note 136, at 216-17. This problem could exist under the death penalty legislation proposed in New York.

143. Indeed, juries have not been allowed to know the meaning of a life sentence even when the defendant expressly seeks to ensure that they do. A recent Fifth Circuit decision held that a capital defendant does not have the right to inquire during jury selection as to the potential juror's understanding of the parole law. *King v. Lynaugh*, 850 F.2d 1055 (5th Cir. 1988) (en

generally admonished not to consider parole in sentencing deliberations,¹⁴⁴ evidence indicates that they are incapable of following such admonitory instructions¹⁴⁵ and base the decision to impose death on parole considerations even in the face of specific and definite instructions not to do so.¹⁴⁶

Hence, jurors' inaccurate beliefs about parole undermine the reliability of capital sentencing. The death penalty is being imposed arbitrarily, based on juries' misinformation about the true nature of the life sentence for capital murder.¹⁴⁷

Another serious problem sometimes arises when a court deals with a "holdout" juror. Under most capital sentencing schemes, both a verdict on guilt and the sentencing decision must be returned by a unanimous jury.¹⁴⁸ However, jurors who hold out for a not-guilty verdict or a life sentence are sometimes coerced into changing their minds, or are actually dismissed from the jury.¹⁴⁹

In one recent case, a holdout juror, who had not been convinced of the defendant's guilt, was dismissed after only two hours of deliberations when, at 12:30 a.m., the jury foreman told the judge that the juror, Mr. Greeson, was "nervous."¹⁵⁰ Once Greeson had been excused—without either the judge, the defense lawyer, or the prosecutor seeing him—it took the reconstituted jury only a matter of minutes to convict the de-

banc), *cert. denied*, 109 S. Ct. 820 (1989). The Fifth Circuit's opinion rested in part upon the assumption that jurors will follow instructions not to consider parole in their sentencing determination, *id.* at 1060, an assumption which has been proven false.

144. *See, e.g.*, *Quick v. State*, 256 Ga. 780, 353 S.E.2d 497 (1987) (and cases discussed therein).

145. The Supreme Court has acknowledged that juries are not always capable of following admonitory or limiting instructions. *See, e.g.*, *Bruton v. United States*, 391 U.S. 123 (1968); *Jackson v. Denno*, 378 U.S. 368 (1964). *See also* *Krulewitch v. United States*, 336 U.S. 440, 453 (1948) (Jackson, J., concurring) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.").

146. The case of *Rogers v. State*, 256 Ga. 139, 344 S.E.2d 644 (1986), provides a clear example. In *Rogers*, the jury had inquired about parole and had been instructed not to consider the issue, but post-trial interviews ordered by the court for unrelated reasons established that 10 of the 12 jurors based the decision to sentence Rogers to death on misinformed parole considerations. Seven of those jurors specifically stated that they believed Rogers would get out in seven years under a life sentence. He would not, in fact, have even been considered for parole for at least 15 years. *See* Note, *supra* note 140 for a discussion of *Rogers*.

147. *See infra* text accompanying notes 461-78 for a discussion of sentencing alternatives generally, and the reasons for these misperceptions.

148. *See* Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 102-19 (1980).

149. *See* Tabak, *supra* note 2, at 815-16.

150. *See* *Peek v. Kemp*, 784 F.2d 1479, 1482 (11th Cir.) (en banc), *cert. denied*, 479 U.S. 939 (1986).

defendant while Greeson drove himself home unaided.¹⁵¹ At 2:00 a.m., after a hasty sentencing hearing, the jury sentenced the defendant to death.¹⁵² The Eleventh Circuit upheld the constitutionality of the conviction and sentence, in large part because of defense counsel's failure to object to Greeson's removal from the jury.¹⁵³ A similar occurrence transpired during the jury deliberations in Roosevelt Green's trial.¹⁵⁴

A further problem is that jurors are often so misinformed or misled as to the way in which the capital sentencing system works that they simply do not believe that the real decision as to whether death will be imposed rests with them.¹⁵⁵ They may return a death verdict because they believe, due to their distorted view of the length of a life sentence for capital murder, that this might keep the defendant in jail longer, or to send a message of extreme disapproval.¹⁵⁶ The latter phenomenon, known as the "Slovik syndrome,"¹⁵⁷ may result in the execution of the defendant, even though the jury never thought its verdict would be carried out.

F. The Lack of Real Proportionality Review Means that the Arbitrary Imposition of Death Is Not Corrected on Appeal

In approving Georgia's new capital punishment scheme in 1976, the Supreme Court emphasized what it asserted were many safeguards that supposedly would prevent the arbitrary and capricious imposition of death.¹⁵⁸ One of these supposed safeguards was the Georgia Supreme Court's statutorily mandated proportionality review,¹⁵⁹ which was designed to ensure that a defendant was not executed unless death

151. 784 F.2d at 1504 (Johnson, J., dissenting).

152. *Id.* (Johnson, J., dissenting).

153. *Id.* at 1484. As the dissent pointed out, the circumstances indicate that Greeson "had been pressured into resigning" because he was in disagreement with the remaining 11 jurors. *Id.* at 1505 (Johnson, J., dissenting).

154. See W. WHITE, *supra* note 35, at 120-27 for a discussion of Mr. Green's trial.

155. See, e.g., *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *Adams v. Wainwright*, 804 F.2d 1526 (11th Cir. 1986), *modified and reh'g denied sub nom. Dugger v. Adams* 816 F.2d 1493 (11th Cir. 1987), *rev'd on other grounds*, 109 S. Ct. 1211 (1989).

156. Weltner, J., Remarks of Charles Weltner at Panel Discussion in Atlanta, Georgia (June 29, 1985) (the Georgia Supreme Court Justice noted that jurors have a distorted view of life sentences). See also Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 927 n.119 (1982).

157. The "Slovik syndrome," named for United States Army Private Eddie Slovik who was sentenced to death in 1944, is the belief by jurors that the death sentence will not actually be carried out. See generally Newman, *Foreword to Project, Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 812-13 (1975).

158. *Gregg v. Georgia*, 428 U.S. 153, 162-68, 190-206 (1976).

159. *Id.* at 204-06.

sentences had been returned in most similar cases.¹⁶⁰

However, such proportionality review has generally not occurred. The Georgia Supreme Court has never vacated a death sentence for murder based on a comparison of different cases.¹⁶¹ Indeed, one justice of the Georgia Supreme Court has openly conceded that the court does not actually do such proportionality review.¹⁶² This means that when defendants with similar backgrounds commit similar crimes but receive strikingly different sentences—due to such arbitrary factors as prosecutorial misconduct, racial discrimination and unguided discretion—the safeguard designed to rectify the disproportionate sentencing has been put “out of commission.”

Tommy Morris of the Georgia Board of Pardons and Paroles has acknowledged that inconsistent sentencing remains a problem.¹⁶³ “Any rational, reasonable person,” says Morris, “ought to be able to take 100 life and 100 death cases and shuffle them, and come back and place those cases back [in the category] they originally came from. And I’m saying it can’t be done.”¹⁶⁴ Florida prosecutor Jerry Blair has similarly stated that “[u]niformity in sentencing is not a high priority in terms of the death penalty.”¹⁶⁵

The danger of disproportionate capital sentencing is especially great in states, like New York, that have locally elected prosecutors, differing levels of defense services by county, and widely different demographic patterns in different areas. Although the proposed New York statute would require the New York Court of Appeals to review a death sentence to determine “whether the sentence is excessive or disproportionate to the penalty imposed in similar cases,”¹⁶⁶ experience in other jurisdictions shows that such legislative mandates have generally not ensured proportionality in death sentencing.

Because proportionality review has not been used to correct the problem of inconsistent sentencing, today’s capital punishment schemes are defective for the same reasons that such schemes were considered

160. *Id.* at 198 (noting that the Georgia Supreme Court must determine “whether the sentence is disproportionate to those sentences imposed in other similar cases”).

161. See Liebman, *Appellate Review of Death Sentences: A Critique of Proportionality Review*, 18 U.C. DAVIS L. REV. 1433, 1434 (1985); accord Bentele, *supra* note 32.

162. Weltner, *supra* note 156.

163. See Thompson, *Once ‘Unfit to Live,’ Ex-death-row Inmates Winning Parole*, Atlanta Const., Mar. 12, 1987, at 1A, col. 4.

164. *Id.*

165. See Milloy, *Florida’s Law There to Stay*, Newsday, June 28, 1989, at 5, col. 2.

166. PROPOSED LEGISLATION, *supra* note 125, § 11.

unconstitutional by Supreme Court Justice Byron White in 1972.¹⁶⁷ As Justice White then stated, capital punishment schemes provide "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."¹⁶⁸

G. Lack of Qualified, Adequately Compensated Counsel for Post-Conviction Proceedings

The scarcity of qualified counsel and the inadequacy of counsel's compensation have been discussed with respect to trials. These problems are no less significant in the area of post-conviction proceedings where fact-finding and legal analysis concerning errors made at the trial level frequently occur.¹⁶⁹

Certain types of constitutional error are raised almost exclusively in post-conviction proceedings. For example, sixth amendment claims regarding the effectiveness of trial counsel are often made only after the essential factual predicates have been uncovered by post-conviction investigations, or after new counsel has examined the record and consulted with the client.¹⁷⁰ An example is the case of Georgia death row inmate William Walter Curry, whose trial counsel failed to seek an independent psychiatric evaluation, even though the trial judge said he would allow one.¹⁷¹ In state post-conviction proceedings, volunteer counsel presented evidence that Curry, who had pled guilty, was mentally retarded, suffered from severe mental illness, and was incapable of waiving his constitutional rights.¹⁷² The Georgia Supreme Court held that Curry's sixth amendment rights had been violated and vacated his death sentence,¹⁷³ although it had earlier affirmed his conviction and sentence on direct appeal.¹⁷⁴

In other cases, counsel working on post-conviction proceedings have

167. See *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring).

168. *Id.*

169. As noted above, habeas relief is granted in one-third to one-half of all death penalty cases in the Eleventh Circuit, which handles the greatest volume of such cases. See Godbold, *supra* note 56, at 862. See generally Lardent & Cohen, *The Last Best Hope: Representing Death Row Inmates*, 23 LOY. L.A.L. REV. 213 (1989).

170. The Supreme Court has recognized that "collateral review will frequently be the only means through which an accused can effectuate the right to counsel," because "[a] layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance . . . [and thus] will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case." *Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986).

171. *Curry v. Zant*, 371 S.E.2d 647, 648 (1988).

172. *Id.* at 648-49.

173. *Id.* at 649.

174. *Curry v. State*, 255 Ga. 215, 336 S.E.2d 762 (1985), *cert. denied*, 475 U.S. 1090 (1986).

presented evidence of other fundamental constitutional violations, or new evidence showing that particular death row inmates were in fact innocent.¹⁷⁵ John Henry Knapp's post-conviction attorneys worked more than 3,000 hours and spent \$75,000 in out-of-pocket expenses in showing that Knapp had been wrongly tried and convicted.¹⁷⁶ As a result, Knapp was released in 1987.¹⁷⁷ In *Amadeo v. Zant*,¹⁷⁸ only a fortuitous turn of events led to the discovery that the jury which had sentenced Amadeo to death had been selected from a pool that was intentionally designed to underrepresent blacks and women.¹⁷⁹ In that case, counsel in an unrelated civil case discovered the evidence which, after years of litigation by volunteer counsel, finally led to relief in post-conviction proceedings.¹⁸⁰

Given the number of death row inmates whose cases are at the post-conviction stage, expecting volunteer counsel to provide all, or even most, of them with proper representation is unrealistic. Pro se representation is also entirely inadequate. Many death row inmates are unable to articulate even those meritorious claims that do not require further factual investigation, simply because they "are illiterate, uneducated, mentally impaired or any combination of the three."¹⁸¹ As Justice Kennedy recently stated, it is "unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law."¹⁸²

Whether counsel will volunteer in any given case, and whether such counsel will be able to donate the necessary time and resources is becoming increasingly unlikely.¹⁸³ This renders the capital punishment system even more arbitrary; those who manage to secure counsel with sufficient resources and abilities benefit, while others are executed because they did not happen to get such counsel.

Studies commissioned by the American Bar Association (ABA) have shown that post-conviction representation of death row inmates requires extraordinary amounts of attorney time and involves high out-of-pocket expenses,¹⁸⁴ which many attorneys simply cannot afford. According to one study, the median time devoted to state post-conviction alone

175. See *infra* notes 290-357 and accompanying text.

176. Smethurst, *Knapp Update: "Innocent Man,"* AM. LAW., Apr. 1987, at 8.

177. *Id.*

178. 108 S. Ct. 1771 (1988).

179. *Id.* at 1774-75.

180. *Id.* at 1774.

181. See Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U.L. REV. 513, 548 (1988).

182. *Murray v. Giarratano*, 109 S. Ct. 2765, 2772 (1989) (Kennedy, J., concurring).

183. *But see* Lardent & Cohen, *supra* note 169.

184. A.B.A. POSTCONVICTION DEATH PENALTY REPRESENTATION PROJECT, TIME AND

(not including federal habeas corpus) was at least 665 hours.¹⁸⁵ Expenses averaged as high as \$20,000 for those who could document the amount.¹⁸⁶

The ABA has repeatedly urged that qualified counsel be appointed, monitored, and adequately compensated for post-conviction representation of indigent death row inmates.¹⁸⁷ However, although appointed counsel is now guaranteed for federal habeas corpus actions,¹⁸⁸ the proposed New York legislation, like that of many states, does not expressly provide for such counsel for state post-conviction proceedings.¹⁸⁹ Since the Supreme Court recently held that there is no federal constitutional guarantee of counsel at the state post-conviction level,¹⁹⁰ many death row inmates could be left with no means to effectively present meritorious claims of fundamental error in their convictions and sentences.¹⁹¹

Lack of qualified, compensated counsel in post-conviction proceedings thus remains a major problem for death row inmates. With proper counsel in such proceedings, these inmates' sentences are often reversed. At retrial, with the constitutional defect remedied, many are given life sentences, and some are even found to be not guilty.¹⁹²

H. Overly-Strict Procedural Bar Rules Lead to Executions of People Unconstitutionally Convicted or Sentenced

Increasingly onerous "procedural bar" rules are preventing capital

EXPENSE ANALYSIS IN POST-CONVICTION DEATH PENALTY CASES (Feb. 1987) (data compilation and analysis by the Spangenberg Group).

185. *Id.*

186. *Id.*

187. See A.B.A. RESOLUTION 102B (approved by the A.B.A. House of Delegates at the 1979 Midyear Meeting); A.B.A. RESOLUTION 112D (approved by the A.B.A. House of Delegates at the 1982 Annual Meeting); A.B.A. RESOLUTION 125 (approved by the A.B.A. House of Delegates at the 1988 Midyear Meeting); Brief of A.B.A., amicus curiae, *Murray v. Giarratano*, 109 S. Ct. 2765 (1989) (No. 88-411).

188. See 18 U.S.C. § 3006A(a) (1987).

189. The proposed bill provides for appointed counsel "after the entry of judgment imposing a sentence of death but before execution of that judgment," but fails to state expressly whether this includes the right to appointed counsel in collateral proceedings after an unsuccessful direct appeal. See PROPOSED LEGISLATION, *supra* note 125, § 14.

190. *Giarratano*, 109 S. Ct. at 2770-71 (1989) (relying on *Pennsylvania v. Finley*, 481 U.S. 551 (1987)).

191. Significantly, the decisive fifth vote in *Giarratano* was cast by Justice Kennedy, who implied that he might view the matter differently if a death row inmate was totally unable to obtain counsel through some means. *Giarratano*, 109 S. Ct. at 2773 (Kennedy, J., concurring). Expressing concern, he nonetheless stated that he would leave matters to "state legislators and prison administrators" for the time being. *Id.*

192. See *infra* text accompanying notes 290-357 for a discussion of defendants sentenced to death and later found to be not guilty.

defendants from raising in subsequent proceedings meritorious constitutional issues that trial counsel negligently failed to raise. Under pre-1977 construction of the federal habeas corpus statute, a defendant was permitted to raise valid constitutional claims in the federal courts unless he had "deliberately bypassed" those claims in state court.¹⁹³ A defendant deliberately bypassed those claims when he "understandingly and knowingly" decided to forego a claim for strategic reasons.¹⁹⁴ Under that standard, the effects of trial counsel's negligent failure to advise or act on behalf of his client were not devastating, since the defendant was able to raise his constitutional claims later in a federal habeas corpus petition.

However, under the more recent Supreme Court decisions, a defendant is said to have waived his right to raise constitutional claims collaterally unless he can show "cause" for having not raised them earlier and "prejudice" resulting therefrom.¹⁹⁵ "Cause" and "prejudice" have been defined so narrowly as to be almost impossible to demonstrate.¹⁹⁶ Therefore, this new judicially-created standard prevents many unconstitutionally convicted or sentenced death row inmates from securing relief.

A fatal example was the United States Supreme Court's recent holding that the Eleventh Circuit had erred in considering the claim that Florida death row inmate Aubrey Dennis Adams had been unconstitutionally sentenced to death.¹⁹⁷ The Court did not suggest that the Eleventh Circuit had been incorrect in its unanimous conclusion that Adams had been unconstitutionally sentenced. Instead, the Court concluded, by a five-to-four vote, that because Adams' attorney had raised no objection at trial and offered no excuse for this failure that would amount to "good cause,"¹⁹⁸ the constitutional claim, no matter how meritorious, could not be considered in federal court.¹⁹⁹ Thus, as the dissenters concluded, the

193. *See* *Fay v. Noia*, 372 U.S. 391, 438 (1963).

194. *Id.* at 439.

195. *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). *See also* *Dugger v. Adams*, 109 S. Ct. 1211 (1989); *Murray v. Carrier*, 477 U.S. 478 (1986); *Engle v. Isaac*, 456 U.S. 107 (1982).

196. *See* *Sykes*, 433 U.S. at 87.

197. *Dugger v. Adams*, 109 S. Ct. 1211 (1989). The Eleventh Circuit had held that the jury instructions in Adams' case unconstitutionally removed from the jury a sense of its actual heavy responsibility for the sentencing decision by repeatedly misinforming the jury that the most important thing for it to understand was that it had *no* responsibility for the sentencing. *Adams v. Wainwright*, 804 F.2d 1526, 1528 (11th Cir. 1986), *modified and reh'g denied sub nom.* *Dugger v. Adams*, 816 F.2d 1493 (11th Cir. 1987). In a later case, every member of the en banc Eleventh Circuit approved the panel's unanimous holding that Adams had been unconstitutionally sentenced to death. *See Adams*, 109 S. Ct. at 1218 n.3 (Blackmun, J., dissenting) (citing *Harich v. Dugger*, 844 F.2d 1464, 1473 (11th Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 1355 (1989)).

198. *Adams*, 109 S. Ct. at 1216.

199. *Id.* at 1217-18.

Supreme Court sent "a man to a presumptively unlawful execution because he or his lawyers did not raise his objection at what is felt to be the appropriate time for doing so."²⁰⁰ Through such decisions, the Court, which in the past "repeatedly has ruled that the Eighth Amendment prohibits the arbitrary or capricious imposition of the death penalty, [is] itself arbitrarily impos[ing] procedural obstacles to thwart the vindication of . . . a meritorious Eighth Amendment claim."²⁰¹ Adams was executed on May 4, 1989²⁰² even though the only federal appellate court to address the merits of his claim had held that his death sentence was unconstitutional and not a harmless error.

In Georgia alone, there have been at least three executions in recent years of unconstitutionally convicted death row inmates who were held to have waived meritorious claims. One such fatality of procedural default was John Eldon Smith, who was tried before a jury picked from a pool that was later found to have been selected in a way that systematically excluded blacks and women.²⁰³ His common-law wife, who was his co-defendant, was tried before a jury selected from the same unconstitutional pool, but her sentence was reversed because she was held not to have fully waived her claim.²⁰⁴ At retrial, she received a life sentence.²⁰⁵ However, Smith's attorney did not raise the jury-composition claim as early in the proceedings as his wife's attorney did.²⁰⁶ For that reason, the Eleventh Circuit—which knew from its ruling in the wife's case that Smith's claim was meritorious—held that he had waived the claim,²⁰⁷ and he was subsequently executed.²⁰⁸

In another Georgia case, John Young, whose trial lawyer later admitted to having been on drugs at the time of the trial,²⁰⁹ was executed²¹⁰ after the courts refused to hear his claims of ineffective assistance of

200. *Id.* at 1218 (Blackmun, J., dissenting).

201. *Id.* (Blackmun, J., dissenting). In further arbitrariness, six days after procedurally barring Adams' claim, the Court denied certiorari in *Dugger v. Mann*, 109 S. Ct. 1353 (1989), and thus left standing the grant of relief in *Mann v. Dugger*, 844 F.2d 1446 (11th Cir. 1988) (en banc), in which the petitioner had prevailed on a claim similar to, but somewhat weaker than Adams'. *Mann*, 844 F.2d at 1447-48. Unlike the court in *Adams*, the en banc Eleventh Circuit had been deeply divided in *Mann*. *Id.* at 1459, 1461.

202. NAACP LEGAL DEF. AND EDUC. FUND, INC., *supra* note 16.

203. See Tabak, *supra* note 2, at 841.

204. *Machetti v. Linahan*, 679 F.2d 1459 (11th Cir.), *cert. denied*, 459 U.S. 1127 (1983).

205. Tabak, *supra* note 2, at 840-41.

206. *Id.*

207. See *Smith v. Kemp*, 715 F.2d 1459 (11th Cir.), *cert. denied*, 464 U.S. 1003 (1983); *Smith v. Kemp*, 464 U.S. 1032 (1983).

208. Tabak, *supra* note 2, at 841.

209. Affidavit of Charles Marchman, Jr., Mar. 16, 1985; *Young v. Kemp*, 758 F.2d 514, 518 (11th Cir. 1985).

counsel and prosecutorial misconduct.²¹¹ The claims were held to have been raised too late, and were therefore barred from review.²¹²

Another Georgia example involved co-defendants Joseph Thomas and Ivon Ray Stanley. Thomas was granted a retrial because the jury charge at the guilt/innocence stage improperly shifted the burden of proof to the defendant on the issue of intent.²¹³ Stanley's attorneys did not raise the same issue in what was deemed to be a "timely" manner; thus, he was held to have waived his right to raise this valid claim.²¹⁴ Stanley was subsequently executed.²¹⁵

These cases are not anomalies. Indeed, very recent Supreme Court decisions may tighten procedural nooses even further, and thereby increase the number of people executed despite having been unconstitutionally convicted or sentenced through what was *not* harmless error. Thus, in *Teague v. Lane*,²¹⁶ decided in February 1989, the Court held that most new federal constitutional holdings would not be retroactively applied to benefit people whose convictions had been affirmed on direct appeal and whose certiorari petitions therefrom had been denied before the date of the ruling establishing the new constitutional principle, even if such defendants had raised the very same claim at trial and on direct appeal.²¹⁷ In *Penry v. Lynaugh*,²¹⁸ the Court announced that *Teague* would apply in the context of capital sentencing proceedings.²¹⁹ In view of the actual way in which *Penry* applied *Teague*,²²⁰ it is not completely

210. John Young was executed on March 20, 1985. NAACP LEGAL DEF. AND EDUC. FUND, INC., *supra* note 16.

211. *Young*, 758 F.2d at 519-20.

212. *Id.*

213. *Thomas v. Kemp*, 800 F.2d 1024, 1026 (11th Cir. 1986).

214. *Stanley v. Kemp*, 737 F.2d 921, 922 (11th Cir. 1984).

215. Ivon Ray Stanley was executed on July 12, 1984. NAACP LEGAL DEF. AND EDUC. FUND, INC., *supra* note 16, at 6.

216. 109 S. Ct. 1060 (1989).

217. *Id.* at 1073.

218. 109 S. Ct. 2934 (1989).

219. *Id.* at 2944-45.

220. Although the *Penry* Court stated that *Teague* would apply in death penalty cases, it did address the merits of *Penry*'s claims, because it held that one ruling which *Penry* sought would not be "a 'new rule' under *Teague*," 109 S. Ct. at 2945, and that his other issue fell within one of the narrow exceptions to *Teague*'s rule of non-retroactivity. *Id.* at 2953. The decision to consider the merits of the first issue caused four justices to complain that *Teague* was being gutted. *Id.* at 2964-65 (Scalia, J., dissenting) ("It is rare that a principle of law as significant as that in *Teague* is adopted and gutted in the same Term."). *Penry*'s second issue was his claim that the eighth amendment prohibits the execution of the mentally retarded. *Id.* The Court, while ruling against him on that issue, stated that an exception to *Teague* applies to rules prohibiting certain types of punishment for certain offenders because of their status or offense. *Id.*

clear how often *Teague* will be held to control retroactivity decisions. But where it does apply, it will mean that even where it is clear by the time of the federal habeas corpus proceedings that the petitioner was unconstitutionally convicted or sentenced, the federal courts will not hear the claim if the conviction and sentence have been upheld on direct appeal and certiorari therefrom has been denied, even if such denial occurs a single day before the issuance of a new constitutional holding upon which petitioner seeks to rely. Hence, two defendants, both presenting exactly the same claim at simultaneously held trials, may now receive entirely opposite treatment, with one being granted relief and the other being executed, on the basis of the fortuity of when their direct appeals were decided.

In view of the increasingly limited availability of federal habeas corpus, there will certainly be unconstitutional executions in New York—as in the rest of the nation—if the death penalty spreads to the Empire State.

All of the problems discussed above contribute to the arbitrariness of the capital punishment system and show that the system itself is permeated with unfairness at every stage. From the initial decision to seek the death penalty in a given case, through the prosecution and defense of the case at trial, to the appeals process and collateral review, the determination of who is executed is made all too often on the basis of arbitrary and capricious factors. Thus, almost two decades after *Furman v. Georgia*,²²¹ it is apparent that the fundamental unfairness of capital punishment in the United States has not been, and cannot be, corrected.

III. THE DEATH PENALTY OPERATES IN A RACIALLY DISCRIMINATORY MANNER

Perhaps the most carefully documented aspect of the capital punishment system in the United States today is racial discrimination in the application of the death penalty. Various recent studies of death penalty states have found that defendants charged with killing white victims have been at least four times, and as much as eleven times, more likely to receive a death sentence than those charged with killing black victims in otherwise similar cases.²²²

221. 408 U.S. 238 (1972).

222. See, e.g., Baldus, Woodworth & Pulaski, *Arbitrariness and Discrimination in the Administration of the Death Penalty*, 15 STETSON L. REV. 133 (1986); Baldus, Woodworth & Pulaski, *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia*, 18 U.C. DAVIS L. REV. 1275 (1985); Baldus, Woodworth & Pulaski, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. &

As previously noted, racial disparity in the application of the death penalty begins at a very early stage in the capital punishment process.²²³ A study presented to the Supreme Court in *McCleskey v. Kemp*²²⁴ (the "Baldus study") showed that prosecutors sought the death penalty in seventy percent of the cases involving black defendants and white victims, and in nineteen percent of the cases involving white defendants and black victims.²²⁵ Racism also affects jury deliberations, since jury selection proceedings do not provide an adequate means of preventing biased jurors from sitting on capital juries.²²⁶ Thus, the race of the victim often operates as a "silent aggravating circumstance" in the jury's decision to impose the death penalty.²²⁷

The Baldus study reviewed all convictions in murder cases that took place in Georgia between 1973 and 1979 in order to determine the effect of race on capital sentencing.²²⁸ That study, which examined over 2,000 cases and considered 230 nonracial variables,²²⁹ found, using regression analysis,²³⁰ that a Georgia defendant's odds of receiving a death sentence were 4.3 times greater if his victim were white than if his victim were black.²³¹ The study showed that defendants charged with killing whites were sentenced to death eleven percent of the time, whereas defendants charged with killing blacks were sentenced to death one percent of the time.²³²

A nationwide study conducted by Dallas Times Herald reporters Jim Henderson and Jack Taylor, which encompassed 11,425 capital murders from 1977-1984, revealed "that the killer of a white is nearly three times more likely to be sentenced to death than the killer of a black

CRIMINOLOGY 661 (1983); Gross, *Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing*, 18 U.C. DAVIS L. REV. 1275 (1985); Gross & Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing*, 37 STAN. L. REV. 27 (1984); Paternoster, *Race of the Victim and Location of the Crime*, 74 J. CRIM. L. & CRIMINOLOGY 754 (1983). In *McCleskey v. Kemp*, the Supreme Court expressly assumed a study reaching such results was statistically valid. 481 U.S. 279, 291 n.7 (1987).

223. See *supra* text accompanying notes 28-31 (discussing racial patterns in prosecutorial decisions to seek the death penalty).

224. 481 U.S. 279 (1987).

225. *Id.* at 287.

226. See *supra* text accompanying notes 106-25.

227. See Bendremer, Bramwick, Jones & Lippman, *McCleskey v. Kemp: Constitutional Tolerance for Racially Disparate Capital Sentencing*, 41 U. MIAMI L. REV. 295, 296 (1986).

228. *McCleskey v. Zant*, 580 F. Supp. 338, 353 (N.D. Ga. 1984), *aff'd*, 481 U.S. 279 (1987) (discussing Baldus study).

229. *McCleskey*, 481 U.S. at 286-87.

230. *Id.* at 292.

231. *Id.* at 287.

232. *Id.* at 286 (summarizing results of Baldus study).

in the thirty-two states where the death penalty has been imposed."²³³ In some states, the disparities were even higher: in Maryland, killers of whites were eight times more likely to be sentenced to death than killers of blacks; in Arkansas, they were six times more likely; and in Texas, they were five times more likely.²³⁴ The study concluded that killers of whites "are prosecuted more vigorously than the killers of blacks and are being put to death at eleven times the rate of those who kill blacks."²³⁵

Other studies have yielded similar results. A 1985 Louisiana study showed that 14.5% of those who killed whites, as compared to 4.1% of those who killed blacks, were sentenced to die, and that no whites who had killed blacks were sentenced to die.²³⁶ Samuel Gross and Robert Mauro extensively studied homicides which occurred from 1976-1980, and, after adjusting for background variables, found statistically significant disparities in the application of the death penalty according to the victim's race in Georgia, Florida, Illinois, Oklahoma, North Carolina and Mississippi.²³⁷

As of July 1989, eighty-five percent of the 115 death row inmates executed under the modern statutes had been convicted of killing white victims.²³⁸ Only eleven percent of those executed had been convicted of killing black victims, and all of those defendants were themselves black.²³⁹ Yet, almost half of the homicide victims in this country are black.²⁴⁰ Indeed, there have been *no* executions of whites convicted of killing black or other minority victims in this country under the modern capital punishment schemes.²⁴¹

Racial discrimination in the imposition of capital punishment is not geographically limited. Recent studies show similar results in northern states with death penalty statutes. In Illinois, for example, between 1977 and 1980, a defendant who killed a white person was six times more likely to be sentenced to death than one who killed a black person.²⁴²

233. *Killers of Dallas Blacks Escape the Death Penalty*, Dallas Times Herald, Nov. 17, 1985, at 1, col. 1.

234. *Id.*

235. *Id.*

236. See DeParle, *Executions Aren't News: Why They Should Be*, WASHINGTON MONTHLY, Mar. 1986, at 19.

237. See Gross & Mauro, *supra* note 222, at 54-55, 93-96.

238. NAACP LEGAL DEF. AND EDUC. FUND, INC., *supra* note 16, at 5.

239. *Id.* Approximately four percent of those executed had been convicted of killing Asian or Hispanic victims. *Id.* All such defendants were also from minority groups. *Id.*

240. 1988 FBI UNIFORM CRIME REP. 11.

241. NAACP LEGAL DEF. AND EDUC. FUND, INC., *supra* note 16, at 5.

242. Gross & Mauro, *supra* note 222, at 55; see also Murphy, *Application of the Death Penalty in Cook County*, 73 ILL. BAR J., Oct. 1984, at 90, 93.

Significant effects depending upon the victim's race have also been shown in Colorado's imposition of the death penalty.²⁴³ Moreover, analysis of New Jersey cases has revealed that the race of the defendant and victim play a significant role in death sentencing in that state.²⁴⁴ In July 1988, the New Jersey Supreme Court appointed Professor Baldus, author of the Baldus study, as a Special Master to investigate the extent of racial discrimination in New Jersey capital sentencing.²⁴⁵

In January 1988, Chief Judge Wachtler of New York's highest court commissioned sixteen lawyers, judges and professors to consider, among other things, whether minorities in New York believe the court system is racially biased.²⁴⁶ The resulting report of the New York State Judicial Commission on Minorities concluded that the New York judicial system had an "overwhelmingly white complexion," and that minorities fear that they will be treated unfairly within that system.²⁴⁷ Commission member Peggy C. Davis of New York University School of Law noted separately that "[e]very relevant opinion poll of which the Commission is aware finds that minorities are more likely than other Americans to doubt the fairness of the court system," and that their doubts are well founded.²⁴⁸ Given the recent racial tensions and related violence in New York,²⁴⁹ no reason exists to presume that New York will differ from the rest of the nation in the racially discriminatory imposition of the death penalty. Yet, despite the fact that the Supreme Court has said that legislative action is an appropriate way to deal with racism in the capital

243. See Baldus, Woodworth & Pulaski, *Arbitrariness and Discrimination in Colorado's Post-Furman Capital Charging and Sentencing Process: A Preliminary Report* 44 (Oct. 1, 1986) (unpublished manuscript on file at Loyola of Los Angeles Law Review).

244. See Bienen, Weiner, Denno, Allison & Mills, *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27, 170-71 (1988); Bienen, *The Reimposition of Capital Punishment in New Jersey: Homicide Cases from 1982-1986*, Study by the Dep't of the Public Advocate, Trenton, New Jersey (Fall 1986).

245. See Order, New Jersey Supreme Court, July 29, 1988, reprinted in Bienen, Weiner, Denno, Allison & Mills, *supra* note 244, at 371-72.

246. Glaberson, *Panel Faults Racial Pattern of Court Staffs*, N.Y. Times, July 12, 1989, at B1, col. 5.

247. *Id.*

248. See Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1559 (1989). One such poll, conducted by the New York Law Journal in 1988, found that 71% of blacks and 31% of whites in New York believed that if "two people—one white, one black—are convicted of identical crimes," the white defendant would get the lighter sentence. *Id.* at 1559 n.1.

249. Blumenthal, *Black Youth Is Killed By Whites; Brooklyn Attack Is Called Racial*, N.Y. Times, Aug. 25, 1989, at A2, col. 1; Farber, *The Howard Beach Case: Puzzling Picture of a Racial Attack*, N.Y. Times, Jan. 5, 1987, at B1, col. 2. See generally Roberts, *When Crimes Become Symbols*, N.Y. Times, May 7, 1989, at E1, col. 5 (discussing recent New York City murders of both black and white victims and related racial tensions).

punishment system,²⁵⁰ the proposed New York legislation fails to address this serious issue.

IV. MENTALLY RETARDED PEOPLE AND OTHERS NOT COMPETENT TO STAND TRIAL ARE BEING EXECUTED

On February 8, 1989, the American Bar Association adopted a resolution stating that the mentally retarded should not be subject to the death penalty.²⁵¹ The report accompanying the resolution stated that "[e]xecuting a person with mental retardation violates contemporary standards of decency."²⁵² The Alliance for the Mentally Ill of New York State has stated that "the concept and the act of capital punishment for mentally disabled persons [are] unacceptable in a civilized nation/state."²⁵³ Moreover, the New York State Association for Retarded Children "object[s] to the execution of persons with mental retardation."²⁵⁴ These national and New York expressions of professional opinion are in accord with public opinion. A poll conducted in May 1989 showed that eighty-two percent of New Yorkers oppose use of the death penalty when the defendant is mentally retarded.²⁵⁵ Similar opinions have been reported internationally.²⁵⁶

The Supreme Court has held that no person is competent to stand trial unless he "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "has a rational as well as factual understanding of the proceedings against him."²⁵⁷ It has further held that the eighth amendment prohibits the execution of

250. See *McCleskey*, 481 U.S. at 319 (holding that legislatures are better qualified to weigh and evaluate results of statistical studies). The ABA has endorsed the passage of such legislation. See Report 109, passed by the ABA House of Delegates at its annual meeting in 1988. *Summary of Action Taken by the House of Delegates of the American Bar Association*, Aug. 9-10, 1988, at 35.

251. A.B.A. RESOLUTION (Feb. 7, 1989).

252. Report accompanying A.B.A. RESOLUTION 2 (Feb. 7, 1989).

253. ALLIANCE FOR THE MENTALLY ILL OF NEW YORK STATE, POSITION PAPER RE: THE DEATH PENALTY (April 16, 1988).

254. NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN, INC., IMPOSITION OF CAPITAL PUNISHMENT (1988) (bill memorandum).

255. Opinion Poll, *supra* note 73, at 3.

256. International opinion on the subject is reflected in a United Nations Committee on Crime Prevention and Control recommendation, made in August, 1988, that member states retaining the death penalty be advised to eliminate the death penalty "for persons suffering from mental retardation or extremely limited mental competence whether at the stage of sentence or execution." AMNESTY INTERNATIONAL, WHEN THE STATE KILLS: THE DEATH PENALTY; A HUMAN RIGHTS ISSUE 42 (1989).

257. *Dusky v. United States*, 362 U.S. 402, 402 (1960).

the insane.²⁵⁸ However, in June 1989, the Court held that the Constitution presently does not bar the execution of the mentally retarded.²⁵⁹

Whereas only two and one-half percent of the United States population is mentally retarded, more than twelve percent of the inmates currently on death row have been diagnosed as either retarded or of borderline intelligence.²⁶⁰ At least six people diagnosed as mentally retarded have been executed in the United States in recent years.²⁶¹

The convictions and sentences imposed upon the mentally retarded are often based on evidence that is unreliable because of their retardation. For example, it is highly doubtful that a mentally retarded person's "confession" is accurate and reliable. The mentally retarded have insufficient and immature notions of blame and causation,²⁶² and may accept responsibility for an act although they actually had little or nothing to do with it.²⁶³ Mentally retarded people are also much more susceptible than people of average intelligence to a desire to please authority figures.²⁶⁴ Thus, more often than not, when a retarded person answers "yes" to a question, the answer is based solely on a desire to please the interrogator.²⁶⁵ The statements of a mentally retarded person are therefore less

258. *Ford v. Wainwright*, 477 U.S. 399, 410 (1986).

259. *Penry v. Lynaugh*, 109 S. Ct. 2934, 2952-58 (1989). The *Penry* Court based its decision largely on the fact that only one state had passed legislation barring execution of the retarded. *Id.* at 2955. Thus, the Court based a federal constitutional determination on the determinations—or inactions—of state legislatures. Although the Court left open the possibility that it might reconsider the issue if the sentiment against executing the retarded expressed in public opinion polls and professional organization resolutions were to "find expression in legislation," *id.*, the decision had the immediate effect of allowing Alabama to proceed with the execution of retarded prisoner Horace Franklin Dunkins.

260. See Georgia Clearinghouse on Prisons and Jails, *Mental Retardation and America's Death Row* (1987) (unpublished study on file at Loyola of Los Angeles Law Review).

261. See NAACP LEGAL DEF. AND EDUC. FUND, INC., *supra* note 16. Ivon Stanley was executed in Georgia on July 12, 1984. AMNESTY INTERNATIONAL, *supra* note 5, at 195. Morris Mason was executed in Virginia on June 25, 1985. *Id.* James Terry Roach was executed in South Carolina on January 10, 1986. *Id.* Jerome Bowden was executed in Georgia on June 24, 1986. NAACP LEGAL DEF. AND EDUC. FUND, INC., *supra* note 16, at 7. John Brogdon was executed in Louisiana on July 30, 1987. *Id.* at 8. Horace Franklin Dunkins was executed in Alabama on July 14, 1989. *Id.*

262. Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 429 n.78 (1985).

263. See generally Person, *The Accused Retardate*, 4 COLUM. HUM. RTS. L. REV. 239, 254 (1972); PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT OF THE TASK FORCE ON LAW 4 (1963).

264. Ellis & Luckasson, *supra* note 262, at 430.

265. See Rosen, Floor & Zisfein, *Investigations: the Phenomenon of Acquiescence in the Mentally Handicapped*, 20 BRIT. J. MENTAL SUBNORMALITY 58, 58-68 (1974); Sigdman, Budd, Stankel & Schroenrock, *When in Doubt, Say Yes: Acquiescence in Interviews with Mentally Retarded Persons*, 19 MENTAL RETARDATION 53 (1980).

likely to be voluntarily made than those of a person of normal intelligence.

Moreover, mentally retarded persons who "confess" do not usually make intelligent and knowing waivers of the right to have counsel present.²⁶⁶ The summary procedure whereby *Miranda* warnings are read and suspects are asked whether they understand the warnings is not a sufficient basis upon which courts may confidently hold that defendants with a mental age of ten or less have intelligently waived the right to counsel.²⁶⁷

Yet, courts do make such determinations. Jerome Bowden, a young black man charged with murder, had been consistently diagnosed over many years as unquestionably retarded.²⁶⁸ In the absence of physical evidence, fingerprints, or eyewitnesses, the most incriminating evidence against Bowden was his confession.²⁶⁹ Bowden later explained to his lawyer and to the court that the detective who had interrogated him told him that he was a "friend," who would help Bowden.²⁷⁰ The detective, according to Bowden, asked him to "sign here," and Bowden had simply done so.²⁷¹ But the court determined that Bowden's confession, which he did not write, was voluntary and reliable,²⁷² and he was executed on June 24, 1986.²⁷³

The mentally retarded face further problems at trial, where their limited intelligence may impair their ability to participate meaningfully in their own defense. This situation is aggravated by the fact that most retarded people try to "pass" for normal, which may effectively conceal

266. See, e.g., *Smith v. Zant*, 855 F.2d 712 (1988), *reh'g granted*, 873 F.2d 253 (11th Cir. 1989) (en banc). In *Smith*, the federal appeals court held that the retarded defendant, who had been sentenced to death, had not knowingly waived his *Miranda* rights and that admission of his confession was not harmless error in either the guilt or sentencing phase of the trial. *Id.* at 721-22.

267. *Id.* at 716. Smith's IQ was found to be 65. *Id.* The Eleventh Circuit quoted the arresting officer as saying: "We read his rights to him. We asked him did he understand them. He said he did, and he signed it." *Id.* at 718. The court found that this procedure was insufficient to assure that the defendant intelligently waived his rights. *Id.* But see *People v. Williams*, 62 N.Y.2d 285, 465 N.E.2d 327, 476 N.Y.S.2d 788 (1984) (holding that functionally illiterate, borderline mentally retarded 20-year-old man who also suffered from organic brain damage could validly waive his rights).

268. Pat Smith, Bowden's attorney, Remarks at a Panel Discussion at the ABA Mid-Year Meeting (Feb. 1987).

269. *Id.*

270. *Id.*

271. *Id.*

272. *Bowden v. Francis*, 733 F.2d 740, 751-56 (11th Cir. 1984) (denying habeas corpus petition), *vacated*, 470 U.S. 1079 (1985), *aff'd on remand sub nom.* *Bowden v. Kemp*, 767 F.2d 761 (11th Cir. 1985).

273. NAACP LEGAL DEF. AND EDUC. FUND, INC., *supra* note 16.

their incapacity to understand and participate rationally in their trials.²⁷⁴

A significant number of men, women and juveniles²⁷⁵ whose mental state is so degraded that they can only fitfully comprehend (if at all) what they have done, what is being done to them and why, are being sentenced to death in the United States. The proposed New York legislation would not avoid such cruel and inhuman results. Although under the proposed bill, the jury in the sentencing phase may consider as a mitigating factor whether "the defendant's mental capacity was significantly impaired"²⁷⁶ (a consideration now required by the United States Constitution),²⁷⁷ nothing in the bill would preclude a jury that finds significant mental impairment from nonetheless imposing a death sentence.²⁷⁸

V. PEOPLE WHO NEITHER KILLED NOR INTENDED TO KILL ARE RECEIVING DEATH SENTENCES

Support for the death penalty apparently rests on the assumption that the worst murderers are the ones selected to be executed. However, the capital punishment system does not necessarily execute the worst killers. In fact, people who never killed at all are sometimes sentenced to death and executed.

The Supreme Court held in *Enmund v. Florida*²⁷⁹ that the death penalty was a disproportionate penalty solely for participation in a robbery in which another robber takes a life,²⁸⁰ and found that intent to kill is a necessary element for capital murder.²⁸¹ Enmund, who had been the getaway driver in a robbery in which his accomplices killed the victims,²⁸² was convicted of murder and sentenced to death.²⁸³ The Court held that the death sentence could not stand "in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund

274. See Smith, *The Execution of Jerome Bowden: 'Bringing to Light Something Wrong'*, Atlanta Const., June 28, 1986, at A17, col. 1. "People with mental retardation . . . spend most of their lives trying to pass for normal. . . . Bowden got so good at it that it killed him." *Id.*

275. James Terry Roach, who was mentally retarded, was a juvenile at the time of the offense. See NAACP LEGAL DEF. AND EDUC. FUND, INC., *supra* note 16, at 7. He was executed in South Carolina in 1986. *Id.*

276. PROPOSED LEGISLATION, *supra* note 125, at § 8.

277. See *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989) (holding that state may not preclude jury from considering, in mitigation of sentence, evidence that defendant is mentally retarded).

278. See Letter from Professor James Ellis to James Murphy, Executive Director, New York State Coalition for Criminal Justice, Albany, New York (Dec. 5, 1988) (concluding that mentally retarded persons could be executed under proposed New York bill).

279. 458 U.S. 782 (1982).

280. *Id.* at 788.

281. *Id.* at 789-91.

282. *Id.* at 784.

283. *Id.* at 785.

intended or contemplated that life would be taken.”²⁸⁴ However, the Court thereafter has substantially cut back on the limitations on the execution of accomplices and felony-murderers. In *Tison v. Arizona*,²⁸⁵ the Court held that “reckless indifference to the value of human life” may be a sufficient variety of “intent” to justify the death penalty.²⁸⁶ The Court therefore held that it would be constitutional to sentence to death two brothers who had neither killed, intended to kill, nor anticipated that the killing would take place.²⁸⁷

Under *Tison*, a defendant may be executed even though he did not kill, attempt to kill, intend that a killing take place, or contemplate that a killing probably would occur. At least one such execution has already occurred. In August 1987, Beauford White was executed in Florida despite the fact that he did not kill or intend to use lethal force, and had objected to any killing before his accomplices started shooting.²⁸⁸

Frequently, the mastermind of the crime will be sentenced to life imprisonment, while the accomplice gets the death penalty. This is often the consequence of the mastermind’s willingness to accept a plea-bargain. A majority of the public in New York does not support executions under such circumstances. A recent public opinion poll showed that New Yorkers are overwhelmingly opposed to the execution of non-triggermen. When given a hypothetical in which the triggerman testified against his partner and received a prison term, whereas the partner was executed, eighty-two percent said they opposed the execution.²⁸⁹ But, in view of the extremely broad death penalty legislation proposed in New York, which would allow capital punishment for deaths occurring during the course of a burglary, robbery, or other specified crimes, and which does

284. *Id.* at 801.

285. 481 U.S. 137 (1987).

286. *Id.* at 158.

287. The actual killings were committed by the brothers’ father and another man, following their escape with the brothers’ aid from an Arizona state prison. *Id.* at 139-41. There was no evidence that either brother “took any act which he desired to, or was substantially certain would, cause death.” *Id.* at 150. In fact, both brothers stated they were surprised by the shooting. *Id.* at 141.

288. *White v. Wainwright*, 809 F.2d 1478 (11th Cir.), *cert. denied*, 483 U.S. 1044 (1987). See also Geimer & Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1 (1987).

289. The poll asked the following question:

How would you feel if you heard that two people were involved in an armed robbery. The person with the gun killed the victim, but he testified against his partner. The partner was executed for the crime, while the person who actually committed the murder received a lesser sentence. Would you feel the death penalty for the accomplice who did not actually shoot the victim was justified in this case, or not?

Opinion Poll, *supra* note 73, at 5.

not limit prosecutorial discretion, such unjust results will surely occur in New York (as it has occurred elsewhere) if that legislation is enacted.

VI. INNOCENT PEOPLE ARE RECEIVING THE DEATH PENALTY AND SOME ARE BEING EXECUTED

Every year, the press carries stories about individuals freed from confinement—as innocent—after evidence is discovered that establishes that they never committed the crime for which they were convicted. Often, this evidence is discovered fortuitously, after the individual has already served many years in prison. Sometimes it is discovered only because a witness happens to come forward years after the trial. The mistakes made in these cases can occur in any type of case, capital or not, in any state. When the defendant is not sentenced to death, there is a chance to correct the miscarriage of justice. There is, of course, no chance to correct an execution.

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; 116 of those were sentenced to death, and twenty-three were actually executed.²⁹⁰ This same study found that there have been twenty-nine mistaken convictions in potentially capital cases in New York, sixteen of which resulted in death verdicts.²⁹¹

The first part of this section discusses people sentenced to death in the United States in recent years who, fortuitously, have subsequently been discovered to have been innocent.²⁹² These cases make it unmistakably clear that innocent people are in fact sentenced to death in this country today. The second part of this section presents examples of people convicted of murder in New York in recent years who were later found to have been innocent. In view of these cases, it seems apparent that if New York had the death penalty, it would certainly have sentenced innocent men to death in recent years. The third part of this section shows that not all innocent death row inmates have been lucky enough to have been saved by fortuitous events. From their cases, involving people already executed as well as some remaining on death row,

290. See Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 36 (1987). Because the Bedau and Radelet study did not include an evaluation of every homicide case, it was not a completely exhaustive report. The study may have missed numerous cases of innocent people convicted of capital crimes.

291. *Id.* at 37.

292. Some, but not all, of these cases are included in Bedau & Radelet, *supra* note 290.

it is clear that execution of the innocent will continue as long as the death penalty exists.

*A. Innocent People Have Been Sentenced to Death
in the 1970s and 1980s*

It is impossible to know how many innocent people are currently on the nation's death rows, but there is no doubt that people are wrongly convicted and sentenced to death in the United States today under the modern, allegedly "reliable," death penalty statutes. The clearest evidence of this is the startling number of people who have been released from death row in recent years after their innocence has been established. It is important to note, in considering these cases, that the discovery of innocence has almost never occurred because of the normal operation of the capital punishment system. Instead, innocence has been discovered either through totally fortuitous circumstances or because lawyers happened to be willing and able to reinvestigate cases,²⁹³ or because, having been fortunate enough to have been granted retrials on legal grounds not directly related to their innocence, death row inmates have been acquitted at the retrials. In many of these cases, the only reason why innocent death row inmates had not been executed before their innocence was demonstrated was the delay occasioned by pending appeals or post-conviction proceedings on *other* issues.

Jerry Banks was convicted and sentenced to death in Georgia in 1975. When it was shown that the prosecution had knowingly withheld evidence, Banks was granted a retrial.²⁹⁴ At retrial in 1976, he was again convicted and resentenced to death.²⁹⁵ Only at his third trial, ordered after a previously silent witness came forward with new evidence,²⁹⁶ was it finally determined that Banks was innocent because his gun could not have fired the fatal shots. After seven years on death row, Banks was finally released. Three months later, he committed suicide. The state

293. Georgia attorney Bobby Lee Cook, whose career inspired the television series "Matlock," has explained his opposition to the death penalty as arising out of an experience in his own practice. See Curriden, *Bobby Lee Cook: Georgia Maverick*, A.B.A. J., Mar. 1989, at 68. One of Cook's clients was convicted of murder and sentenced to death, although Cook believed he was innocent. *Id.* at 71. After the conviction and sentence had been affirmed at all levels of appeal, Cook's investigators came across evidence which showed that the prosecution's chief witness had been lying on the stand. *Id.* at 71-72. Cook's client, Larry Hacker, was released after a federal judge found that he had been framed. *Id.* at 72. Cook is now a staunch opponent of capital punishment: "It's just too damn final," he says. *Id.*

294. *Banks v. State*, 235 Ga. 121, 218 S.E.2d 851 (1975), *cert. denied*, 430 U.S. 975 (1977).

295. *Banks v. Glass*, 242 Ga. 518, 250 S.E.2d 431 (1978); *Banks v. State*, 237 Ga. 325, 227 S.E.2d 380 (1976), *cert. denied*, 430 U.S. 975 (1977).

296. *Banks v. State*, 246 Ga. 1, 268 S.E.2d 630 (1980).

awarded his children \$150,000.²⁹⁷

Johnny Ross, a black man, was sentenced to death in Louisiana in 1975 for the rape of a white woman. The entire trial lasted only a few hours. When the United States Supreme Court held, in 1976, that the death penalty for rape was unconstitutional,²⁹⁸ Ross' death sentence was commuted to twenty years.²⁹⁹ After five more years in prison, Ross was released in 1981, when volunteer lawyers were able to prove that the blood type of the sperm found in the victim differed from his.³⁰⁰

Earl Charles was convicted of two counts of murder in Georgia in 1975 and sentenced to death. He was released three years later when new evidence proved his alibi to be true.³⁰¹ He was awarded \$417,000 in a civil suit against a police officer for violation of his civil rights, but the officer was unable to pay, and Charles ultimately settled with the city for \$75,000.³⁰²

Anthony Brown was convicted of murder and sentenced to death (despite a jury recommendation of life) in Florida in 1983. The only evidence against Brown was the testimony of a co-defendant, who received a life sentence for his role in the crime. Brown was granted a retrial because his right to cross-examine the co-defendant had been improperly limited.³⁰³ Upon retrial in 1986, the co-defendant confessed to having testified falsely against Brown in order to obtain a life sentence for himself, and Brown was acquitted.³⁰⁴

In 1974, Thomas Gladish, Richard Greer, Ronald Keine, and Clarence Smith were convicted of murder, kidnapping, sodomy and rape, and sentenced to death in New Mexico. Fortunately for them, two newspaper reporters from Detroit (home of three of the defendants) decided to investigate the case. The murder weapon and getaway car were traced to a drifter in South Carolina, who confessed to the crime. The convictions

297. See Gleason, *Undue Process: The Jerry Banks Case*, 21 ATLANTA 50 (1982); Atlanta Const., Apr. 1, 1983, at 10A, col. 1; *id.*, Mar. 22, 1983, at 14A, col. 1; *id.*, Mar. 18, 1983, at E1, col. 2; N.Y. Times, Dec. 26, 1980, at 31, col. 5; *id.*, Oct. 17, 1980, at 31, col. 5.

298. *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

299. *State v. Ross*, 343 So. 2d 722, 728 (La. 1977).

300. See generally SOUTHERN POVERTY LAW CENTER POVERTY LAW REPORT (Jan. 1982); Letter from John L. Carroll, Ross' attorney, to Michael L. Radelet (Sept. 21, 1983).

301. *State v. Charles*, No. 23-392 (Ga. Super. Ct. July 5, 1978).

302. See generally Bentele, *supra* note 32 at 601; Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 920 n.69 (1982); Schmitz, *Beyond a Reasonable Doubt*, ATLANTA WEEKLY, May 30, 1982, at 6.

303. *Brown v. State*, 471 So. 2d 6, 7 (Fla. 1985).

304. See generally Pensacola News, March 2, 1986, at 1, col. 2; *id.*, Feb. 20, 1986, at 1B, col. 2; *id.*, Feb. 13, 1986, at 1B, col. 2; *id.*, Feb. 9, 1986, at 1B, col. 4; *id.*, July 27, 1983, at 1, col. 4.

had been obtained through use of perjured testimony given under police pressure. After serving nearly two years on death row, the four men were released in 1976.³⁰⁵

In 1975, Jonathan Charles Treadaway was convicted of the murder and sodomy of a six-year-old boy, and sentenced to death in Arizona. Treadaway was later granted a retrial—not because anyone believed him to be innocent, but rather because evidence of a prior criminal act had been improperly admitted.³⁰⁶ At retrial, five experts showed that there was *no* evidence that the boy had been sodomized. Indeed, they demonstrated that the boy had not been murdered, but had apparently died of pneumonia. After acquitting Treadaway, members of the jury observed that the prosecutor had not even been able to establish that Treadaway had ever been in the victim's home.³⁰⁷

In 1976, Gary Beeman was convicted of murder and sentenced to death in Ohio. In 1978, a federal court ordered a retrial because Beeman was denied the right to adequately cross-examine the main witness against him, an escaped prisoner named Claire Liuzzo. At the retrial, five witnesses testified that Liuzzo had confessed to the crime, and Beeman was released in 1979.³⁰⁸

Delbert Tibbs, a black theology student, was convicted (by an all-white jury) of the rape of a sixteen-year-old white girl and the murder of her companion, and sentenced to death in Florida in 1974. Tibbs' conviction was reversed on evidentiary grounds on appeal,³⁰⁹ and in 1977 he was released while the state attempted to establish that it could legally reprosecute.³¹⁰ Ultimately, the case was dropped. The original prosecutor has stated that if there were a retrial, he would appear as a witness for Tibbs.³¹¹

In 1978, Larry Hicks was convicted of two murders and sentenced

305. See generally Detroit News, Jan. 11, 1976, (Magazine), at 14; Detroit News, Dec. 16, 1975, at 1, col. 1.

306. State v. Treadaway, 116 Ariz. 163, 568 P.2d 1061 (1977).

307. See generally Greenberg, *supra* note 156, at 920 n.69; Arizona Republic, Oct. 10, 1978, at 1, col. 4; *id.*, Sept. 22, 1978, at B2, col. 7; *id.*, Sept. 15, 1978, at B1, col. 2; *id.*, Sept. 14, 1978, at B1, col. 2; *id.*, Sept. 7, 1978, at B1, col. 3; *id.*, Sept. 1, 1978, at B2, col. 3.

308. See Ashtabula Star Beacon, Oct. 5, 1979, at 1, col. 1; *id.*, Sept. 29, 1979, at 14, col. 4; *id.*, Sept. 25, 1979, at 11, col. 4; *id.*, Sept. 5, 1979, at 1, col. 6; *id.*, Apr. 11, 1978, at 10, col. 4; *id.*, July 28, 1976, at 9, col. 1; *id.*, June 5, 1976, at 1, col. 2; see generally Greenberg, *supra* note 156, at 920 n.69.

309. Tibbs v. State, 337 So. 2d 788 (Fla. 1976).

310. See Tibbs v. State, 397 So. 2d 1120 (Fla. Dist. Ct. App. 1981), *aff'd*, 457 U.S. 31 (1982).

311. See McClory, *Justice for Mr. Tibbs*, Chicago Reader, Feb. 11, 1983, at 1, col. 1; Miami Times, Sept. 16, 1982, at 4, col. 5; Miami Herald, June 8, 1982, at 1, col. 3.

to death in Indiana. Two weeks before his scheduled execution, a volunteer lawyer became interested in the case. In 1980, a new trial was ordered on the grounds that Hicks, who is of subnormal intelligence, had not understood the proceedings well enough to participate in his own defense. At the retrial, his alibi was proven to be true, and it was shown that his conviction had rested on perjured testimony. He was acquitted and released, having avoided the electric chair mainly by a stroke of extraordinary good luck.³¹²

Neil Ferber was convicted of murder and sentenced to death in Pennsylvania in 1982. Four years later, through the work of a detective concerned about the case, evidence was produced which showed that the state's chief witness, a former cellmate of Ferber, had lied. When, in addition, an eyewitness said she was certain Ferber was not the perpetrator, a new trial was ordered. The charges were dropped, and Ferber was released in 1986.³¹³

Wrongful sentencing of innocent people shows no sign of diminishing with the passage of time. Indeed, the capital punishment system seems to be becoming even less reliable over time. In 1987, 1988, and the first seven months of 1989 alone, at least a dozen more men who had received death sentences have been released as innocent.

John Henry Knapp was released from Arizona's death row in 1987 after his volunteer attorneys showed that expert testimony presented at his trial had improperly determined the cause of death of Knapp's two children.³¹⁴ Robert Lewis Wallace was released from Georgia's death row in 1987 after, on retrial, it was determined that he was innocent.³¹⁵ Darby Williams and Perry Cobb were released from Illinois' death row in 1987 after five trials when a prosecutor from another county finally came forward and revealed that the state's key witness had told him that the witness' boyfriend had killed the victim.³¹⁶ Joseph Green Brown, who once came within fifteen hours of execution, was released in 1987

312. See *The Man Who Didn't Do It*, PLAYBOY, Aug. 1980, at 62; *The Ordeal of Larry Hicks*, PLAYBOY, May 1981, at 66, 67 ("The way [Hicks'] attorney McShane put it later, 'Larry was one lucky slum kid, and it just makes you wonder how many unlucky ones will be going to the chair.'"). The Playboy Foundation provided funds for the reinvestigation of Hicks' case. *Id.* at 66.

313. See Philadelphia Daily News, Mar. 7, 1986, at 9, col. 1; Philadelphia Inquirer, Mar. 7, 1986, at 1B, col. 1; *id.*, Jan. 4, 1986, at 1B, col. 2; *60 Minutes: A Good Cop* (CBS television broadcast, Jan. 11, 1987) (transcript on file at Loyola of Los Angeles Law Review).

314. See Smethurst, *Knapp Update: 'Innocent Man,'* AM. LAW., Apr. 1987, at 80.

315. Williams, *In Second Trial, Defendant Cleared in Officer's Slaying*, Atlanta Const., June 5, 1987, at 3D, col. 1.

316. *Defendants Found Innocent After Five Trials*, Associated Press, Jan. 21, 1987 (LEXIS, Nexis library, Omni file).

after fourteen years on Florida's death row when it was discovered that the prosecution had knowingly relied on false testimony.³¹⁷ Henry Drake was released after nearly nine years on Georgia's death row, when it was shown that the testimony which was the basis of his conviction was perjured. The real perpetrator, who had testified against Drake, finally conceded that he, not Drake, had committed the crime.³¹⁸

Convicted in 1980, William Riley Jent and Earnest Lee Miller spent eight years on Florida's death row and came within sixteen hours of execution. They had been sentenced to death for the murder of eighteen-year-old Linda Gale Bradshaw, despite the fact that prior to the sentencing an eyewitness to the crime stated in an affidavit that the murder had been committed by another man, Bobby Dodd. Dodd was also implicated in the virtually identical murder of another young woman in Georgia. It was eventually discovered that one of the key witnesses against Jent and Miller had told police that she had only seen the murder "in a dream." Police had, however, withheld this evidence from the defense. The other key witness recanted her testimony against Miller and Jent, saying she had lied because investigators had threatened her with the electric chair. Miller and Jent were granted a retrial in 1987 by a federal judge who said prosecutors and police had shown a "callous disregard for the fundamental principles of truth and fairness."³¹⁹ The prosecution nonetheless persisted with the claim that the two were guilty even though no physical evidence linked them to the crime and although the victim's family and Dodd's parole officer both wanted Dodd charged with the crime. Miller and Jent were finally released from prison on January 14, 1988, after they agreed to plea bargain rather than face another trial in the Florida courts.³²⁰

In March 1989, the Texas Court of Criminal Appeals set aside the conviction of Randall Dale Adams, who had been sentenced to death in 1977 for the murder of a Dallas police officer. Although Adams had previously had his death sentence overturned, not because of any question about his guilt but because of the unconstitutionality of the statute Texas was then using,³²¹ he spent twelve years in prison for a crime he

317. Von Drehle, *Fairness Was a Fatal Blow to Fast Executions*, Miami Herald, July 11, 1988, at 8A, col. 2; 20/20: *Hours From Execution* (ABC television broadcast, July 23, 1987) (transcript on file at Loyola of Los Angeles Law Review).

318. Kaplan, *Death Row Dilemma*, Nat'l L.J., Jan. 25, 1988, at 35.

319. *Judge Orders New Trial for Two Death Row Inmates*, Miami Herald, Nov. 4, 1987, at 1A, col. 3.

320. See Finkel, *Presumed Guilty*, ESQUIRE, Mar. 1989, at 178-88.

321. See Applebome, *Overtaken Murder Conviction Spotlights Dallas-Style Justice*, N.Y. Times, Mar. 7, 1989, at A19, col. 1.

did not commit. Then, the critically acclaimed film, "The Thin Blue Line," brought his case to national prominence after its producer happened to take an interest in Adams' case. The state's misconduct in the case included, among numerous other things, its prompting an alleged eyewitness to identify Adams in a line-up after the witness initially identified a different man.³²² As Jim McCloskey (a private investigator who has worked on four cases in which Texas inmates have ultimately been released due to their innocence) stated, in commenting on the Adams case, "[t]he criminal justice system in the United States is . . . a far leakier cistern where many people slip through a wide crack than the public would care to believe."³²³

In April 1989, Timothy Baily Hennis was released from death row in North Carolina.³²⁴ Hennis, an Army sergeant stationed at Fort Bragg, North Carolina, had been convicted of the 1985 rape and murder of the wife of an Air Force captain and the murder of her two young children.³²⁵

The brutal murder, which was described by the local sheriff as an "out of the usual homicide case,"³²⁶ attracted national attention in 1985.³²⁷ The police focused on Hennis because several days before the murder he had responded to an advertisement in which the victims offered to give away a dog.³²⁸ Hennis turned himself in as soon as he heard, on local radio and television stations, that he was being sought in connection with the crime.³²⁹ He maintained throughout that he was innocent and had nothing to do with the murders.³³⁰ The only evidence against Hennis came from two eyewitnesses—whose testimony the North Carolina Supreme Court later characterized as "extremely tentative" and "tenuous."³³¹ Moreover, pubic hairs and semen samples taken from the

322. See Fricker, *Crime and Punishment in Dallas*, A.B.A. J., July 1989, at 52, 53; Suro, *Conviction Voided in Texas Murder*, N.Y. Times, Mar. 2, 1989, at A18, col. 6; Applebome, *A Murder in Texas: 12 Years Later, Questions Linger About Justice System*, N.Y. Times, Oct. 31, 1988, at A13, col. 4.

323. See Applebome, *supra* note 321.

324. See UPI Report, Apr. 20, 1989 (LEXIS, Nexis library, Omni file).

325. *State v. Hennis*, 323 N.C. 279, 372 S.E.2d 523 (1988).

326. Minehart, *Air Force Slayings*, May 16, 1985 (LEXIS, Nexis library, Omni file).

327. See *Sergeant Charged in 3 Slayings*, Wash. Post, May 17, 1985, at A8, col. 2; *Sgt. Charged in Slaying of 3 in Family*, L.A. Times, May 16, 1985, Part I, at A2, col. 5.

328. L.A. Times, May 16, 1985, Part I, at A2, col. 5.

329. *Id.*

330. See *Judge Sentences Hennis to Death*, UPI Report, July 9, 1986 (LEXIS, Nexis library, Omni file). Upon being sentenced, Hennis stated, "[t]he only thing I can say, your Honor, is that I am not guilty as I have always been." *Id.*

331. *Hennis*, 323 N.C. at 281-82, 372 S.E.2d at 525. One witness initially described a man whom he had allegedly seen in the victims' driveway as "shorter and slighter than himself,"

scene did not match Hennis'.³³² Hennis was nonetheless arrested, indicted, tried, convicted, and sentenced to death.³³³ In 1988, the North Carolina Supreme Court reversed his conviction because autopsy photos had been improperly admitted into evidence.³³⁴

Hennis was retried in a different county in 1989. The new jury found him not guilty on all charges, and he was released.³³⁵

Florida inmate Joseph Richardson was released in May 1989, after spending twenty-one years in prison. Richardson had been accused of poisoning his six children, had been sentenced to death in 1968, and had come within hours of execution. If his death sentence had not been commuted to life by *Furman v. Georgia*,³³⁶ he almost certainly would have been executed over a decade ago. In view of evidence developed by volunteer counsel, even the prosecutor agreed in 1989 that Richardson had been convicted on the basis of testimony which the prosecution had known to be false and that the prosecutors had withheld evidence which would have led to an acquittal.³³⁷

On July 5, 1989, Jerry Bigelow was released from California's San Quentin state prison.³³⁸ Bigelow had been sentenced to death in 1980.³³⁹ A retrial was ordered in 1984.³⁴⁰ At the retrial, the jury acquitted him of the murder charge, concluding that he had been asleep in the car when another man committed the crime. However, the trial judge refused to accept the acquittal and forced the jury to continue deliberating until a

but later revised his impression to match that of Hennis, who was taller and heavier. *Id.* The other witness, who testified that she had seen a man who looked like Hennis near the bank where one victim's bank card had been used, apparently after the murder, initially did not recall seeing anyone at all. It was almost a year later when she finally recalled seeing Hennis, and she then admitted that she was not certain whether she was identifying him from newspaper photographs or from having actually seen him. *Id.* at 282, 372 S.E.2d at 525.

332. *Id.* at 281, 372 S.E.2d at 525.

333. *Id.* at 287, 372 S.E.2d at 528. See also *Judge Sentences Hennis to Death*, UPI Report, July 9, 1986 (LEXIS, Nexis library, Omni file).

334. *Hennis*, 323 N.C. at 286-87, 372 S.E.2d at 527-28.

335. UPI Report, *supra* note 333.

336. 408 U.S. 238 (1972).

337. See *Florida Won't Retry Man in Poisoning Case*, N.Y. Times, May 6, 1989, at 28, col. 5; *After 21 Years, Florida Man is Released in Poisoning Case*, N.Y. Times, Apr. 27, 1989, at A16, col. 6; *Worth, Jailed for Killing His Child, Father Says He Is a Victim*, N.Y. Times, Apr. 23, 1989, at A18, col. 5. See generally Curriden, *No Honor Among Thieves*, A.B.A. J., June 1989, at 52; Malcolm, *Tainted Verdicts Resurrect Specter of Executing the Innocent*, N.Y. Times, May 3, 1989, at A18, col. 1.

338. Morain, *Inmate Walks Away From Death Row After His Acquittal*, L.A. Times, July 6, 1989, Part I, at 3, col. 1 [hereinafter Morain, *Inmate Walks Away After Acquittal*].

339. *Id.*

340. *Id.*

mistrial was declared.³⁴¹ On appeal, the acquittal was reinstated, and Bigelow was set free.³⁴²

Further facts about Bigelow's case significantly illuminate the fortuities of the capital punishment system. Years before his innocence was established, Bigelow attempted to drop his appeals so that he could be executed, rather than live "through the hell that is Death Row."³⁴³ He later attempted to commit suicide. Then, his conviction was overturned by the California Supreme Court under Chief Justice Rose Bird, on the ground that the trial judge should not have let Bigelow represent himself.³⁴⁴ Bigelow was fortunate enough to be represented thereafter by an attorney with access to investigators, jury consultants, and psychologists to work on the case.³⁴⁵ As the trial judge commented, "[t]his is one case where the ability of a skillful attorney made all the difference in the world."³⁴⁶

Another notable recent case is that of Ronald Monroe. Monroe was sentenced to death in Louisiana in 1980 for the stabbing murder of Lenora Collins, his next-door neighbor. No physical evidence linked Monroe to the crime, and he and his mother testified that he was home asleep when it occurred.³⁴⁷ The victim's two young children testified that their neighbor Monroe was the one who fatally attacked their mother—the only evidence presented against Monroe. Years later, Monroe's volunteer attorneys from a large New York law firm presented new evidence which strongly suggests that the victim's former husband, George Stinson, had committed the crime. This evidence shows that

341. The judge concluded that since the jury did believe a murder had occurred, it would still be possible for them to conclude that Bigelow was guilty under the felony murder rule. Morain, *Inmate Walks Away After Acquittal*, *supra* note 338; San Francisco Examiner, July 6, 1989, at A10, col. 4; Morain, *Death Row Prisoner May Gain Freedom By Appeal Court's Ruling*, L.A. Times, Mar. 21, 1989, Part I, at 3, col. 1 [hereinafter Morain, *Death Row Prisoner May Gain Freedom*].

342. Morain, *Inmate Walks Away After Acquittal*, *supra* note 338.

343. *Id.*

344. Morain, *Death Row Prisoner May Gain Freedom*, *supra* note 341. Bigelow's attorney, Robert Bryan, has suggested that since the current California Supreme Court affirms twice as many death sentences as it reverses, it is questionable whether Bigelow's original conviction and death sentence would have been reversed had the current court decided the case. See Morain, *Blind Justice*, L.A. Times, July 16, 1989, Part VI, at 1, col. 1 [hereinafter Morain, *Blind Justice*].

345. Morain, *Blind Justice*, *supra* note 344.

346. *Id.* Superior Court Judge Harkjoon Paik, who presided over the retrial, also stated that, "From day one I told both sides that this was not a death penalty case. I told the DA he was making a serious mistake by going for the death penalty. . . . When an attorney tries to overreach, sometimes it backfires." *Id.*

347. Applebome, *Death Cases: The Law is Reluctant to Start Over*, N.Y. Times, Aug. 28, 1988, § 4, at 6, col. 4.

Stinson was subsequently convicted of the stabbing murder of his next common-law wife in Michigan in 1980, and that he had attempted to stab his first wife, as well.³⁴⁸ Moreover, Stinson has recently been implicated in yet another knife attack.³⁴⁹ Furthermore, new evidence has enabled Monroe's attorneys to contend that Stinson had been sexually abusing the victim's daughter—one of the prosecution's two key witnesses—in the years preceding the murder.³⁵⁰ After eight years on death row, Monroe was only three days away from execution when he was given a temporary stay in December 1988.³⁵¹ In August 1989, after national attention became focused on the case, and after the state Pardon Board recommended commutation,³⁵² Louisiana Governor Buddy Roemer commuted Monroe's sentence to life without parole.³⁵³ Governor Roemer stated, "[i]n an execution in this country, the test ought not to be reasonable doubt. The test ought to be is there any doubt."³⁵⁴ In Monroe's case, he said, "the test for execution was not met."³⁵⁵

It is crucial to recognize that the eventual releases of so many wrongfully-convicted individuals who had been sentenced to death does *not* indicate that the capital punishment system is working. These defendants were still alive when their innocence was fortuitously established for reasons *other than* the system's recognition of their possible innocence.³⁵⁶ These reasons have sometimes included long delays resulting from appeals and collateral proceedings—the very sorts of delays which have been denounced by, among others, Chief Justice William Rehnquist.³⁵⁷

348. *Id.*

349. Applebome, *Governor of Louisiana to Spare Inmate's Life*, N.Y. Times, Aug. 17, 1989, at A16, col. 5.

350. *Id.*

351. See Wicker, *The Last Mile*, N.Y. Times, Dec. 5, 1988, at 3, col. 2.

352. See, e.g., *One Last Chance to Save a Life*, N.Y. Daily News, Aug. 3, 1989, at 48, col. 1 (editorial calling on Louisiana governor to commute Monroe's sentence); Herbert, *Plea for Life of an Innocent Man*, N.Y. Daily News, Aug. 1, 1989, at 4, col. 1.

353. Applebome, *supra* note 321. See generally Applebome, *Death Row Takes On Higher Profile*, N.Y. Times, Aug. 21, 1989, at A10, col. 4.

354. Applebome, *supra* note 321.

355. *Id.*

356. For example, Drake was granted a retrial due to an unconstitutional jury charge, Kaplan, *supra* note 318, at 37; Randall Adams was alive due to a Supreme Court ruling that the Texas death penalty statute was unconstitutional, Applebome, *supra* note 321; and Richardson was only alive because of *Furman v. Georgia*, Malcolm, *supra* note 337.

357. Address by Chief Justice William H. Rehnquist, in Denver (Feb. 6, 1989).

*B. Numerous Innocent People Have Been and Still
Are Convicted in New York*

Perhaps the most well-known case of wrongful conviction in New York history is Isadore Zimmerman's. On the morning of January 26, 1939, Zimmerman bid a last farewell to his father and two brothers. The barber shaved Zimmerman's head and a tailor slit his trouser leg on the right side, where the electrodes would be attached. The execution was scheduled for 3:00 p.m. Had New York Governor Herbert Lehman not intervened at 1:00 p.m. and commuted the sentence to life imprisonment, Zimmerman would have been electrocuted for supplying the gun used to kill a police detective.³⁵⁸ Thereafter, he protested his innocence to all who would listen, but further appeals failed and he languished in prison.

In 1961, a volunteer lawyer agreed to reinvestigate the case. The investigation revealed that the trial prosecutor knew Zimmerman was innocent but had suppressed evidence and pressured witnesses to lie. In 1962, after Zimmerman had served twenty-four years in prison, his conviction was vacated and he was released. For the two ensuing decades, the state rebuffed his efforts to obtain financial compensation. In 1983, the New York Court of Claims finally awarded Zimmerman \$1 million in damages, four months before he died.³⁵⁹

Zimmerman's disturbing story is by no means unique in New York history. Like most states, New York has repeatedly incarcerated innocent people for violent crimes only to discover, often much later, that the wrong person had been tried and convicted.³⁶⁰ Such errors have contin-

358. Zimmerman's conviction and death sentence were affirmed by the New York Court of Appeals despite the court's acknowledgment that he had not been at the scene of the crime. See *People v. Guariglia*, 279 N.Y. 707, 18 N.E.2d 324 (1938). See also *supra* notes 279-89 and accompanying text.

359. *After 24 Years in Jail, a \$1 Million Verdict*, NEWSWEEK, June 13, 1983, at 82; McFadden, *Isadore Zimmerman*, 66, *Man Unjustly Jailed for Murder*, N.Y. Times, Oct. 14, 1983, § 2, at 6, col. 3; *Man, 42, Is Freed After 24 Years*, N.Y. Times, Feb. 3, 1962, at 19, col. 1.

360. The two following examples illustrate what has occurred in many New York murder cases. In 1958, after 11 years in prison and 14 additional years on parole, William Fisher obtained reversal of his manslaughter conviction on the grounds that the prosecutor knew that the gun introduced as the murder weapon had not been fired by Fisher, and that the state had knowingly withheld additional evidence which clearly would have established Fisher's innocence. *People v. Fisher*, 4 N.Y.2d 943, 151 N.E.2d 617, 175 N.Y.S.2d 820 (1958) (per curiam). In 1986, the New York Court of Claims awarded Fisher \$750,000 for his wrongful conviction and imprisonment. See *Newsday*, Feb. 18, 1986, § II, at 3, col. 1; Smothers, *Former Convict Fighting to Right 50-Year Wrong*, N.Y. Times, July 3, 1983, at 18, col. 1.

William Pfeffer was convicted in New York of second-degree murder in 1954 and sentenced to 20 years to life in prison. Another man, Roche, later confessed to the crime. A new trial was ordered for Pfeffer, but the state declined to pursue the charges against him. N.Y. Times, Jan. 10, 1956, at 63, col. 1. A leading New York newspaper observed at the time that "the Pfeffer-Roche case dramatically illustrated to New York the built-in danger of its capital

ued to occur in New York criminal trials in the 1970s and 1980s.

For example, in 1971, Edmond D. Jackson was convicted of two counts of murder and sentenced to two terms of twenty years-to-life. The conviction was affirmed by the New York Court of Appeals.³⁶¹ Seven years later, a federal judge found that what supposedly was eyewitness testimony was unreliable and that "not a scintilla of evidence was offered at the trial to connect petitioner to the crime."³⁶² The judge said he "shudder[ed] to think what the situation would have been in this case if there had been a mandatory death penalty."³⁶³

In 1981, Robert McLaughlin was convicted of a 1980 Brooklyn felony murder and sentenced to fifteen years to life.³⁶⁴ After serving six years of this sentence, McLaughlin was released in 1986, when the prosecution admitted that his conviction was erroneous. Upon being released, McLaughlin pointedly observed, "[i]f New York had a death penalty law, I would now be ashes in an urn on my mom's mantle."³⁶⁵ McLaughlin's father, who used to support the death penalty, now lobbies against it. "People believe errors will be found and corrected," he says. "The truth of the matter is they don't know. They are just as naive as we were."³⁶⁶

In 1982, Nathaniel Carter was convicted of murder in New York and sentenced to twenty-five years to life in prison, the maximum sentence. Convinced of his innocence, Carter's friends pursued an investigation that resulted in the state's reopening the case. Carter was freed in 1984, after his former wife, who had been the chief witness against him, admitted that her testimony had been perjured. One of Carter's lawyers commented that "[i]f New York State had the death penalty, God knows what would have happened to this poor man."³⁶⁷

Gregory Reed served five and one-half years of a fifteen-years-to-life prison term for the 1978 death of a Brooklyn man. In 1985, New York's

punishment law: the ever-present possibility of executing an innocent man." N.Y. Herald Tribune, July 20, 1954, at 1, col. 3.

361. *People v. Jackson*, 35 N.Y.2d 856, 322 N.E.2d 272, 363 N.Y.S.2d 580 (1974).

362. *Jackson v. Fogg*, 465 F. Supp. 177, 187 (S.D.N.Y.), *aff'd*, 589 F.2d 108 (2d Cir. 1978).

363. Lubasch, *1970 Murder Conviction Voided; Judges Criticize Queens Officials*, N.Y. Times, Dec. 23, 1978, at 1, col. 2.

364. *State v. McLaughlin*, 104 A.D.2d 829, 480 N.Y.S.2d 151 (App. Div. 1984) (affirming the conviction and sentence).

365. Newfield, *They Prefer Revenge Over Prevention*, N.Y. Daily News, June 19, 1989, at 12, col. 1. *Sweet Land of Liberty: Bobby McLaughlin Comes Home*, Village Voice, July 15, 1986, at 13, col. 1; N.Y. Times, July 20, 1986, at 24, col. 1; *id.*, July 4, 1986, at B10, col. 4.

366. See Giordano, *Showdown on the Chair*, Newsday, June 19, 1989, at 7, col. 1.

367. N.Y. Times, Jan. 19, 1984, at B9, col. 1; *id.*, Mar. 26, 1984, at B2, col. 4; *id.*, Mar. 16, 1984, at B1, col. 1; *id.*, Mar. 15, 1984, at B1, col. 1; *id.*, Jan. 26, 1984, at B5, col. 1.

highest court overturned the conviction, ruling that the testimony of the state's sole witness against Reed as to the time, location and circumstances of the event was riddled with hopeless contradictions. Reed was later awarded \$495,000 in damages for his unjust conviction and imprisonment.³⁶⁸

It is difficult to say how many of these wrongfully convicted men—from what is by no means an exhaustive list—would have received the death penalty, but it is likely that some of them would have. Their cases dramatically illustrate that New York's criminal justice system remains fallible enough to execute innocent people if New York reinstates the death penalty.³⁶⁹

C. *Innocent People Are Still Being Executed*

Not all those who were wrongly convicted and sentenced to death have been lucky enough to have been kept alive by the fortuities which saved those discussed in the above sections. We will never know who most of them are, because cases are rarely reinvestigated once prisoners have been executed. Nevertheless, there are many specific instances in which people executed in the United States are now widely believed to have been entirely innocent. Joe Hill,³⁷⁰ Richard Hauptmann,³⁷¹ Sacco

368. N.Y.L.J., Nov. 7, 1988, at 1, col. 5. In the neighboring state of New Jersey, J. James Landano was released in July 1989 after serving 13 years for a murder he did not commit. The federal judge who ordered his release noted that prosecutors had systematically withheld evidence that would have proven him not guilty. Had the current death penalty in New Jersey been in effect when the crime for which Landano was wrongly convicted took place, he would have been executed after the Supreme Court refused to review his case. "That would have been before we learned of the new evidence," he said, "and I would have been long gone." Sullivan, *Behind the Overturning of a '76 Murder Verdict*, N.Y. Times, Aug. 3, 1989, at B1, col. 2.

369. A recent case which never went to trial should also be noted. William Gergel, who was indicted in 1987 for a Queens robbery and triple homicide, was recently released after spending 17 months in jail awaiting trial. Suspicion had focused on Gergel because a police computer said he resembled the suspect. Police and prosecutors eventually conceded that they had arrested the wrong man. One police official explained that "[w]hen a detective works on a case and develops information and comes up with the fellow he believes is the perpetrator, it's difficult to turn himself off." See Fried, *Man Freed in Queens Triple Slaying*, N.Y. Times, Feb. 8, 1989, at B3, col. 1; see also *Longtime Criminal Guilty of 3 Murders*, N.Y. Times, June 8, 1989, at B4, col. 6; Fried, *'Right' Man on Trial in Three Murders, Prosecutor Tells Jury*, N.Y. Times, May 23, 1989, at B3, col. 1 (correct defendant now on trial).

370. Joseph Hillstrom (real name), the union bard, was executed in 1915 in Utah, despite appeals from President Wilson and countless others. His conviction and death have been called "one of the worst travesties of justice in American labor history." FONER, *THE CASE OF JOE HILL* 66-96 (1965).

371. Hauptmann was executed in New Jersey in 1936 for the infamous kidnapping of the Lindbergh baby. "Hauptmann's is a classic case of a conviction based on an intricate web of circumstantial evidence, perjury, prosecutorial suppression of evidence, a grossly incompetent

and Vanzetti³⁷² and Ethel Rosenberg³⁷³ are perhaps the most famous examples of those whose guilt has been seriously questioned. There are numerous others who, although probably wrongly convicted and executed, have not become household names. Roosevelt Collins,³⁷⁴ Willie McGee,³⁷⁵ Sie Dawson,³⁷⁶ and Maurice Mays³⁷⁷ were all executed despite doubts as to their guilt and are now widely believed to have been

defense attorney, and a trial in an atmosphere of near hysteria." Bedau & Radelet, *supra* note 290, at 124; see also L. KENNEDY, *THE AIRMAN AND THE CARPENTER: THE LINDBERGH KIDNAPPING AND THE FRAMING OF RICHARD HAUPTMANN* (1985); A. SCADUTO, *SCAPEGOAT: THE LONESOME DEATH OF RICHARD BRUNO HAUPTMANN* (1976); Seidman, *The Trial and Execution of Bruno Richard Hauptmann: Still Another Case That 'Will Not Die'*, 66 GEO. L.J. 1 (1977).

372. Nicola Sacco and Bartolomeo Vanzetti were executed in Massachusetts in 1927. Victims of the "Red Scare" of the early 1920s, the two were referred to as "anarchist bastards" by the judge who tried the case. Although another man confessed to the crime in 1925, motions for retrial were denied. See generally W. YOUNG & D. KAISER, *POSTMORTEM: NEW EVIDENCE IN THE CASE OF SACCO AND VANZETTI* (1985). In 1977, in a proclamation designed to clear the names of Sacco and Vanzetti, Massachusetts Governor Michael S. Dukakis stated that their "trial and execution . . . should serve to remind all civilized people of the constant need to guard against our susceptibility to prejudice, our intolerance of unorthodox ideas, and our failure to defend the rights of persons who are looked upon as strangers in our midst." Proclamation of the Governor of Massachusetts (July 19, 1977), reprinted in EXECUTIVE DEP'T OF MASS., *REPORT TO THE GOVERNOR IN THE MATTER OF SACCO AND VANZETTI* (1977).

373. Even some who have concluded that Julius Rosenberg was guilty have expressed serious doubt regarding the guilt of his wife, Ethel Rosenberg. See R. RADOSH & J. MILTON, *THE ROSENBERG FILE: A SEARCH FOR THE TRUTH* (1983). Others maintain that both were wrongly convicted. See, e.g., W. SCHNEIR & M. SCHNEIR, *INVITATION TO AN INQUEST* 168, 238, 246 (2d ed. 1983); N.Y. Times, Nov. 14, 1985, at 13, col. 1.

374. Collins, a black man executed in Alabama for the rape of a white woman, was known to have been innocent even by the jurors and the judge who sentenced him. HUIE, *THE DEATH PENALTY* 91 (1964). Although it was believed that the sexual conduct was consensual, jurors commented that Collins deserved to die simply for "messin' around" with a white woman. *Id.*

375. McGee was executed in Mississippi in 1951, after three trials, for the rape of a white woman. The principal evidence against him was a "confession" coerced after 32 days of his being held incommunicado. Evidence later revealed that the "victim" had been consorting with McGee for four years and charged rape only because he attempted to end the relationship. S. BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* 239-45 (1975); W. PATTERSON, *THE MAN WHO CRIED GENOCIDE* 157 (1971); C. ROWAN, *SOUTH OF FREEDOM* 174-92 (1952).

376. Dawson, who was retarded, was executed for murder in Florida in 1964. The only evidence against him was a confession obtained after a week of incommunicado police interrogation. According to Dawson, the police threatened to give him to the "mob" outside if he did not confess. Tallahassee Democrat, May 20, 1979, at 1A, col. 1; St. Petersburg Times, Sept. 20, 1977, at 1A, col. 1.

377. Mays was executed for murder in Tennessee in 1919. In 1926, the true killer confessed to the crime. Egerton, *A Case of Prejudice: Maurice Mays and the Knoxville Race Riot of 1919*, S. EXPOSURE, July 1983, at 56.

innocent.³⁷⁸ According to a recent law review article, there may have been at least twenty-three wrongful executions in the United States in this century, with New York leading the list with eight, more than any other state.³⁷⁹

Such miscarriages of justice can, and do, still occur today. Indeed, there have been executions in very recent years of people whom many believe to have been innocent. One case that has received international attention is the Mississippi execution of Edward Earl Johnson.³⁸⁰ Johnson, who had no prior criminal record, was convicted on the basis of testimony by a witness who initially said that Johnson was not the attacker but who later changed her story after Johnson signed a confession. Johnson alleged that the confession was coerced and that he signed it only out of fear of violence against his grandparents, who had tried to protect him. Eighteen years old when the crime occurred in 1979, Johnson was executed in Mississippi's gas chamber in May 1987.³⁸¹

In 1984, James Adams was executed in Florida despite evidence, raised in the last four weeks before his execution, that he was not the assailant. A hair sample found in the victim's hand was shown not to be Adams'. Moreover, a witness who had identified Adams as fleeing the crime scene was found to have had a grudge against Adams for being involved with the witness' wife. Another witness positively stated that Adams was not the person seen fleeing the crime. Nevertheless, Florida Governor Bob Graham—who now as a United States Senator complains about delays in carrying out executions—refused to grant even a short stay to permit an evaluation of this evidence.³⁸²

In another Florida case, Willie Jasper Darden was executed on March 15, 1988, even though substantial evidence supported his claim of innocence, and despite appeals for clemency from such diverse sources as

378. This catalogue does not include the numerous "unofficial" executions by lynch mobs, such as the notorious lynching of Leo Frank in Georgia. Frank, who had been sentenced to death, was taken from jail and lynched in an atmosphere of violent anti-semitism, after the governor bravely commuted his sentence to life. Frank was fully pardoned by the Georgia Board of Pardons and Paroles in 1986. *Georgia Pardons Victim 70 Years After Lynching*, N.Y. Times, Mar. 12, 1986, at A16, col. 1.

379. See Bedau & Radelet, *supra* note 290, at 73.

380. Johnson's story was the subject of a British Broadcasting Company special, later shown in edited form on Home Box Office, entitled "Fourteen Days in May." *Haunting Chronicle of a Death Foretold*, N.Y. Times, May 22, 1988, at 29, col. 1. His attorney, Clive Stafford Smith of the Southern Prisoners Defense Committee in Atlanta, Georgia, is continuing his efforts to prove that Johnson was innocent.

381. See Wicker, *Death and Disparity*, N.Y. Times, May 16, 1987, at 31, col. 6; *Black is Executed in Mississippi for Murder of White Lawman*, Reuters, May 20, 1987.

382. See Bedau & Radelet, *supra* note 290, at 91.

Pope John Paul II, Nobel laureate Andrei Sakharov, presidential candidate Jesse Jackson, Amnesty International, and 10,000 Dutch petition signers. Darden was first identified not in a line-up but rather in court, where he was the only black man in the room. No physical evidence was ever established to link Darden to the crime. Moreover, two independent witnesses came forward to say that Darden had been far from the crime scene on the night in question. One of the two court-appointed attorneys who represented Darden at trial, neither of whom had ever tried a capital case before, later commented that the trial was "one of the worst cases I have ever been associated with."³⁸³ Supreme Court Justice Harry Blackmun, dissenting from the Court's five-to-four decision denying relief to Darden despite its unanimous agreement that there had been prosecutorial misconduct, stated that the "level of fairness and reliability [was] so low it should make conscientious prosecutors cringe."³⁸⁴

There are people currently on death row who may yet be executed despite their innocence. Clarence Brandley, a black man, was convicted and sentenced to death in Texas in 1980 for the rape and murder of a sixteen-year-old white girl. Brandley had been the only black of five janitors at the high school where the crime took place. The other four janitors provided alibis for each other, and Brandley was convicted largely because he had no way to verify his whereabouts at the time of the crime. Attorneys for Brandley have presented new evidence, including videotaped statements by two of the janitors conceding that another white janitor, not Brandley, committed the crime. Moreover, semen samples taken from the victim's body, along with pubic hair and a body hair found in her pubic area, all of which were clearly *not* from a black man, were "lost" and their existence was not disclosed to the jury.³⁸⁵ In 1987, a Texas judge recommended that Brandley be given a new trial, stating: "The authorities wholly ignored any evidence or leads to evidence which might prove inconsistent with their premature conclusion that Brandley had committed the crime. . . . The conclusion is inescapable that the

383. See Lefevere, *Major Justice Questions Lurk in Some Executions*, NAT'L CATHOLIC REP., July 1, 1988, at 7-8.

384. *Darden v. Wainwright*, 477 U.S. 168, 189 (1986) (Blackmun, J., dissenting). As the majority had noted, the prosecutor's closing arguments in the case had been highly improper. *Id.* at 178-83. The dissent referred to the argument as "a calculated and sustained attempt to inflame the jury," and contended that the evidence against Darden was "sufficiently problematic" as to make it unclear that a jury which had not been subject to such inflammatory arguments would have convicted him. *Id.* at 197-200.

385. See Applebome, *The Truth Is Also on Trial In a Texas Death Row Case*, N.Y. Times, Oct. 4, 1987, at 26, col. 1; Applebome, *7 Years Later, Hope for Texas Death Row Inmate*, N.Y. Times, Mar. 22, 1987, at 26, col. 1; *60 Minutes: Clarence Brandley Is On Death Row* (CBS television broadcast, Apr. 4, 1987) (transcript on file at Loyola of Los Angeles Law Review).

investigation was conducted not to solve the crime, but to convict Brandley."³⁸⁶ Despite the judge's recommendation, however, the Texas Court of Criminal Appeals has not responded to Brandley's case, and he remains on death row.³⁸⁷

There are undoubtedly other innocent people among the approximately 2,200 people on death rows across the nation today. When one considers the recent cases finding people innocent, and how their innocence was established—for example, only because a witness happened to come forward, some volunteer reinvestigated the facts, or the defendant was granted a retrial on some *other* ground and his lawyer then managed to establish his innocence at retrial—one must conclude that there are other innocent people on death row. Unfortunately, some innocent people on death row will be executed before their innocence is discovered, if it is ever discovered.

That any active capital punishment system in this country will sometimes execute the innocent is not seriously disputed. Even ardent capital punishment advocate Ernest van den Haag concedes this. But Professor van den Haag argues that these errors are comparable to "wrongful deaths" that occur in "building houses, driving a car, playing golf or football," and that what he believes to be the "net gain" of the death penalty generally is worth the price of such errors.³⁸⁸ Van den Haag's notion that we must accept the execution of innocent persons is, however, contrary to the principles of fundamental fairness and due process at the core of our constitutional system of government. Moreover, van den Haag's notion is based on the false premise that the death penalty achieves benefits for society.³⁸⁹

The inevitability of executing the innocent is one of the leading reasons why the death penalty must be abolished where it now exists. And it is a major reason why New York must not reinstitute capital punishment.

VII. THE DEATH PENALTY IS NOT A DETERRENT

A. *The Death Penalty Is Not a General Deterrent*

Proponents of the death penalty—including prosecutors arguing to

386. UPI Report, Jan. 18, 1989 (LEXIS, Nexis library, Omni file).

387. UPI Report, June 29, 1989 (LEXIS, Nexis library, Omni file).

388. *25 Wrongfully Executed in U.S., Study Finds*, N.Y. Times, Nov. 14, 1985, at 13, col. 1; see also van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1664 (1986) ("I do not doubt that, over a long enough period, miscarriages of justice will occur even in capital cases.").

389. See *infra* text accompanying notes 390-478.

capital sentencing juries—often claim that capital punishment is justified by its supposed deterrent effect.³⁹⁰ But while various studies have been conducted to examine the assertion that the death penalty deters, no substantial study has demonstrated a deterrent effect.³⁹¹

Indeed, many death penalty supporters who have seen the death penalty in action concede that it is not deterring murder. For example, Texas Attorney General Jim Mattox, the chief law enforcement officer of the state with the most executions since *Gregg v. Georgia*, has acknowledged that the death penalty is probably not having a deterrent effect in Texas precisely because it is so often carried out.³⁹² Mattox says he has

390. See, e.g., VAN DEN HAAG, PUNISHING CRIMINALS 209-12 (1975).

391. See, e.g., THE DEATH PENALTY IN AMERICA 93-185 (H. Bedau ed. 1981). A United Nations study has also concluded that the death penalty has no demonstrable deterrent effect. See SIXTH UNITED NATIONS CONGRESS ON THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS, CAPITAL PUNISHMENT: WORKING PAPER PREPARED BY THE SECRETARIAT 87-9, ¶ 65 (1980); see also *Gregg v. Georgia*, 428 U.S. 153, 184-85 (1976) ("Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes . . . simply have been inconclusive."). A study published in 1975 purported to show that the death penalty did deter crime. See Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975). That study, which shocked the criminological community because its conclusions were so at odds with those of all other such studies, has been extensively criticized for methodological error and poor use of data. See, e.g., Gibbs, *Preventive Effects of Capital Punishment Other Than Deterrence*, in THE DEATH PENALTY IN AMERICA, *supra*, at 103; Klein, Forst & Filatov, *The Deterrent Effect of Capital Punishment: An Assessment of the Evidence*, in THE DEATH PENALTY IN AMERICA, *supra*, at 138; Zeisel, *The Deterrent Effect of the Death Penalty: Facts v. Faith*, in THE DEATH PENALTY IN AMERICA, *supra*, at 116; see also Fox & Radelet, *Persistent Flaws in Econometric Studies of the Deterrent Effect of the Death Penalty*, 23 LOY. L.A.L. REV. 29, 29 n.3 (1989) (studies cited). A more recent study also purported to show that the death penalty has a deterrent effect on crime. See Layson, *Homicide and Deterrence: A Reexamination of the United States Time-Series Evidence*, 52 S. ECON. J. 68 (1985). This study has also come under sharp criticism for using unreliable data and a flawed methodology. See generally Fox & Radelet, *supra*, at 29; see also *Capital Punishment: Hearings on H.R. 2837 and H.R. 343 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 323-47 (1985) (testimony and prepared statement of Alan Fox) [hereinafter *House Hearings*]. It is somewhat surprising that Layson purported to show any deterrent effect of the death penalty based on his research. Although his study covered the period from 1934 to 1977, Layson only actually claimed to have found a deterrent effect during the last fifteen of those years, during eight of which there were no executions in the United States. As Layson himself conceded during testimony before the United States House of Representatives, "if I exclude all the data past 1960, I do find that the evidence for the deterrent effect of capital punishment is very weak," or even "nonexistent." See *House Hearings*, *supra*, at 312, 316 (testimony of Stephen Layson). Layson, who was a student of Ehrlich at the University of Chicago, see *id.* at 313-14, admitted that his study was "not conclusive," and that many more studies would be needed before one could argue that the death penalty has a deterrent effect. *Id.* at 313.

392. See *Top Official and Death Row Fear Texas is Shrugging Off Executions*, N.Y. Times, July 2, 1987, at A21, col. 1. However, another death penalty supporter, Vicki Marani of the Washington Legal Foundation, gives a diametrically opposite excuse for why the death penalty does not deter, saying, "It's not a deterrent because it is so infrequently used." Malcolm,

interviewed nearly every person executed in Texas and that the possibility of being sentenced to death never even crossed their minds.³⁹³ He advocates televising executions to cause deterrence.³⁹⁴

Nevertheless, other death penalty supporters still claim that it is a deterrent. An example is the Senate sponsor of the New York bill, Senator Dale Volker. His "evidence" for deterrence is the rise in the number of murders in the years since capital punishment ceased in New York.³⁹⁵ That, however, was merely part of a general increase in murder across the nation, including the states that maintained the death penalty.³⁹⁶ Furthermore, a comparison of states with similar social and economic conditions shows that those without the death penalty often have lower homicide rates than nearby states that have the death penalty. For example, Virginia and Washington, each of which has a death penalty, have higher homicide rates than their respective neighboring states of West Virginia and Oregon, that do not have the death penalty.³⁹⁷

Some death penalty advocates claim, in contradistinction to Texas Attorney General Mattox, that deterrence depends on the death penalty being carried out regularly.³⁹⁸ This claim is contradicted by a great many facts. For example, Texas, the state with the most executions in American history and with the most active current death penalty, also has one of the highest murder rates.³⁹⁹ The Texas murder rate—which hovers around 13-14 murders per 100,000 people per year⁴⁰⁰—is considerably higher than that of New York State, which is approximately 9-10 per 100,000.⁴⁰¹ In fact, in 1985, all the most active death penalty states—including Florida (11.4), Georgia (10.4), Alabama (9.8), and Louisiana (10.9), as well as Texas (13.0)—had higher murder rates than

Tainted Verdicts Resurrect Specter of Executing the Innocent, N.Y. Times, May 3, 1989, at A18, col. 1.

393. Magagnini, *Death's Door is Opening*, Sacramento Bee, Mar. 27, 1988, at A1, col. 1.

394. N.Y. Times, July 2, 1987, at A21, col. 1.

395. Letter from New York State Senator Dale Volker to New York State Senator Manfred Ohrenstein (Mar. 30, 1989) (letter sent to all members of New York State Senate).

396. See Forst, *The Deterrent Effect of Capital Punishment: A Cross-State Analysis of the 1960s*, 61 MINN. L. REV. 743 (1977).

397. 1985 FBI UNIFORM CRIME REP. 52, 59-62, Table 5 (released July 1, 1986) [hereinafter CRIME REPORTS 1985].

398. See Malcolm, *supra* note 392 (quoting Vicki Marani of the Washington Legal Foundation).

399. See CRIME REPORTS 1985, *supra* note 397, at 52-62, Table 5.

400. See *id.* at 59; 1986 FBI UNIFORM CRIME REP. 52, 61, Table 5 [hereinafter CRIME REPORTS 1986].

401. See CRIME REPORTS 1986, *supra* note 400, at 58, Table 5; CRIME REPORTS 1985, *supra* note 397, at 58, Table 5.

New York (9.5).⁴⁰²

Those states' high murder rates persist, and even grow, despite their high number of executions. From 1984 to 1985, the number of executions in Texas increased by 100%; from 1985 to 1986, it nearly doubled again.⁴⁰³ Yet during this same period, the murder rate in Texas continued to rise. There were 126 more murders in Texas in 1986 than in 1985.⁴⁰⁴ Similar increases occurred during this period in Florida, Georgia, Louisiana and Alabama.⁴⁰⁵ Indeed, several independent studies have shown that the number of homicides may actually *increase* during the period immediately after an execution.⁴⁰⁶ One such study⁴⁰⁷ analyzed monthly homicide rates in New York State from 1907 to 1963, a period during which New York carried out more executions than any other state in the nation.⁴⁰⁸ That study found that there had been, on the average, two additional homicides in the month after an execution.⁴⁰⁹

Thus, far from having the net effect of deterring crime, use of the death penalty actually may have a "brutalizing effect."⁴¹⁰ That may explain such cases as the Florida murder of Ulyses Block in March 1988. On March 15, 1988, at 7:00 a.m., the State of Florida executed Willie Jasper Darden.⁴¹¹ Ken Brooks, a Florida prison guard, spent the day guarding prisoners who talked of virtually nothing but the execution. That afternoon, Brooks left work, and at 5:30 p.m. he murdered his ex-wife's suspected lover.⁴¹² That same evening, Brooks was booked for

402. CRIME REPORTS 1985, *supra* note 397, at 52-62, Table 5.

403. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 1984, CAPITAL PUNISHMENT 1985, & CAPITAL PUNISHMENT 1986.

404. Compare CRIME REPORTS 1985, *supra* note 397, at 61, Table 5 with CRIME REPORTS 1986, *supra* note 400, at 61, Table 5.

405. Compare CRIME REPORTS 1985, *supra* note 397 at 53-61, Table 5 with CRIME REPORTS 1986, *supra* note 400, at 53-61, Table 5.

406. See, e.g., T. SELLIN, THE DEATH PENALTY 23 (1959) (study conducted for the Model Penal Code Project of the American Law Institute); Bailey, *Disaggregation in Deterrence and Death Penalty Research: The Case of Murder in Chicago*, 74 J. CRIM. L. & CRIMINOLOGY 827 (1983); Bowers & Pierce, *Deterrence or Brutalization: What is the Effect of Executions?*, 26 CRIME AND DELINQ. 453 (1980).

407. Bowers & Pierce, *supra* note 406.

408. NEW YORK STATE COALITION FOR CRIMINAL JUSTICE REPORT 6 (1987).

409. Bowers & Pierce, *supra* note 406, at 453-84.

410. As State Supreme Court Justice, former Bronx District Attorney Burton Roberts said of the death penalty: "It's wrong. It's a cosmetic approach to the problem and doesn't deter the commission of homicides. In fact, it exacerbates it. Stupid kids may try to emulate someone who was lionized on Death Row." Lazar, *The Death Penalty Divides N.Y. Prosecutors*, N.Y. Observer, Mar. 6, 1989, at 1, col. 4.

411. Breslin, *Plenty of Smoke on Electric Chair*, N.Y. Daily News, Mar. 17, 1988, at 4. Darden is believed by many to have been innocent. See *supra* notes 383-84 and accompanying text.

412. Breslin, *supra* note 411.

first-degree murder, a potentially capital offense.⁴¹³

Proponents of the death penalty, including Senator Volker, also make the more specific claim that the death penalty would deter the killing of police officers.⁴¹⁴ This claim is also contrary to fact, since the death penalty actually does *not* deter police killings. A 1955 study showed that police homicides were higher in states that had the death penalty than in states that did not.⁴¹⁵ Another study, conducted in 1980, produced similar results.⁴¹⁶ A recent review of FBI statistics reveals that police officers still face a greater risk in states with the death penalty. For the ten-year period from 1976 to 1986, the murder rate for police officers was highest in the states that had executed people during that period, was next highest in the states with a death penalty but no executions, and was *lowest* in the states without a death penalty.⁴¹⁷

Specifically, the twelve states that executed people during that ten-year period had 340 law-enforcement officers killed, for an officer-killed rate of 4.9 per million population, and had a murder rate of 106 per million population.⁴¹⁸ The twenty-five states with a death penalty but no executions had 374 officers killed, for an officer-killed rate of 3.2 per million population, and had a murder rate of 66 per million population.⁴¹⁹ The thirteen states without a death penalty had 143 officers killed, for an officer-killed rate of 2.7 per million population, and had a murder rate of 53 per million.⁴²⁰

In view of these facts, it is not surprising that even the well known academic advocate of the death penalty, Ernest van den Haag, has conceded that deterrence has not been shown.⁴²¹ Yet politicians and prose-

413. *Id.*

414. See Volker, *supra* note 395.

415. Sellin, *The Death Penalty and Police Safety*, *Minutes of Proceedings and Evidence of the Joint Committee of the Senate and the House of Commons on Capital and Corporal Punishment*, 20 OTTAWA QUEENS PRINTER 718-28 (1955).

416. Sellin, *The Penalty of Death*, 102 SAGE LIBR. OF SOC. RES. 171-72 (1980).

417. NEW YORK STATE COALITION FOR CRIMINAL JUSTICE, ALBANY, N.Y., REPORT (1987) (summarizing FBI statistics).

418. *Id.* at 6, 11.

419. *Id.* at 6.

420. *Id.* See also NATIONAL ASSOCIATION OF CHIEFS OF POLICE, ANNUAL REPORT: OFFICERS KILLED IN THE LINE OF DUTY (1988). During 1988, five officers were killed in New York, nine in California, eight in Florida and eleven in Texas. California, Florida and Texas have the death penalty, and Florida and Texas led the nation in executions. NEW YORK STATE COALITION FOR CRIMINAL JUSTICE REPORT 10 (1987).

421. Van den Haag, *supra* note 390, at 134-35. Professor van den Haag candidly admits that "deterrence is no panacea," although he does continue to make an argument for specific deterrence, or incapacitation. *Id.* at 208-10.

cutors seeking the death penalty continue to rely on discredited notions of deterrence.

*B. The Death Penalty Is Not Relevant to Arguments
for Specific Deterrence*

Many death penalty supporters who now concede that the death penalty does not *generally* deter murders proceed to contend that it would nevertheless prevent murders committed by criminals who have been paroled a few years before. However, in reality, the death penalty would not, and does not, prevent such murders.

In making the specific deterrence, or incapacitation argument, death penalty proponents regularly advert to situations in which individuals have committed violent crimes within a few years after being released on parole, or in which notorious murderers or other violent criminals have been considered for, or even given parole within a similarly brief period. The death penalty is needed, these proponents say, in order to prevent such people from committing new murders.

This argument is completely erroneous, because it rests on inaccurate presumptions regarding both the examples cited and the available sentencing alternatives. When these false presumptions are corrected, the "house of cards" supporting the specific deterrence/incapacitation argument collapses.

The first error in the specific deterrence/incapacitation argument is the assertion that a death penalty statute would prevent murders committed by people paroled within a few years after their convictions. Contrary to this assertion, the well-publicized cases of parolees who have committed such murders have generally involved people whose previous conviction was not for homicide at all⁴²² or was for a degree of homicide less than capital murder, and who, for those or other reasons, received less than the most severe available life sentence for homicide when originally convicted.

If the death penalty had been on the books—as it often was in such cases—it would have had *no* effect on what happened, for two reasons.

422. It is also important to note that over 90% of those on death row had never been convicted of *any* homicide other than the one resulting in their death sentence. Justice Department statistics show that of the 1,862 people on death row at the end of 1988 for whom relevant information was available (there were 262 inmates for whom such information was not available), 1,688 had no prior homicide conviction. UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, CAPITAL PUNISHMENT, 1988, Table 7 (July 1989). Since 91% of death row inmates (for whom there was data) had never before been convicted of *any* degree of homicide, the death penalty could not possibly, and did not, incapacitate them from committing the homicide for which they were sentenced to death.

First, such people *could not* have received the death sentence for their prior convictions for crimes other than homicide, or for homicide convictions that were not of the most severe degree, because the death sentence cannot constitutionally be imposed for violent crimes other than the most severe degree of homicide.⁴²³ Second, even those whose prior conviction *was* for the most severe degree of homicide would generally not have been eligible for parole in so few years if they had received the most severe available sentence for that degree of homicide. Since the parolees in these well-publicized cases had either not been found guilty of the most severe degree of homicide or had not received the most severe available sentence for that crime, they surely would not have gotten the death sentence if—as was often the case—such a sentence existed in their states.

A few examples of well-publicized cases illustrate the fallacies of the incapacitation argument. One case which caused considerable public reaction was the case of Mauricio Silva. Silva was convicted in California in 1984 for three murders, all committed, as the media observed, within a week of his release from prison on parole.⁴²⁴ However, the conviction from which Silva was paroled was a manslaughter conviction, not a first-degree murder conviction.⁴²⁵ Because the death penalty is not available for manslaughter, the death penalty was entirely irrelevant to preventing the 1984 murders.

One of the most notorious recent cases in which the granting of parole has outraged a community is that of Lawrence Singleton. Singleton was convicted of rape and attempted murder in California in 1979,⁴²⁶ in a case where the young victim's arms were brutally chopped off.⁴²⁷ He was released on parole in 1987 amidst an angry public outcry.⁴²⁸ Singleton had been given a fourteen-year prison sentence, the maximum prison term available at that time for the crimes of which he was convicted.⁴²⁹

423. *Tison v. Arizona*, 481 U.S. 137 (1987); *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977).

424. See Pristin, *Jury Votes Death for Killer of Three Teen-Agers*, L.A. Times, May 29, 1986, Part II, at 1, col. 1.

425. L.A. Times, Aug. 12, 1986, Part I, at 2, col. 4; McGraw, *Parolee Booked in Murder of Girl*, 17, L.A. Times, May 30, 1984, Part II, at 1, col. 1.

426. Bishop, *Sentencing Roulette*, CAL. LAW., Dec. 1987, at 40; Crabbe, *Lawrence Singleton: The Neighbor Nobody Wants*, UPI, Apr. 24, 1987; Morain & Stein, *Singleton: He's A Symbol of the Public's Fear*, L.A. Times, May 31, 1987, Part I, at 3, col. 1.

427. Morain, *Florida Balks at Singleton's Parole in State*, L.A. Times, Apr. 28, 1987, Part I, at 17, col. 3.

428. *Id.*

429. See CAL. PENAL CODE §§ 264 (rape) (as amended 1978) (maximum sentence eight years) (West 1988 & Supp. 1989), 204 (mayhem) (as amended 1978) (maximum sentence six years) (West 1988).

The death penalty, although it existed, was not, and could not constitutionally have been, available as a sentencing alternative for those crimes.⁴³⁰

Another pertinent example has ironically been provided by Senator Dale Volker, the Senate sponsor of the proposed New York death penalty legislation. In a letter to his colleagues in which he argues in favor of the death penalty, Senator Volker cites the case of Clifford Phillips, stating: "Clifford Phillips murdered his 3 year old son here in New York. After serving 4 years for this crime, he headed to Texas where he committed another murder in 1982."⁴³¹ This is simply untrue. Clifford Phillips was convicted in New York, not of murder, but of second-degree manslaughter, for which he served his time.⁴³² Even if there had been a death penalty statute such as the Volker-Graber bill on the books at the time of the first crime, it would have made absolutely *no* difference in the outcome. Phillips would still have been released when he was because Volker's bill does not, and constitutionally cannot, provide for capital punishment for second-degree manslaughter.⁴³³ Such arguments, perpetuating misunderstandings and inaccuracies, are apparently necessary to maintain support for the proposed legislation.

Numerous other examples are frequently raised in the media. One famous case is that of Jimmy Lee Smith, whose story was the source of Joseph Wambaugh's novel, *The Onion Field*. Smith was convicted of murdering a Los Angeles policeman the same year he was paroled from Folsom Prison, where he was serving time on theft and drug convictions⁴³⁴—convictions for which he could not have received the death penalty.

Another example, often miscited⁴³⁵ in support of the death penalty, is the case of Dan White, who killed San Francisco Mayor George Moscone and Supervisor Harvey Milk in 1978. White (in a state *with* the death penalty) was found guilty only of voluntary manslaughter, on the

430. See *supra* note 423 and accompanying text.

431. Volker, *supra* note 395.

432. Telephone conversation with Eden Harrington, Phillips' attorney (Apr. 12, 1989).

433. See *supra* note 423 and accompanying text. Phillips' case is still being litigated in Texas. Telephone conversation with Eden Harrington, Phillips' attorney (Apr. 12, 1989). His attorneys say that the final outcome of the case cannot be predicted at this time. *Id.*

434. See Baker & Quintana, *Freedom Defeats 'Onion Field' Killer Again*, L.A. Times, June 8, 1989, Part II, at 1, col. 1.

435. The death penalty *existed* at the time White was convicted, but could not be applied to his conviction, which was for voluntary manslaughter. California Lt. Governor Leo McCarthy, formerly a staunch opponent of the death penalty, became an advocate of it after White was released on parole. See Ingram, *McCarthy Disagrees But Still Backs Bird*, L.A. Times, Oct. 17, 1985, Part I, at 3, col. 2.

basis of his defense that eating junk food (along with financial and other pressures) had left him unable to control himself. He was sentenced to only seven years, the maximum at that time for voluntary manslaughter, and was paroled after only four years (after which he died without committing another crime).

If, unlike White's case, the defendant *could have been*, but was not sentenced to a term which would have prevented his early release on parole, the problem lies not with the range of available non-death sentences, but rather with the failure of the sentencer to sentence the defendant more severely within that range, or perhaps with the failure of the state to ensure rehabilitation before release.⁴³⁶ If, on the other hand, the defendant could not have been sentenced to a term preventing his early release on parole, the problem lies with either the degree of crime for which he was charged or found guilty, as in White's case, or perhaps—in some instances of serious non-homicidal crimes—with inadequate maximum available sentences.⁴³⁷

There have also been some instances in which the reason a notorious convicted murderer was given, or considered for, parole was that the most severe life sentence permitted parole consideration after a relatively short time. But those instances, too, are irrelevant to a current debate over the death penalty, because the laws in question have since been changed to be like the laws in New York and most other states—which do not permit parole in such cases in less than twenty, twenty-five, thirty or forty years, or never.⁴³⁸ For example, a well-known case in Kentucky was that of Allan Todd Hume, who, after being convicted of two murders in 1978 and sentenced to life imprisonment, was released on parole in 1985.⁴³⁹ This was possible because the law in effect at the time

436. A case that has become widely known due to its sensationalistic use in the 1988 presidential campaign is that of Willie Horton. Horton, who was convicted in 1974 of murder and sentenced to life imprisonment without parole, was released in 1986 under a weekend furlough program, during which release he raped a Maryland woman and beat her husband. Such life-term inmates are no longer eligible for furloughs, and never should have been. The problem raised by the Horton case, a problem unique to Massachusetts, has thus been resolved without the aid of a death penalty statute. *See generally* Love, *Bush Backers Have Horton Victims Speak*, L.A. Times, Oct. 8, 1988, Part I, at 23, col. 4.

437. This is, however, increasingly unlikely in the present era of stiffening sentencing possibilities. Lawrence Singleton, for example, could be sentenced to life imprisonment today, whereas when he was convicted the maximum sentence (which he was given) was fourteen years. *See* Morain & Stein, *supra* note 426.

438. *See infra* notes 469-71 and accompanying text.

439. *Parole Granted in Madison Murders Criticized*, Louisville Courier-J., Nov. 15, 1985, at B2, col. 1; *Two Murders, Seven Years: Why Parole System Stinks*, Lexington Herald-Leader, Nov. 15, 1985, at A18, col. 1 (editorial).

of his conviction allowed for parole after seven years.⁴⁴⁰ However, under *current* Kentucky law, life sentences without possibility of parole for at least twenty-five years are now available for capital murder.⁴⁴¹

Proponents of the death penalty also regularly cite a few notorious cases, such as those of Charles Manson or Sirhan Sirhan, to argue that the death penalty is needed in order to prevent the worst killers from being *considered for parole*.⁴⁴² That argument again ignores the fact that the only reason these cases are *ever* reviewed by the parole board is that they were convicted at a time before California enacted its present life-without-parole sentence for capital murder.⁴⁴³ Because they were convicted at this earlier time, they remain subject to the previous law,⁴⁴⁴ but nonetheless have *not been* paroled.⁴⁴⁵

Although the argument is sometimes made that the death penalty is nonetheless needed to protect prison guards, this argument also fails to survive examination of the facts. A study of all death row inmates who had their sentences commuted to life by the Supreme Court's decision in *Furman v. Georgia*⁴⁴⁶ shows that of 558 inmates in thirty states whose sentences were so commuted, none of them in twenty-nine of those thirty states has killed a prison guard in the ensuing fifteen years.⁴⁴⁷ Indeed,

440. KY. REV. STAT. ANN. § 507.020 (Baldwin 1974).

441. KY. REV. STAT. ANN. § 532.030(1) (Michie/Bobbs-Merrill 1985).

442. These cases have received considerable media attention whenever parole hearings are held or parole dates are set. See, e.g., Kasindorf, *Keeping Manson Behind Bars; Prosecutor Stephen Kay Still Fights to Make Sure the Evil of the Tate-LaBianca Murders is Never Forgotten*, L.A. TIMES MAGAZINE, May 14, 1989, at 9; McClay, *Convicted RFK Assassin Loses Ninth Bid For Parole*, Associated Press, May 28, 1987 (LEXIS, Nexis library, Omni file); *Sirhan Says He Feels Remorse for Kennedy Assassination*, Associated Press, June 24, 1985 (LEXIS, Nexis library, Omni file); *Crime and Punishment—and Crime*, N.Y. Times, Aug. 17, 1981, at A14, col. 1 (editorial).

443. In 1978, California enacted by initiative Penal Code § 190, which provides that a life sentence for capital murder is served "without possibility of parole." CAL. PENAL CODE § 190.2 (West Supp. 1989). Those convicted of the type of murder for which Manson and Sirhan were convicted would, under the present law, never be reviewed for parole. Hence, the argument that the death penalty is needed to prevent parole eligibility for this type of case is obviously incorrect.

444. This is required by the *ex post facto* clause of the United States Constitution, which forbids enhancement of sentences already determined. U.S. CONST. art. I, § 10, cl. 1.

445. Jimmy Lee Smith, after he finally became the "Onion Field killer," was also sentenced to death. J. WAMBAUGH, *THE ONION FIELD* 327 (1973). His death sentence was commuted to life. *Id.* at 432-35. Under California law at that time, parole eligibility for a life sentence began after seven years. CAL. PENAL CODE § 3046 (1941) (as amended 1978). Smith was later paroled, and proceeded to commit various petty crimes. See Baker & Quintana, *supra* note 434. As pointed out above, however, this could not happen today, since California now provides that life sentences for capital murder will be served without possibility of parole. CAL. PENAL CODE § 190.2 (West Supp. 1989).

446. 408 U.S. 238 (1972).

447. See Marquart & Sorensen, *From Death Row to Prison Society: A National Study of the*

only seven of them have committed additional homicides in those fifteen years.⁴⁴⁸ Four of these were against fellow prisoners, and another was committed against an ex-girlfriend by a man who then committed suicide.⁴⁴⁹ Only two, both in Ohio, killed prison guards.⁴⁵⁰ "[M]ost of the *Furman* inmates were not violent menaces to the institutional order. As a group, they were not a disproportionate threat to guards and other inmates."⁴⁵¹

Moreover, at least four people from this population have already been shown to have been entirely innocent of the crime for which they were sentenced to death.⁴⁵² As Professor James Marquart, a principal author of this study, said: "Executing all of them would not have greatly protected society. We would have executed nearly 600 convicts to protect us from [seven], and we would have killed four innocent people in the process."⁴⁵³

A separate study of inmates sentenced to death *after Furman*, but whose sentences were changed to life imprisonment, reveals that none of these inmates committed prison murders, and that these inmates were generally less violent than the overall prison population.⁴⁵⁴ Executing these inmates would not have saved one prison guard. Indeed, there has been only one state prison guard killed in New York in the last decade, during which time the state has imprisoned some 100,000 inmates.⁴⁵⁵

According to Thomas Coughlin, Commissioner of the New York State Department of Correctional Services, the inmates currently serving minimum sentences of seventy-five years-to-life in New York⁴⁵⁶ are among the best-behaved prisoners in the entire state system.⁴⁵⁷ Coughlin

Furman-Commuted Inmates, 23 LOY. L.A.L. REV. 5 (1989). Marquart and Sorensen note that four of the six *Furman*-commuted inmates who committed homicides in prison did not receive death sentences for those homicides. *Id.* at 21.

448. *Id.* at 27.

449. *Id.* at 23.

450. *Id.* at 21.

451. *Id.* at 20.

452. *Id.* at 25.

453. See Malcolm, *Society's Conflict on Death Penalty Stalls Procession of the Condemned*, N.Y. Times, June 19, 1989, at B10, col. 1.

454. See J. Marquart, S. Ekland-Olson & J. Sorensen, *Gazing Into the Crystal Ball: Can Jurors and Psychiatrists Accurately Predict Future Dangerousness In Capital Cases?* (1989) (unpublished manuscript on file at Loyola of Los Angeles Law Review).

455. Telephone conversation with James Flateau, Public Information Office, New York State Department of Corrections (July 19, 1989).

456. See *infra* text accompanying notes 463-68.

457. Memorandum from Thomas Coughlin III, Commissioner, New York Dep't of Correctional Services, to Governor Mario Cuomo (May 23, 1989). Coughlin points out that prisoners in New York's maximum-security prisons were involved in violent incidents at a rate of 179 per thousand inmates per year. *Id.* However, those inmates whose prison terms were 75 years

reasons that "true lifers" are interested in "[a]voiding incidents of any type, obeying the rules and attempting to ingratiate themselves with staff as much as possible."⁴⁵⁸ Death row inmates, on the other hand, "would have nothing to lose by assaulting the staff. . . . There would be no reason for them to keep a low profile, no incentive to follow the rules."⁴⁵⁹

Michigan officials agree with Coughlin about prisoners serving life sentences. Leo Lalonde of the Michigan Department of Corrections says of those serving life without parole: "After a few years, lifers become your better prisoners. They tend to adjust and just do their time. They tend to be a calming influence on the younger kids, and we have more problems with people serving short terms."⁴⁶⁰

C. Currently Available Life Sentences for the Most Severe Murders Do Provide Effective Incapacitation

Because the public is acutely aware of, but seriously misunderstands, the various well-publicized cases discussed above, it is not at all surprising that most members of the public are woefully misinformed about the actual life sentences which are now imposed on people convicted of the most severe degree of murder. Much of the public remains under the mistaken impression that life sentences for such murder convictions result in parole after a short term of years.⁴⁶¹ This misperception is often central to public support for the death penalty, and it frequently leads juries to impose capital punishment in particular cases.⁴⁶² Proponents of the death penalty often play upon (and perhaps share) the public's misconceptions by making the utterly bogus assertion that the death penalty would make the streets safe by preventing heinous murderers from being released in a few years to kill again.

In New York, the sentence for the most severe degree of murder can be as much as twenty-five years-to-life.⁴⁶³ Under existing law, an inmate

to life were involved in only 110 such incidents per thousand per year, making the latter a significantly more manageable group. *Id.*

458. *Id.*

459. *Id.*

460. See Katz, *In Mich., Life Without Parole*, *Newsday*, June 20, 1989, at 5.

461. Paduano & Stafford Smith, *supra* note 136, at 211-12.

462. Note, *supra* note 140. For a discussion of juror misconceptions regarding parole, see *supra* text accompanying notes 134-46.

463. The possible sentences for a class A-I felony range from 15 years to life to 25 years to life. N.Y. PENAL LAW §§ 70.00(2)(a), 70.00(3)(a)(i) (McKinney 1987). The highest degree of homicide under New York's current law is murder in the second degree, which is malice murder in the traditional sense. N.Y. PENAL LAW § 125.25 (McKinney 1987). Murder in the first degree as defined by the statute is for police or correctional employee killings, carries a mandatory death penalty, and so has been held unconstitutional. *People v. Smith*, 63 N.Y.2d

who receives that sentence may not even be reviewed for parole until he has served his minimum sentence, *i.e.*, twenty-five years.⁴⁶⁴ Moreover, where the murder was aggravated by the existence of other crimes, such as rape, kidnapping, robbery, etc.—as would be true in most cases to which the proposed New York death penalty law would apply—minimum sentences for those additional crimes may be aggregated, and the defendant may thus effectively *never* be eligible for parole.⁴⁶⁵

For example, under existing New York law, if a defendant were convicted of first-degree robbery and second-degree murder, the minimum sentence for the robbery conviction, which could be as much as twelve and one-half years,⁴⁶⁶ could be aggregated with a twenty-five year minimum term for the murder conviction.⁴⁶⁷ In that situation, the defendant would not even be eligible to be *considered* for parole for thirty-seven and one-half years. Indeed, as of May 1989, there were already 142 inmates in New York serving prison terms of at least fifty or seventy-five years-to-life, who are therefore ineligible for parole for fifty or even seventy-five years.⁴⁶⁸

However, even if the existing sentencing structure is deemed inadequate to ensure incapacitation, there remain various alternatives to the death penalty. Most states have passed legislation providing for life sentences for the most severe degree of murder which severely limit, or totally eliminate, any possibility of parole. At least ten states have life sentences under which parole is not even possible for twenty, twenty-five, thirty or forty years, depending on the state.⁴⁶⁹ Moreover, in at least

41, 468 N.E.2d 879, 479 N.Y.S.2d 706 (1984); *People v. Davis*, 43 N.Y.2d 17, 371 N.E.2d 456, 400 N.Y.S.2d 735 (1977), *cert. denied*, 435 U.S. 998 (1978). In New York, second-degree murder is a class A-I felony. N.Y. PENAL LAW § 125.25 (McKinney 1987).

464. Under New York law, a person serving an indeterminate sentence (*e.g.*, 25 years-to-life) must serve the minimum (*i.e.*, 25 years, in the case of a 25 years-to-life sentence) before being considered for parole. N.Y. PENAL LAW § 70.40(1)(a) (McKinney 1987).

465. Minimum sentences may be aggregated when more than one crime is found. N.Y. PENAL LAW § 70.40(1)(a) (McKinney 1987). It should also be noted that there are no "good time" provisions applicable to an indeterminate maximum sentence (a life sentence), since "good time" in New York is calculated based on the maximum sentence. *Id.* § 70.40(1)(b). For a discussion of "good time," see Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 UCLA L. REV. 217 (1982).

466. First-degree robbery, under New York law, is a class B felony. N.Y. PENAL LAW § 160.15 (McKinney 1987). Minimum sentences for such an offense may be from one-third to one-half the maximum sentence, which may be 25 years. See *id.* §§ 70.02(3), (4). Hence, the minimum term for first-degree robbery may be from 8.5 to 12.5 years.

467. See *supra* note 465.

468. Memorandum from Thomas Coughlin III, Commissioner, New York Dep't of Correctional Services, to Governor Mario Cuomo (May 23, 1989).

469. See, *e.g.*, ARIZ. REV. STAT. ANN. § 13-703 (1988) (25 or 35 years before parole possible, depending on age of victim); COLO. REV. STAT. § 18-1-105(4) (1986) (40 years before

eighteen states there are life sentences with no possibility of parole *at all*.⁴⁷⁰ In these states, inmates convicted of aggravated murder and sentenced to the highest form of life sentence are extremely unlikely to ever be released.⁴⁷¹

Numerous public opinion polls show that life sentences that are perceived to be adequate are preferred over the death penalty, and that the public would prefer to achieve incapacitation through measures less extreme than death. For example, a poll conducted by Patrick Caddell Associates in May 1989, at the height of hysteria over violent crime in New York,⁴⁷² found that New Yorkers, by a two-to-one majority, preferred life without possibility of parole, with restitution to the victim's family, over the death penalty.⁴⁷³ The same poll also showed that a sub-

parole possible); FLA. STAT. ANN. § 775.082(a) (West 1976) (25 years before parole possible); KY. REV. STAT. ANN. § 532.030 (Michie/Bobbs-Merrill 1985) (25 years before parole possible one alternative); N.J. STAT. ANN. § 2C:11-3b to 3c (West Supp. 1989) (30 years before parole possible); N.M. STAT. ANN. § 31-21-10(A) (Supp. 1987) (30 years before parole possible); N.C. GEN. STAT. § 15A-1371(a1) (1988) (20 years before parole possible); OHIO REV. CODE ANN. § 2929.03(c)(2) (Anderson 1987) (20 or 30 years before parole possible); S.C. CODE ANN. § 16-3-20(A) (Law Co-op Supp. 1988) (30 years before parole possible where statutory aggravating circumstance found; 20 years before parole possible where no statutory aggravating circumstance found). In addition, as noted above, New York provides sentences under which 25 years, or under some circumstances, 50 or even 75 years, must be served before parole is possible. *See supra* notes 463-65.

470. ALA. CODE § 13A-5-45(f) (1987); ARK. STAT. ANN. § 5-10-101(c) (1987); CAL. PENAL CODE § 190.2(a) (West Supp. 1989); CONN. GEN. STAT. ANN. § 53a-46a(f) (West 1985); DEL. CODE ANN. tit. 11, 4209(a) (1987); ILL. ANN. STAT. ch. 38, ¶¶ 1005-8-1(d), 1003-3-3(d) (Smith-Hurd Supp. 1989) (second homicide or multiple homicide); LA. REV. STAT. ANN. § 14:30(C) (West 1987); MD. ANN. CODE art. 27, § 412(b) (Supp. 1987) (sentencer's discretion); MASS. GEN. LAWS ANN. ch. 265, § 2 (West 1989); MICH. COMPILED LAWS ANN. § 750.316 (West Supp. 1989); MO. ANN. STAT. § 565.020(2) (Vernon Supp. 1989); NEB. REV. STAT. §§ 83-192(9)(e), 83-1,110 (1987) (no minimum term for life imprisonment means no parole eligibility unless commuted to term of years); NEV. REV. STAT. ANN. § 175.552 (1986) (sentencer's discretion); N.H. REV. STAT. ANN. § 630:5(V) (1986); OKLA. STAT. ANN. tit. 21, § 701.10 (West Supp. 1989) (sentencer's discretion); PA. STAT. ANN. tit. 61, § 331.17 (Purdon Supp. 1989) (power of Board of Parole extends only to "definite or flat sentences"); S.D. CODIFIED LAWS ANN. § 24-15-4 (1988); WASH. REV. CODE ANN. § 10.95.030 (1989).

471. While clemency may theoretically be possible in such states, it is not being granted often, if at all. For example, Michigan's governor has refused to commute life-without-parole sentences to a lesser term, meaning that those sentenced to the maximum life term have not been getting out of prison. *See Katz, supra* note 460, at 5.

472. The Caddell poll was conducted in the wake of hysterical reaction to the brutal gang-rape of a Central Park jogger, including, among other things, full-page ads by developer Donald Trump in all four New York daily newspapers calling for hatred and the death penalty and two full-page *New York Post* editorials calling for the death penalty and listing the addresses and phone number of every New York assemblyperson opposed to the death penalty. *See, e.g.,* Newsday, May 1, 1989, at 9, col. 1.

473. *See* Opinion Poll, *supra* note 73. This poll showed that 72% of New Yorkers favored the death penalty and 22% opposed it, when asked that question in isolation. However, when asked whether they prefer the death penalty or an alternative of life without parole with the

stantial majority favored life without parole for twenty-five years, together with restitution to the victim's family, over the death penalty.⁴⁷⁴

These results are consistent with a wide variety of public opinion polls conducted around the nation over the last several years. A poll conducted in New York in mid-1989 for Gannett newspapers yielded results very similar to those in the Caddell poll. The Gannett poll showed that when given the choice, the majority preferred life without parole (even without restitution to the victim's family) over the death penalty.⁴⁷⁵ A 1987 poll conducted in Nebraska, a death penalty state, showed that the majority favored abolishing the death penalty in favor of life without parole for twenty-five years together with restitution to the victim's family.⁴⁷⁶ In addition, polls conducted in Georgia, Florida, Mississippi, and Alabama have shown that, in those states, support is higher for alternative life sentences than for the death penalty.⁴⁷⁷

If New Yorkers knew about, but were not satisfied with, the state's existing tough minimums for many egregious murders, they could have a statute today explicitly providing for some type of life-without-parole sentence. Indeed, this explicit type of sentence could have been passed in New York by now, were it not for the fact that some death penalty proponents in the State Senate have cynically prevented a vote on such legislation—which the Governor has proposed and the Assembly has previously passed. These proponents apparently know that the enactment of any form of explicit life-without-parole legislation would greatly diminish support for the death penalty by causing many more people to understand the fallacy of the argument that the death penalty would pre-

inmate's prison earnings going to the victim's family, 62% favored this alternative, whereas 32% favored the death penalty. See also Milligan & McCoy, *Life-Without-Parole Favored*, N.Y. Daily News, May 23, 1989, at 15, col. 1.

474. Fifty-four percent favored life without parole for 25 years and restitution, whereas 41% favored the death penalty. Opinion Poll, *supra* note 73, at 2.

475. See Gallagher, *Death or Life Without Parole?*, Gannett Westchester Newspapers, June 25, 1989, at A1, col. 4. This poll, which did not include restitution to the victim's family, indicated that 52% would prefer life without parole, compared to only 41% favoring the death penalty. *Id.*

476. A. BOOTH, UNIVERSITY OF NEBRASKA, BUREAU OF SOCIOLOGICAL RESEARCH, NEBRASKA ANNUAL SOCIAL INDICATORS SURVEY, MAJORITY FAVOR ALTERNATIVES TO DEATH PENALTY (January 1988). This poll also showed that of the 34% who still favored the death penalty over the proffered alternative, one-third would no longer favor the death penalty if the alternative were increased to life with no possibility of parole at all. *Id.*

477. A Georgia poll conducted in 1986 showed that 53% of Georgia adults would favor abolition of capital punishment if state law provided for life sentences with no parole for at least 25 years, and for a restitution program. GEORGIA STATE UNIVERSITY, GEORGIA RESIDENTS' ATTITUDES TOWARD THE DEATH PENALTY, THE DISPOSITION OF JUVENILE OFFENDERS, AND RELATED ISSUES 24-25 (1986); Paduano & Stafford Smith, *supra* note 136 (reporting similar results in other states).

vent murders by parolees.⁴⁷⁸

Thus, the most important thing to recognize about the incapacitation argument for the death penalty is that it is a completely baseless "solution" to the public's legitimate concern over serious crimes committed by parolees. As the actions of New York's State Senate illustrate, death penalty proponents are so enamored of this phony argument that they will do nothing—such as passing legislation which might prevent some of the early paroles they are so eager to bemoan—that could cause the public to realize how totally irrelevant the concern over early paroles is to the question of whether there should be a death penalty.

VIII. THE DEATH PENALTY ACTUALLY EXACERBATES THE PROBLEMS OF VICTIMS' FAMILIES

No question defines the moral, philosophical or penological abstraction of the death penalty more directly than this one: What if your loved one were murdered? When invoked by death penalty advocates, this question implies that the death penalty will best satisfy the needs of murder victims' survivors. Yet, in reality, rather than affording them a quick and final disposition of the case against the murderer, so that they may finalize the tragedy and begin rebuilding their lives, the capital punishment process often creates a second victimization of survivors. They must contend with repeated reminders about the murder during the protracted proceedings in which the death penalty's implementation is—usually unsuccessfully—sought. Moreover, even in the few cases where there *is* an execution, it is doubtful that this really provides relief to the victim's family.

In a system without the death penalty, there are fewer trials, less protracted proceedings, and greater certainty that the sentence imposed will be carried out.

A. Survivors of Murder Victims Often Oppose the Death Penalty

Many survivors of murder victims have publicly denounced the death penalty, and some have actively opposed the execution of the convicted murderer. Christine Farris, whose mother and brother were slain in separate incidents, objected to the death sentence given to her

478. See Kolbert, *As Vote on Death Penalty Nears, Cuomo Advocates Life Sentences*, N.Y. Times, June 19, 1989, at B10, col. 1; Gallagher, *supra* note 475. The New York Law Enforcement Council, a statewide association of prosecutors, police chiefs and sheriffs, endorsed the Governor's life without parole proposal and called on the legislature to pass it. See Milligan & Beneson, *Lawmen Call For No Parole*, N.Y. Daily News, June 24, 1989, at 5, col. 1.

mother's murderer.⁴⁷⁹ Ms. Farris observed simply, "You don't gain anything by taking one life for another."⁴⁸⁰ Coretta Scott King, whose husband and mother-in-law were both assassinated, stated, "I stand firmly and unequivocally opposed to the death penalty for those convicted of capital offenses. An evil deed is not redeemed by an evil deed of retaliation. Justice is never advanced in the taking of a human life. Morality is never upheld by legalized murder."⁴⁸¹

Some victims' rights groups have opposed capital punishment, as well. Marie Deans is founder of Murder Victims' Families for Reconciliation. Although her mother-in-law was murdered, she opposes the death penalty. Deans has asked, "How can we stand as murder victims, in our pain and sorrow, and give it to someone else's family as well?"⁴⁸² Odile Stern, Executive Director of Parents of Murdered Children, has said that she opposes capital punishment and is "at peace" with the life sentence that her daughter's murderer received.⁴⁸³

Merri Dee, a Chicago television talk-show host who was kidnapped along with a guest who was later murdered, has declared that she and the members of her victims' rights group do not advocate the death penalty.⁴⁸⁴ Ms. Dee was shot in the head, inducing temporary blindness and paralysis.⁴⁸⁵ Despite her horrifying experience, she said, "Going with the death penalty puts me on the criminal's level."⁴⁸⁶

Some victims' families have sought clemency for the accused murderer of their loved one. In the case of Kenneth Brock, both the victim's father and the prosecutor appealed for clemency. Nonetheless, Brock was executed by lethal injection on June 19, 1986.⁴⁸⁷ Similarly, William

479. Montgomery, *You Can Never Know How It Feels to Have Loved One Killed*, Atlanta Const., Oct. 14, 1986, at 1A, col. 5.

480. *Id.*

481. See AMNESTY INTERNATIONAL USA, *THE DEATH PENALTY: CRUEL AND INHUMAN PUNISHMENT* (1987). Family members of Nancy Allen, who was murdered in Missouri in 1985, have opposed the death penalty for the convicted murderer, Heath Williams. See Rosenbaum, *Too Young To Die*, N.Y. Times, Mar. 12, 1989, (Magazine) 33, 61. Upon discovering that Williams, who was 16 years old at the time of the crime, was seeking the death penalty for himself, Allen's brother-in-law concluded that life imprisonment would be a greater punishment. *Id.*

482. Myers, *Death Penalty Protestors Rally at Capitol*, UPI, June 28, 1987 (LEXIS, Nexis library, Omni file).

483. Buckley, *A Victim of Violence*, CATH. N.Y., Apr. 17, 1986, at 2.

484. Cunningham, *Murder-victim Advocates, Lawyers Open Dialogue*, Louisville Courier-J., Apr. 17, 1987, at B2, col. 3.

485. *Id.*

486. *Id.*

487. Lefevere, *Many Victims' Families Recoil at Death Penalty Spectacle*, NAT'L CATH. REP., Nov. 7, 1986, at 5.

Riley beseeched Florida Governor (now United States Senator) Bob Graham to grant clemency to James Dupree Henry, who had been sentenced to death for the murder of Riley's father. In his letter, Riley wrote, "The God I came to know, through my father, was one of love, mercy and giving another a chance to do better—not one of vengeance."⁴⁸⁸ Against Riley's wishes, Henry was executed on September 20, 1984.⁴⁸⁹

*B. Imposition of the Death Penalty Means Continued
Victimization of Survivors*

According to the National Organization of Victim Assistance (NOVA), the healing process starts with the adoption of new patterns of thinking and acting, and generally "involves an increased remembering of the murder victim—not the murder."⁴⁹⁰ The system of capital punishment directly undermines this healing process. Forced to endure repeated reminders of the crime while capital defendants are put on trial, engage in appeals, post-conviction proceedings, and, frequently, retrials, the survivor is repeatedly reminded of the offender's actions and is unable to deal with the loss of the loved one, thus impeding his or her recovery.

As the Executive Director of Parents of Murdered Children has said, "Most families find the court process is their second victimization . . . the system is complex and impersonal."⁴⁹¹ For example, when informed that their daughter's murderer's death sentence had been reversed, the Fredrickson family was stunned. Their ordeal began anew, as "the weight that had been lifted off our shoulders had been dropped back down."⁴⁹² Another victim's family had waited years for the death verdict of their son's murderer to finally be affirmed, only to discover, "out of the blue," that there would be a retrial. "It'll bring all the bad memories back and dredge up the unpleasant things all over."⁴⁹³

Whereas survivors of murder victims need finality, capital punishment brings prolonged suffering and grief. Wholly aside from appeals, collateral proceedings, retrials and clemency hearings, the death penalty system features trials with unique and time-consuming procedures. The elaborate police investigations, extensive voir dire, frequent sequestration

488. *Id.*

489. *Id.*

490. National Organization of Victim Assistance, *Survivors of Homicide Victims*, NETWORK INFO. BULL., Oct. 1985, at 8.

491. Payton, *How Parents of Slain Children Cope*, Oakland Tribune, Mar. 6, 1987, at C7, col. 2.

492. Corwin & Morain, *The Fredricksons*, L.A. Times, Aug. 22, 1985, Part I, at 33, col. 1.

493. Corwin & Morain, *The Finneys*, L.A. Times, Aug. 22, 1985, Part I, at 30, col. 1.

of juries, changes of venue, numerous pretrial motions and bifurcated trial greatly protract these cases. In short, the capital punishment system's alienation of survivors, perpetuation of reminders of the crime, and prevention of swift and certain finality compound the survivors' suffering and grief.

C. Executions Do Not Provide Satisfaction

Even in those few instances in which the death penalty is carried out, the execution of the defendant may only exacerbate the anguish of the victim's survivors and often fails to provide any relief. According to the Executive Director of Parents of Murdered Children, "Even if the defendant gets the maximum sentence, it can never equate to the loss of your child's life and the horrors of murder."⁴⁹⁴

After her child's murderer was finally executed, Beth Wright proclaimed that she was "furious" that she could not see the corpse, expressing her lack of satisfaction with the execution itself.⁴⁹⁵ In the case of Robert Lee Willie, the survivors attended every court argument, including those held in another state.⁴⁹⁶ After witnessing Mr. Willie's execution, the step-father of the victim bitterly complained that Mr. Willie had not suffered as much as the victim had suffered.⁴⁹⁷ The survivors from that case have proceeded to attend all subsequent Louisiana executions.⁴⁹⁸

Similarly, Jack Stewart claimed a center seat for James Raulson's execution and "looked at him right in the eye" the whole time.⁴⁹⁹ Yet Stewart's agony did not end after the execution. Tormented by the experience, Stewart lamented, "[w]ell, what was to prevent him from being forgiven and entering into heaven with all the good people?"⁵⁰⁰

494. See Payton, *supra* note 491.

495. Makin, *supra* note 20.

496. DeParle, *supra* note 23.

497. *Id.*

498. *Id.*

499. Dolan, *The South—Nation's Death Belt*, L.A. Times, Aug. 25, 1985, Part I, at 21, col. 1.

500. *Id.*

IX. A DEATH PENALTY SYSTEM IS MORE COSTLY THAN A SYSTEM
IN WHICH LIFE IMPRISONMENT IS THE MOST
SEVERE PUNISHMENT

A. *There Are Many Reasons Why Death Penalty Cases Require
Additional Expenditure of Tremendous Amounts of
Taxpayers' Money*

The Supreme Court has repeatedly stated that because "death is a different kind of punishment," much higher levels of procedural safeguards are required by the Constitution before it may be imposed.⁵⁰¹ What this means in practical terms is very long, complex and extremely expensive litigation.⁵⁰²

One must recognize, at the outset of this analysis, that the state must incur the enormous expenses of a capital trial whenever the death penalty is sought, no matter what the trial's outcome may be, even in the many cases where the defendant is found not guilty or is not sentenced to death. The enormous expense frequently can be avoided where the death penalty is not sought, because clearly guilty defendants often plead guilty when not facing the death penalty. But, if the state insists on seeking the death penalty, very few defendants will plead guilty and agree to a death sentence, even when their guilt is clear, and some sort of trial usually occurs even when the defendant wants to be executed.⁵⁰³

The added complexity and expense of capital trials begins well before trial. It is much more costly for both the prosecution and the defense to investigate death penalty cases for two reasons. First, the crime itself is likely to be investigated more thoroughly by both the prosecution (who must prove aggravating circumstances in order to seek the death penalty) and the defense (who must be prepared to argue the same issues). Second, because there is a separate penalty phase where any mitigating evidence may be presented, the defense should develop evidence, which the prosecution may endeavor to rebut, concerning the defendant's entire background—including childhood, mental and psychological conditions, family relations, employment history, prior arrests and convictions, medical history, and much more. This often entails the employ-

501. See, e.g., *Gardner v. Florida*, 430 U.S. 349, 357 (1977) (and cases discussed therein).

502. Indeed, the death penalty was probably more costly than life imprisonment even *before* the Supreme Court granted new constitutional protections after *Furman v. Georgia*. 408 U.S. 238 (1972). In his concurring opinion in *Furman*, Justice Marshall observed: "As for the argument that it is cheaper to execute a capital offender than to imprison him for life, even assuming that such an argument, if true, would support a capital sanction, it is simply incorrect." *Id.* at 357 (Marshall, J., concurring).

503. See Rosenbaum, *supra* note 481, at 59.

ment of social scientists, psychologists, psychiatrists, and various forensic experts, all of whom must be paid by the state in many instances.⁵⁰⁴ For example, in some situations the Constitution requires the state to pay for expert witnesses for the defense as well as the state.⁵⁰⁵

Pretrial motions in capital cases are both more numerous and more complex than in other cases. Because there is a whole body of eighth amendment law relating specifically to death penalty cases, many more pretrial motions are required in a capital case. The process of voir dire should also be far more complex and lengthy in a capital case, where there are enhanced constitutional concerns regarding pretrial publicity, racial prejudice, and other areas of possible juror bias. Where pretrial publicity has affected potential jurors, the considerable additional cost of a change of venue may have to be incurred. Moreover, jurors should be asked a series of questions designed to determine whether they are excludable either because they could not impose the death penalty due to moral convictions, or because they would automatically impose the death penalty if guilt were found.⁵⁰⁶

The inclusion of a separate sentencing phase in capital trials makes such trials longer than non-capital trials, quite apart from the additional complexities of pretrial proceedings and jury selection.

Not only are capital trials more lengthy and expensive, but, because the defendant's life is at stake, more retrials will likely be conducted. In some instances, one Supreme Court decision may mandate retrial of large segments—even the entire population—of the state's death row.⁵⁰⁷ These costs, both of the initial trial and the retrials, will be incurred even in the many cases where the jury does not return a death verdict upon retrial.

Additional areas of considerable expense are the constitutionally mandated appeals process and the often extensive collateral proceedings. The appeals process requires appointment of counsel where the defendant is indigent, which usually occurs. Of course, the state must always bear the cost of at least the prosecution's participation in all proceedings.

In addition to litigation per se, state clemency hearings entail fur-

504. For a general discussion of the costs attending the death penalty, see Spangenberg & Walsh, *Capital Punishment or Life Imprisonment? Some Cost Considerations*, 23 LOY. L.A.L. REV. 45 (1989).

505. See *Ake v. Oklahoma*, 470 U.S. 68 (1985) (state must provide defendant access to competent psychiatrist when mental capacity is raised by either side).

506. See *Lockhart v. McCree*, 476 U.S. 162 (1986); *Wainwright v. Witt*, 469 U.S. 412 (1985); *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

507. Amsterdam, *In Favorem Mortis*, 14 HUM. RTS. 14 (Winter 1987) (describing instances of single decision requiring reversal of sentences of entire death row populations).

ther expense and complexities. Assuming these clemency hearings do not result in relief for a death row inmate, the state must then incur the cost of the execution itself.

Two other points, frequently ignored in the studies discussed below, should also be considered. First, maintaining a death row, even in lamentably poor condition, is more expensive than keeping the same prisoners in other forms of custody—into which many death row inmates will go when their death sentences are overturned. Second, the extra costs of the capital punishment system are all incurred “up front” or within a few years, as compared to the savings from capital punishment, which do not arise, in the few cases where executions do occur, for a great many years. Hence, the savings from not having to incarcerate people following their executions must be discounted back to the present through the application of a discount rate reflecting the amount of interest which a dollar saved today could earn over the many years before the execution occurs.

B. Numerous Studies Confirm that the Death Penalty Is More Expensive

Several scholarly works have concluded that a criminal justice system which uses the death penalty costs more than a system in which life imprisonment is the ultimate punishment.⁵⁰⁸ Several states have reached the same conclusions. For example, a study commissioned by the Maryland state legislature and the state’s highest court concluded that costs are higher for every justice component for death penalty cases.⁵⁰⁹ In Indiana, a legislative study estimated that a bill which would replace the death penalty with life-without-parole would save the state \$5 million per year.⁵¹⁰ Additionally, a study conducted by the New York Department of Correctional Services estimated that the death penalty would cost taxpayers \$1 million per capital trial.⁵¹¹

508. See, e.g., Nakell, *The Cost of the Death Penalty*, 14 CRIM. L. BULL. 69 (1978); Comment, *The Cost of Taking a Life: Dollars and Cents of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221 (1985) (authored by Margaret Garey).

509. See COMMITTEE TO STUDY THE DEATH PENALTY IN MARYLAND, FINAL REPORT: THE COST AND HOURS ASSOCIATED WITH PROCESSING A SAMPLE OF FIRST DEGREE MURDER CASES FOR WHICH THE DEATH PENALTY WAS SOUGHT IN MARYLAND BETWEEN JULY 1979 AND MARCH 1984 (1984).

510. INDIANA LEGISLATURE, A FISCAL IMPACT STATEMENT RE SENATE BILL 531 (1989).

511. Moran & Ellis, *Death Penalty: A Luxury Item*, Newsday, June 14, 1989, at 60, col. 1. In addition, a study conducted in New York State in 1982 concluded that, at that time, it would cost the state over \$1.8 million to litigate a capital case. NEW YORK STATE DEFENDER’S ASSOCIATION, INC., CAPITAL LOSSES: THE PRICE OF THE DEATH PENALTY FOR NEW YORK STATE, A REPORT FROM THE PUBLIC DEFENSE BACKUP CENTER TO THE SENATE FINANCE COMMITTEE, THE ASSEMBLY WAYS AND MEANS COMMITTEE, AND THE DI-

Among those reporting similar conclusions is the Houston Chronicle, which reported in 1988 that capital cases cost the state of Texas \$2 million each.⁵¹² Also in 1988, the Miami Herald reported that \$57.2 million had been spent to execute eighteen people in Florida, amounting to well over \$3 million per execution, or approximately six times the cost of imprisoning those same people for their entire lives.⁵¹³ In another 1988 report, the Sacramento Bee reported that it currently costs the State of California at least \$15 million per execution to operate its capital punishment system, and that California taxpayers would save \$90 million per year by abolishing the death penalty.⁵¹⁴ Moreover, a recent estimate concluded that it would cost approximately \$7.3 million to sentence one person to death in New Jersey.⁵¹⁵ Meanwhile, in Michigan, a state with no death penalty but with over 1,100 people serving life-without-parole terms, many have concluded that the approximately \$22,000 cost of housing an inmate per year is a bargain compared to the cost of death penalty trials and appeals, which, it is estimated, would be at least \$1.8 million per case in that state.⁵¹⁶

Accordingly, there can no longer be any serious doubt whether the death penalty costs more than the available alternatives. The only question now is *how much* money the death penalty wastes.

C. *The Death Penalty Diverts Resources Away from Fighting Crime*

The constant debate over the death penalty diverts the public's attention away from considering measures which could truly serve to fight crime. Perniciously, the death penalty debate enables public officials and legislators to falsely assert that they are being tough on crime because they favor the death penalty. They may, at least for a while, thereby avoid taking effective, if unexciting, measures that really would prevent crime, such as putting more police on the street, adding courts, prosecutors and defense counsel, and providing drug treatment facilities for everyone who would use them. As former British Prime Minister Edward

VISION OF THE BUDGET (Apr. 1, 1982). That study, which established a model charting system based on 144 cost centers, only dealt with the first three levels of judicial review. *See id.*

512. Gradess, *The Death Penalty Doesn't Pay*, Houston Chronicle, Mar. 13, 1988, § 6, at 1, col. 1.

513. Von Drehle, *Capital Punishment in Paralysis*, Miami Herald, July 10, 1988, at 1A, col. 1.

514. Magagnini, *Closing Death Row Would Save State \$90 Million a Year*, Sacramento Bee, Mar. 28, 1988, at 1, col. 1.

515. Jones Presentation, *supra* note 67.

516. *See* Katz, *supra* note 460, at 5.

Heath has stated, "the constant emphasis on capital punishment is preventing us from giving real attention and resources to the problems of crime in a modern democracy."⁵¹⁷

Moreover, where the death penalty is enacted, it uses up financial resources that could be put to far better uses which, unlike the death penalty, could help control violent crime.⁵¹⁸ According to one estimate, the death penalty would cost New York taxpayers approximately \$550 million over its first five years, "with no discernible payoff in the reduction of murder or other violent crimes."⁵¹⁹ This same money "would buy 250 more police for the Tactical Narcotics Team . . . and build prisons for 6,000 inmates,"⁵²⁰ measures which would surely incapacitate more criminals than the death penalty.

New York State already faces serious difficulties in providing adequate representation for indigent criminal defendants across the state. New York has sixty-two counties with eighty separate plans for providing counsel to indigent criminal defendants. An attempt to accommodate capital trials within the state's currently inadequate public defense system would surely fail. Yet, an effort to provide the proper representation which such complex cases require⁵²¹ would be an unacceptable drain on the state's ability to provide other required legal services. If New York tries, as its neighbor New Jersey has, to avoid ineffectiveness of defense counsel, it will have to pay substantial amounts in the process. New Jersey reportedly spent \$6.9 million in one year, an average of \$42,000 per trial, just providing expert witnesses for the defense, and mil-

517. ENGLISH HOUSE OF COMMONS, OFFICIAL REPORT, PARLIAMENTARY DEBATES (Hansard), Vol. 45, No. 20, July 13, 1983. Great Britain abolished the death penalty for murder in 1969. See AMNESTY INTERNATIONAL, WHEN THE STATE KILLS: THE DEATH PENALTY; A HUMAN RIGHTS ISSUE 226 (1989). Various efforts to reinstate it have been defeated in subsequent years. *Id.*

518. For example, Seminole County, Georgia has gone deeply into debt just to try three death penalty cases. See Ricks, *Seminole Borrows to Pay for Alday Case*, Atlanta J. and Const., Aug. 8, 1988, at B6, col. 4. Although the State has agreed to reimburse the County for much of its expenses in these related cases, only a portion of the money has been paid. *Id.* Seminole County Commission Chairman Robert M. Dutton reported: "We've had to borrow money to operate." *Id.* Dutton continued, "We're hoping that this thing is going to end soon. . . . [B]ut there's no telling." *Id.* Although the cases nearly bankrupted the County, two of the three defendants have now been given life sentences. *Id.* The third case is still on appeal. *Id.*

519. See Moran & Ellis, *supra* note 511, at 62.

520. *Id.*

521. See Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 303-04 (1983); NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, WASHINGTON D.C., STANDARDS FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (Dec. 18, 1988) (adopted by the American Bar Association by resolution of Feb. 7, 1989).

lions more on defense counsel.⁵²²

Similarly, New York's ability to provide adequate prosecution services would be undermined by enactment of the death penalty. Most New York prosecutors have never tried a capital case. In rural areas, many district attorneys work only part time, and would be unable to devote the time and resources necessary for a proper capital trial. This would make errors, and hence the need for retrials, more likely. Moreover, confronting the complexities of the death penalty would undermine the general law enforcement effort by diverting resources, including the prosecutors and police who would be tied down in the additional and lengthier trials which seeking the death penalty entails.

A death penalty system would also impose a great burden on the state-court system. Appellate court judges in other states have pointed out the extreme burden placed on them by the death penalty, and in some states, the highest courts have had to cut back on the non-death cases they will hear in order to confront the tremendous burden of deciding highly complex capital cases.⁵²³ As Chief Justice Dixon of the Louisiana Supreme Court has said, "Capital punishment is destroying the system."⁵²⁴

X. THE DEATH PENALTY PLACES THE UNITED STATES IN ISOLATION FROM VIRTUALLY ALL DEMOCRATIC COUNTRIES AND IN THE COMPANY OF THE WORST DICTATORSHIPS

On the same day in March 1988 that President Reagan appealed, on "compassionate and humanitarian" grounds, to South Africa to grant clemency to the condemned "Sharpeville Six,"⁵²⁵ Willie Jasper Darden was executed in Florida's electric chair, despite evidence from two independent witnesses suggesting that he could not have been at the scene of the crime when the murder was committed.⁵²⁶ Darden had maintained his innocence for the fourteen years he spent on death row, and had become the focus of international debate and protest over capital

522. Jones Presentation, *supra* note 67.

523. For a discussion of the impact on the Florida courts, see Leonard, *Death Cases Are a Big Pain and No Deterrent, Chief Justice Says*, Tallahassee Democrat, Feb. 27, 1986, at 1B, col. 1. For a discussion of the impact on the California Supreme Court, which, as a result of death penalty cases, has had to cut back greatly on the number of non-criminal cases it hears, see Cox, *Inaction In Action*, Nat'l L.J., July 11, 1988, at 1, col. 1.

524. Kaplan, *Death Mill, USA*, Nat'l L.J., May 8, 1989, at 38, col. 4.

525. Johnson, *Reagan in Appeal to Pretoria*, N.Y. Times, Mar. 16, 1988, at A3, col. 2.

526. See *supra* notes 383-84 and accompanying text.

punishment.⁵²⁷ More recently, in the midst of world-wide condemnation of the Chinese government for political executions,⁵²⁸ the United States Supreme Court held that states may execute the mentally retarded,⁵²⁹ and the State of Alabama executed a retarded man who did not die during the first attempt, and whose execution took nearly half an hour.⁵³⁰ Only weeks before, the Supreme Court permitted Florida to execute Aubrey Dennis Adams,⁵³¹ although the Court did not indicate any disagreement with the Eleventh Circuit's unanimous holding that he had been unconstitutionally sentenced to death in what was not harmless error.⁵³²

Among Western democracies, the United States stands virtually alone in permitting capital punishment. It has been abolished throughout Western Europe, and in our own hemisphere has been eliminated in all but a small handful of countries. Throughout the world, the trend since World War II has been toward abolition, and during the past decade an average of at least one country per year has eliminated the death penalty for ordinary crimes or for all crimes. Today over forty percent—nearly half—of all nations have abolished the death penalty in law or in practice.⁵³³

European countries that have abolished the death penalty for all crimes include Denmark, Sweden, Portugal, Norway, Holland, both East and West Germany, Finland, England, Luxembourg, Monaco, Austria, and France.⁵³⁴ In our own hemisphere, the following countries, among others, have abolished the death penalty for all crimes: Uruguay, Venezuela, Honduras, Ecuador, Costa Rica, Nicaragua, Panama, and Colombia.⁵³⁵ In the last few years, Australia and the Phillipines have abolished the death penalty,⁵³⁶ and most recently Cambodia announced its abolition there.⁵³⁷

527. See *supra* notes 383-84 and accompanying text.

528. It is reported that China executed 27 people during June 1989, for political crimes. These executions were condemned by Western governments and some on Capitol Hill. See Holley, *Execution Toll Up to 27 in China; 13 More Seized*, L.A. Times, June 23, 1989, Part I, at 1, col. 3.

529. *Penry v. Lynaugh*, 109 S. Ct. 2934, 2952-58 (1989).

530. See *supra* note 259 and accompanying text.

531. See *supra* notes 197-202 and accompanying text.

532. See *Dugger v. Adams*, 109 S. Ct. 1211 (1989).

533. At least 36 countries have abolished the death penalty for all crimes; at least another 18 have abolished it for all but exceptional offenses, such as genocide or wartime crimes; at least another 27 have abolished it de facto, by no longer carrying out executions. See AMNESTY INTERNATIONAL, *supra* note 517, at 4.

534. *Id.* at 259.

535. *Id.*

536. *Id.* at 102 (Australia) and 191 (Phillipines).

537. See Greenway, *Report From Cambodia*, NEW YORKER, July 17, 1989, at 72, 75.

The following countries are among those which retain the death penalty only for extraordinary crimes such as war crimes or genocide: United Kingdom, Switzerland, Brazil, Canada, Spain, Peru, New Zealand, Israel, Mexico, Fiji, Cyprus, and Italy.⁵³⁸ Most of these countries have not permitted an execution in many decades, and only three (Peru, El Salvador and Spain) have permitted executions in the last two decades.⁵³⁹ In addition, the following countries, among others, while officially retaining the death penalty, have abolished it in practice by not executing anyone in at least the last decade: Belgium, Greece, Ireland, Paraguay, Bolivia, Madagascar, Niger, Senegal, and Sri Lanka.⁵⁴⁰

Several countries have abolished the death penalty and reinstated it, only to abolish it again after a relatively short time. For example, Brazil eliminated the death penalty for common crimes in 1891, but reintroduced it from 1969 to 1979 for politically motivated violent crimes.⁵⁴¹ Argentina abolished it for ordinary crimes in 1921, reintroduced it for certain offenses in 1976 while under military rule, then restricted it again in 1984, after returning to civilian rule.⁵⁴² In addition, several countries that have abolished the death penalty, reconsidered the issue several years later, and decided not to reestablish it. For example, the United Kingdom abolished the death penalty for murder for an experimental period in 1965, and permanently in 1969.⁵⁴³ The United Kingdom reconsidered the issue, but did not reinstate the death penalty in 1983, after extensive debate over the question.⁵⁴⁴ Similarly, Canada abolished the death penalty for murder in 1976, reconsidered the issue in 1987, and decided not to reinstate it.⁵⁴⁵

A number of nations, in addition to having abolished the death penalty internally, have established rules blocking the extradition of any prisoner to any nation where that person could be executed. For example, Austria,⁵⁴⁶ Denmark,⁵⁴⁷ the Netherlands,⁵⁴⁸ Switzerland,⁵⁴⁹ and England⁵⁵⁰ will not extradite a person if that person could face the death

538. AMNESTY INTERNATIONAL, *supra* note 517, at 260.

539. *Id.*

540. *Id.* at 260-61.

541. *Id.* at 111.

542. *Id.* at 102.

543. *Id.* at 226.

544. *Id.* at 86.

545. *Id.* at 116.

546. Auslieferung-und Rechtschilfegesetz of 1979, para. 20.

547. Extradition Act of 1967, art. 10.

548. Extradition Act of 1967, art. 8.

549. Loi federale sur l'entraide internationale en matiere penale of 1981, art. 37.

550. Criminal Justice Act of 1988, Part 1, § 9(11)(b).

penalty by such extradition, or, in some cases, will extradite the person only upon full assurance that he or she will not be executed.

In recent years, condemnation of the death penalty has become increasingly common in international and regional intergovernmental organizations. For example, the United Nations passed a resolution in 1977 stating that the number and type of offenses for which the death penalty is available should be continually restricted "with a view to the desirability of abolishing this punishment."⁵⁵¹ In 1985, the Council of Europe set forth in its Protocol No. 6 that "[t]he death penalty shall be abolished. No one shall be condemned to such penalty or executed."⁵⁵² The United Nations General Assembly is scheduled to consider, during its 1989 session, a proposal put forward by the Federal Republic of Germany that would call for abolition of capital punishment.⁵⁵³

There are, of course, countries besides the United States that retain the death penalty for ordinary (as opposed to wartime) crimes. They include Syria, the USSR, Afghanistan, Iran, Iraq, South Africa, Libya, China, Cuba, Viet Nam, Uganda, Ethiopia, Chile, Hungary, Kenya, North and South Korea, Lebanon, Thailand, Turkey, Guatemala, Saudi Arabia, Poland, Albania, Egypt, Chad, Angola, Czechoslovakia, and Somalia.⁵⁵⁴ Thus, by carrying out numerous executions each year, the United States places itself among nations most of which we routinely condemn as human rights violators, rather than among the enlightened democratic nations with which we otherwise prefer to be associated.

New York is in many ways a symbol of internationalism. With the United Nations, the international financial institutions, and one of the most culturally diverse populations anywhere, New York is a gateway to the rest of the world. Accordingly, it is appropriate that, in 1989, New

551. G.A. Res. 32, 61 U.N. GAOR Supp. (No. 45) at 136, U.N. Doc. A/32/45 (1977).

552. Art. 1, 6th Protocol, Council of Europe (1985). The Council of Europe includes the following nations: Austria, Belgium, Cyprus, Denmark, France, Germany (Federal Republic), Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, and the United Kingdom.

553. See also American Convention on Human Rights, Art. 4(2) and 4(3) (1969); M. Bosuyt, Guide to the "Travaux Pré Paratoires" of the International Covenant on Civil and Political Rights, Art. 6 (1987).

554. AMNESTY INTERNATIONAL, *supra* note 517, at 261-62. On July 14, 1989, the same day that retarded Alabama inmate Horace Franklin Dunkins was executed in a procedure that lasted nearly half an hour, see *supra* note 259, the Somali government reportedly rounded up 46 people, who were tried, convicted, and executed in a matter of hours. *Somalia Executes 46 After Rioting*, N.Y. Times, July 22, 1989, at A4, col. 1. The United States government condemned the action, and State Department spokesman Richard Boucher stated: "We are directing our embassy in Mogadishu to raise our concern with the Somali Government and ask it to insure that civil liberties and human rights are fully protected." *Id.*

York continued to resist appeals to raw emotion and did not enact the proposed capital punishment legislation.

XI. THE OLD AND NEW TESTAMENTS HAVE BEEN GROSSLY DISTORTED AS A PURPORTED JUSTIFICATION FOR THE DEATH PENALTY

In advocating the immoral death penalty, capital punishment advocates often attempt to draw support from the Old Testament and the New Testament. Such efforts to show that Judaism and Christianity favor this country's implementation of the death penalty are directly contradicted by the basic principles of these great religions.

The central applicable principles in our religious traditions are found in the Sixth Commandment, which instructs, "Thou shalt not kill," and in Ezekiel's insistence that "[w]e do not want the death of a sinner, but that he should repent of his way and live."⁵⁵⁵

Yet, advocates of the death penalty often quote passages from the Old Testament which actually do not support the death penalty existing in the United States. For while the Old Testament mentions the death penalty as a form of punishment,⁵⁵⁶ executions were *extremely rare* under Old Testament law. This was no accident, for Judaism recognizes that the Bible includes the death penalty as a punishment largely for symbolic purposes.⁵⁵⁷ As one scholar has observed, "Hebrew law abolished capital punishment not by denying its conceptual validity, but rather by allowing *only* its conceptual validity."⁵⁵⁸

Thus, under the Talmud, there were such extensive procedural requirements for the imposition of the death penalty that, by design, it was nearly impossible to secure a death verdict.⁵⁵⁹ For example, under Talmudic law, capital cases were tried before large Sanhedrins, or courts, composed of up to seventy judges, who cross-examined witnesses against the defendant.⁵⁶⁰ The judges in these courts actually represented the in-

555. *Ezekiel* 18:32.

556. *See, e.g., Exodus* 21:12.

557. *See Cohn, The Penology of the Talmud*, 5 ISRAEL L. REV. 53 (1970).

558. Erez, *Thou Shalt Not Execute: Hebrew Law Perspective on Capital Punishment*, 19 CRIMINOLOGY 25, 40 (1981).

559. *See id.* at 40 ("The strict interpretations of rules pertaining to procedure and evidence . . . rendered requirements for substantive elements of offenses almost impossible to be met in real life, [and] transformed capital punishment laws into a dead letter.").

560. *See Cohn, supra* note 557, at 64 ("[R]ather absurd forms of cross-examination were devised to confuse the witnesses, make them contradict each other and themselves, and thus render their evidence untrustworthy."); *see also Erez, supra* note 558, at 34 ("The court was actually expected to act in defense of the defendant.").

terests of the defendant. Before a Talmudic court could impose the death penalty, it was necessary for two competent witnesses to testify that they saw the defendant commit the crime after he was specifically warned in advance⁵⁶¹ of both the unlawfulness of the act and the fact that it was punishable by death.⁵⁶² Moreover, the use of confessions was strictly prohibited in such cases. Whereas in the United States a criminal defendant, even if mentally retarded, may go to the electric chair on the basis of nothing but his own confession,⁵⁶³ nothing the criminal defendant said before a Talmudic court could, under any circumstances, be used against him in a trial for his life.⁵⁶⁴

Furthermore, if a witness was related to the defendant, or if he had any complaint against the defendant in the past, his testimony was inadmissible.⁵⁶⁵ And, if *any* evidence—including the testimony of a third eyewitness, although only two were required—was shown to be incompetent, *all* of the evidence and testimony against the defendant was dismissed, because “all evidence as to the same matter is treated as a unit, and . . . disqualification of any of the component parts disqualifies the whole.”⁵⁶⁶

It was no accident that under these strict standards it was rare to have even one execution in a great many years. Often many decades went by between executions. The Mishnah notes that a Sanhedrin under which one person was executed in seven years was considered to be a “destructive” court.⁵⁶⁷ Indeed, the rabbis debated whether a court which imposed the death penalty once in *seventy* years was a “Bloody Sanhedrin.”⁵⁶⁸ After the first century of the Common Era (which Christians term A.D.), adjudication of capital cases under Talmudic law was suspended altogether, and discussion of the death penalty became a matter of purely scholarly interest.⁵⁶⁹

The history of the death penalty in Israel reflects Judaism’s continued de facto virtual abolition of capital punishment. Capital punishment for murder was abolished in Israel in 1954, but retained for treason and various war crimes. However, in the entire forty-year history of the na-

561. Erez, *supra* note 558, at 35.

562. Rosenberg & Rosenberg, *In the Beginning: The Talmudic Rule Against Self-Incrimination*, 63 N.Y.U. L. REV. 955, 974-78 (1988).

563. *See supra* notes 266-73 and accompanying text.

564. *See generally* Rosenberg & Rosenberg, *supra* note 562, at 974-84.

565. *Id.*

566. *Id.* at 1009.

567. Erez, *supra* note 558, at 37 (quoting M. Makkot I, 10).

568. Rosenberg & Rosenberg, *supra* note 562, at 1029; *see also* Cohn, *supra* note 557, at 64.

569. *See* Erez, *supra* note 558, at 29.

tion only one execution has taken place—the 1962 execution of Adolph Eichmann, the principal implementor of Hitler's "Final Solution."⁵⁷⁰

In view of this history, it becomes easier to recognize that when specific Old Testament passages are cited in support of the death penalty in the United States, they are being taken out of context. The often quoted "eye for an eye" principle, for example, was actually a limiting doctrine, designed to check the use of disproportionate punishments, not a prescription of an appropriate punishment. Its purpose was to provide, for example, that the "eye" of a rich man would not be treated as better than the "eye" of a poor man,⁵⁷¹ and it limited "the number of sheep a herdsman could seek as restitution if one of his animals had been killed."⁵⁷²

Taken together with the rest of the Old Testament, this principle formed part of a system characterized by a deep sense of fairness and compassion, under which the death penalty could be imposed only under circumstances which arose only once in a great many years. This in no way supports the death penalty system in the United States, under which *hundreds* of people are being sentenced to death *each year*, and numerous executions take place *every year*.

The foregoing principles apply to Christianity as well as to Judaism. Indeed, numerous New Testament passages make clear that the death penalty is inconsistent with the basic tenets of Christianity. For example, *Matthew* says, in a much noted passage, "[y]ou have heard that it was said, 'An eye for an eye and a tooth for a tooth.' But I say to you, do not resist one who is evil. But if any one strikes you on the right cheek, turn to him the other also."⁵⁷³ *Luke* commands similarly, "[j]udge not, and you will not be judged; condemn not, and you will not be condemned; forgive, and you will be forgiven."⁵⁷⁴ And *John*, denouncing an execution, challenges, "[h]e that is without sin among you, let him cast the first stone."⁵⁷⁵

In accordance with the Bible's counseling against the death penalty, many churches, including the Baptist, Presbyterian, Methodist, Church of Christ, Catholic, Unitarian, Mennonite, Episcopal, Lutheran, Quaker

570. AMNESTY INTERNATIONAL, *supra* note 517, at 154.

571. See Cohn, *supra* note 557, at 64-68; see also Erez, *supra* note 558, at 37. In fact, monetary compensation is the punishment provided for by this principle. Cohn, *supra* note 557, at 64-68; Erez, *supra* note 558, at 37.

572. MACKAY, PUNISHMENT IN THE SCRIPTURE AND TRADITION OF JUDAISM, CHRISTIANITY AND ISLAM 3 (1981).

573. *Matthew* 5:38-41.

574. *Luke* 6:37.

575. *John* 8:7.

and Greek Orthodox, have opposed its use.⁵⁷⁶ In addition, many religious organizations, including the National Council of Churches, the United States Conference of Catholic Bishops, the American Friends Service Committee, the Union of American Hebrew Congregations, the Fellowship of Reconciliation, the American Jewish Committee, and the American Ethical Union have denounced capital punishment and called for its abolition.⁵⁷⁷

The head of the Brooklyn Archdiocese of the Catholic Church, Bishop Francis J. Mugavero, is among many who recognize that moral opposition to the death penalty cannot be abandoned in the face of public outcries about violent crime.⁵⁷⁸ Bishop Mugavero recently stated:

Capital punishment is a savage act that does not deter crime, and often is an act of revenge that appeals to our baser instincts. Worst of all, it is being used as a panacea that will keep us from attacking the real problems at the core of the growing violence in our streets.⁵⁷⁹

Perhaps, upon reflection, we will reach the same conclusion as Nobel laureate and Auschwitz survivor Elie Wiesel, one of the world's

576. See, e.g., ZEHR, *DEATH AS A PENALTY: A MORAL, PRACTICAL AND THEOLOGICAL DISCUSSION* (Mennonite Central Committee 1983); *THE CHURCH SPEAKS: CAPITAL PUNISHMENT* (Presbyterian Church in the U.S. 1966). See generally MACKAY, *supra* note 572, at 58-68 (summarizing positions of churches).

577. See generally NATIONAL INTERRELIGIOUS TASK FORCE ON CRIMINAL JUSTICE, *NEW YORK, CAPITAL PUNISHMENT: WHAT THE RELIGIOUS COMMUNITY SAYS* (1980) (collecting resolutions of religious groups).

578. Such thoughts have apparently also affected New York State Senator James Donovan. Donovan, who for over 23 years has voted for the death penalty, has recently indicated that he opposes the death penalty and has expressed doubts on how he will vote on it in the future. Senator Donovan's recent expression of his personal opposition to the death penalty is a result not only of his bout with cancer, but apparently also derives from his deeply held religious views. Senator Donovan said, "[i]n the traditional Judeo-Christian view we're supposed to be forgiving and all men are deemed to be redemptive." McAlary, *'We're all terminal,' senator says*, N.Y. Daily News, June 16, 1989, at C4, col. 1. "I doubt very much whether electrocuting people is the best illustration of our capacity to . . . develop a society with Judeo-Christian principles." Stinson, *Death Penalty Vote Weighs on Key Senator*, N.Y. Post, June 15, 1989, at 7, col. 1. "Ideally," Donovan continued, "we as a state or as a people shouldn't finance the destruction of any human life." *Id.* In light of press reports indicating that the death penalty might be enacted through an override of Governor Cuomo's veto, Senator Donovan concluded that he should reconsider his prior position of voting to override such vetoes. "'The death penalty bills that we passed in prior years were, in part, a certain amount of bravado and also an accommodation of constituents,' said Donovan. 'Everybody . . . said this isn't going anywhere. That isn't the case any more.'" Giordano, *Senator's Soul Searching*, Newsday, June 28, 1989, at 5, col. 1. After more than two decades of voting for the death penalty, Senator Donovan has now stated publicly, "I am personally opposed to the death penalty." Naylor, *Donovan's Coming Back*, Utica Observer-Dispatch, June 13, 1989, at 1A, col. 1.

579. See McKeown, *Mugavero Says He Opposes the Death Penalty*, N.Y. Daily News, June 1, 1989, at 4, col. 1.

most revered moral leaders, who has said, "[w]ith every cell in my being, and with every fibre of my memory, I oppose the death penalty in all forms."⁵⁸⁰

XII. CONCLUSION

The death penalty imposes tremendous costs on society while providing no benefits. It is arbitrary, capricious, permeated with unfairness and racially discriminatory; it kills the retarded and the innocent, while failing to deter crime or to provide additional incapacitation; it compounds the problems of victims' families, diverts much-needed resources away from measures which would aid law enforcement, and isolates the United States from virtually all democratic countries while putting us (except for such states as New York) in the company of the world's most brutal societies.⁵⁸¹

It is a tragedy that the states with capital punishment have wasted so much time and effort on such a useless, counterproductive, and immoral system. It would be even more tragic if, when the facts set forth in this Article become widely known, the death penalty is not completely abolished in the United States.

580. N.Y. Times, May 15, 1989, at D11, col. 1.

581. Former Justice Lewis Powell, Jr., who still believes that capital punishment is constitutional, recently stated that if he were a legislator he would vote against it. He "just can't imagine having the job of pulling the switch on someone in the electric chair" and now believes, contrary to his original supposition, that "capital punishment has not deterred murders," which have continued at a "shocking" level since, with his concurrence, the Supreme Court held the death penalty constitutional in 1976. Justice Powell also made it clear that, as a legislator, he would vote against the death penalty even if it did not entail what he perceives to be "extended litigation and the ineffectiveness of the way the system operates." Justice Powell stated, "I would be inclined to vote against it in any event. We are the only Western democracy that still retains the death sentence. . . . We have a system that isn't working, and I doubt very much whether you could ever by law create a system that would work at the present stage of our civilization." Justice Powell went on to say that "I have moral concerns as well as legal The taking of human life is something that I'd rather leave to whomever one thinks of as God." Taylor, *Powell's Predicament*, MANHATTAN LAW., Oct. 3, 1989, at 12. Accordingly, legislators should "give some thought to the broader points Powell made . . . : The death penalty serves no useful purpose. It will serve no useful purpose no matter how much the review process is tinkered with. It is morally troublesome, if not worse. And it ought to be abolished." *Id.* at 14.