Opposing Capital Punishment: A Prosecutor's Perspective

E. Michael McCann
OPPOSING CAPITAL PUNISHMENT:
A PROSECUTOR’S PERSPECTIVE

E. Michael McCann*  

INTRODUCTION  
In 1940, then United States Attorney General Robert H. Jackson stated, “The prosecutor has more control over life, liberty, and reputation than any other person in America.”¹ “It’s local prosecutors, not judges or governors, who most often decide which criminals live or die for their crimes,” Tina Rosenberg flatly postulated in her New York Times Magazine article entitled Deadliest D.A.² Both statements are entirely accurate. Capital punishment has appropriately been the subject of many law review articles and books. The gravity and finality of the penalty stir strong feelings on both sides of the issue. The various aspects of capital punishment include the potential execution of the innocent, the roles of politics, race and poverty, deterrence, cost, moral and religious perceptions, and a host of other issues.

I write this Article from the perspective of a lawyer in his twenty-eighth year as District Attorney of Milwaukee County, Wisconsin, having served almost four years prior as an assistant district attorney. I write from the perspective of one who has tried or supervised, directly or indirectly, many hundreds of homicide prosecutions. My genuine respect for the district attorneys of Wisconsin and for the hundreds of other prosecutors with whom I have worked or been professionally associated in the National District Attorneys’ Association and the American Bar Association is immense. Some of those prosecutors support capital punishment and some oppose it.

My various experiences and contacts through the years have played a role in shaping my opposition to capital punishment. It is from this particular perspective, that of the experienced elected district attorney, that I write at this time as the Wisconsin legislature deliberates the

* District Attorney, Milwaukee County, Wisconsin; B.A., University of Detroit, 1959; LL.B., Georgetown University, 1962; LL.M., Harvard University, 1963. Mr. McCann was first elected District Attorney in 1968 and has been re-elected to the post every two years thereafter. In perhaps his most prominent case, Mr. McCann successfully prosecuted serial slayer Jeffrey Dahmer in 1992.

1. JOHN J. DOUGLASS, ETHICAL ISSUES IN PROSECUTION 9 (1988).
adoption of capital punishment. My focus will be upon potential execution of the innocent, on politics and race, and more briefly on cost and deterrence. I will touch, as well, on the opposition to capital punishment among Wisconsin district attorneys and from religious consistories in the State.

PROPOSED WISCONSIN LEGISLATION

Four bills, SB 1, AB 298, AB 352, and AB 937 are pending before the legislature proposing various grounds for the adoption of capital punishment in the State of Wisconsin. All the bills would apply to offenders sixteen years of age or older who intentionally kill. SB 1 would provide capital punishment for the slaying of a child under sixteen. AB 352 would expand the victim category to include an on-duty police officer or correctional officer. AB 298 would apply to the killing (1) of a victim for hire, (2) of a child under age fourteen, (3) of an on-duty firefighter, peace officer, or corrections employee, (4) of serial or multiple victims, and (5) in connection with a kidnapping or sexual assault. AB 937 would provide capital punishment for any intentional killing. Each bill provides for trial to a court or jury in a bifurcated procedure with ascertainment of guilt in the first portion and determination of punishment in the second. Under the bills, the jury will be instructed to consider the presence or absence of several aggravating factors and several mitigating factors listed in the bills and other mitigating factors submitted by the defense.

Under SB 1, AB 298, and AB 352, the sentence recommended by the majority jury will be advisory to the trial judge who is then to weigh the aggravating factors against the mitigating factors and impose capital punishment or a life sentence with various or no release options. Under AB 937, the majority jury recommendation will be for life.

7. SB 1, supra note 3, § 27; AB 298, supra note 4, § 27; AB 352, supra note 5, § 27; AB 937, supra note 6, § 26.
8. SB 1, supra note 3, § 25.
9. AB 352, supra note 5, § 25.
10. AB 298, supra note 4, § 25.
11. AB 937, supra note 6, § 24.
12. SB 1, supra note 3, § 36; AB 298, supra note 4, § 36; AB 352, supra note 5, § 36; AB 937, supra note 6, § 35.
13. SB 1, supra note 3, § 36; AB 298, supra note 4, § 36; AB 352, supra note 5, § 36.
imprisonment or death and the judge, after weighing the factors, shall make the final decision. Under all four bills, if death is imposed, appeal to the Wisconsin Supreme Court will be automatic. Under SB 1, AB 298, and AB 352, Wisconsin Statutes section 940.01(1) would remain as it is, broadly crafted to include all intentional homicide, while the proposals would add options available to be targeted at the offenders involved in the types of intentional homicides listed under what would become 940.01(1)(b). AB 937 would replace current section 940.01(1), and would provide either life without parole or execution upon conviction.

Current reports indicate that a capital punishment bill would pass in the assembly but would fall one vote short in the Senate. On March 28, 1996, a resolution to place a referendum question on capital punishment on the November 1996 ballot failed in the Wisconsin Senate by a vote of twenty-one to twelve. A number of supporters of capital punishment voted against the proposal on grounds other than opposition to executions. While it appears unlikely that the current legislature will adopt any of the pending bills, all persons knowledgeable on the issue, aware of the extensive support for capital punishment among legislators, anticipate a strong return to the subject in the 1997-1999 session.

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14. AB 937, supra note 6, § 35.
15. SB 1, supra note 3, § 36; AB 298, supra note 4, § 36; AB 352, supra note 5, § 36; AB 937, supra note 6, § 35.
16. The present version of the statute reads: "OFFENSE. Except as provided in sub. (2), whoever causes the death of another human being with intent to kill that person or another is guilty of a Class A felony." Wis. Stat. § 940.01(1) (1995). Subsection (1) would be renumbered to (1)(a) under three bills: SB 1, supra note 3, § 24; AB 298, supra note 4, § 24; AB 352, supra note 5, § 24.
17. SB 1, supra note 3, §§ 24 and 25; AB 298, supra note 4, §§ 24 and 25; AB 352, supra note 5, §§ 24 and 25.
18. AB 937, supra note 6, § 24.
21. The Author believes that the vote reflects the Senate's sentiment on the referendum only, and not its sentiment on the death penalty itself, as evidenced by the fact that several pro-death penalty senators voted against the referendum.
22. JOURNAL OF THE WIS. SENATE, Oct. 19, 1993, at 480. The vote on Senate Bill 23 was 21 to 12 in favor of indefinite postponement. Id.
in Oklahoma City, the continuing impact of Jeffrey Dahmer's necrophilic serial slayings, and several other widely publicized murders in Wisconsin have quickened citizen and legislative support for capital punishment. Paroled sex offender David Spanbauer was convicted of the Fox River Valley intentional homicides of ten-year-old Ronelle Eichstedt, twelve-year-old Cora Jones, and twenty-one-year-old Trudi Jeschke. James and Theodore Oswald, father and son respectively, were convicted of the intentional slaying of on-duty Waukesha Police Captain James A. Lutz during a wild west style bank robbery, hostage seizure, and gun firing chase. Curtis Walker and Denziss Jackson were convicted of the intentional ambush killing of on-duty Milwaukee Police Officer William Robertson. All the Wisconsin offenders involved were sentenced to lengthy terms that will surely result in their deaths in prison except for the eighteen-year-old Jackson who was sentenced to fifty years without parole for his somewhat lesser role in Officer Robertson's death.

These types of slayings leave distraught family members and communities deeply touched and troubled by the loss of children and respected peace officers. Polls show that a majority of Wisconsin citizens (71%) now support the adoption of a capital punishment law. When given the choice, however, between death and life in prison with no opportunity for parole, the percentage in favor of death drops to 53%. Even if the victim were a twelve-year-old child, the percentage in favor of death over life without parole increases to no more than 65%.

It is understandable that consideration of capital punishment for the offender would arise in connection with murder cases. Clearly, the offender has torn from the victim a value beyond all property: life itself. No amount of restitution can make the victim whole. Anguish beyond compare is visited upon the family of the victim. A child loses a parent, a parent loses a child, a spouse or sibling's life is taken and the lives of the survivors are materially changed for all their own lifetimes. When the loss of life is attended with the knowledge that the loved victim was

23. Oklahoma is a capital punishment state. See OKLA. STAT. ANN. 21, § 701.9 (West 1996).
27. Id. at 2.
first sexually assaulted, wounded, or tortured, the feelings of deprivation, anger, and anguish often impact upon the survivors with an overwhelming force beyond any other experience known to the human spirit. It comes as no wonder that in the United States, where in excess of 20,000 have been slain annually in the recent past, the demand for capital punishment has grown. If the keenly felt desire for vengeance alone could guarantee sound public policy, capital punishment would carry the day. However, to oppose the adoption of capital punishment is not to fail to appreciate the value of human life. Indeed, it is the very importance and preciousness beyond compare of human life that underpins the most powerful reason to oppose capital punishment—the knowledge that innocent persons will inevitably be convicted and executed.

**EXECUTION OF THE INNOCENT**

Mr. Justice Marshall, concurring in *Furman v. Georgia*, noted that "[n]o matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging how many innocent persons have been executed, but we can be certain that there were some." In *Innocence and the Death Penalty: Assessing the Danger of Mistaken Execution*, the Subcommittee on Civil and Constitutional Rights listed forty-eight capital punishment cases arising between 1973 and 1993 in which convictions were overturned and persons released from death row. The Subcommittee study in part concluded:

Americans are justifiably concerned about the possibility that an innocent person may be executed. Capital punishment in the United States today provides no reliable safeguards against this danger. Errors can and have been made repeatedly in the trial of death penalty cases because of poor representation, racial prejudice, prosecutorial misconduct, or simply the presentation of erroneous evidence. Once convicted, a death row inmate faces

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30. *Id.* at 367-68 (Marshall, J., concurring) (footnote omitted).
serious obstacles in convincing any tribunal that he is innocent.\textsuperscript{32}

The Subcommittee study reflected a continuation of the work of Professors Hugo Adam Bedau and Michael L. Radelet. Bedau and Radelet conducted an extensive investigation of capital cases reported in various fashions to be potential miscarriages of justice.\textsuperscript{33} They identified 350 cases of capital punishment convictions between 1900 and 1985 in which there are sound reasons to conclude that the convictions were in error.\textsuperscript{34} In 139 of those cases, the defendant was sentenced to die.\textsuperscript{35} In 23 cases, the innocent defendant was executed.\textsuperscript{36} They listed the grounds for such errors as follows with more than one error having occurred in some cases:

\textbf{CAUSES OF ERRONEOUS CONVICTION}\textsuperscript{37}

\begin{center}
\begin{tabular}{|l|l|}
\hline
\textbf{Type of Error} & \textbf{Number of Cases} \\
\hline
\hline
\textbf{I. POLICE ERROR} & \textbf{82} \\
A. Coerced or other false confession & 49 \\
B. Negligence & 11 \\
C. Other overzealous police work & 22 \\
\hline
\textbf{II. PROSECUTOR ERROR} & \textbf{50} \\
A. Suppression of exculpatory evidence & 35 \\
B. Other overzealous prosecution & 15 \\
\hline
\textbf{III. WITNESS ERROR} & \textbf{193} \\
A. Mistaken eyewitness identification & 56 \\
B. Perjury by prosecution witness & 117 \\
C. Unreliable or erroneous prosecution testimony & 20 \\
\hline
\textbf{IV. OTHER ERROR} & \textbf{209} \\
A. Misleading circumstantial evidence & 30 \\
B. Incompetence of defense counsel & 10 \\
C. Judicial denial of admissibility of exculpatory evidence & 7 \\
D. Inadequate consideration of alibi evidence & 45 \\
\hline
\end{tabular}
\end{center}

\textsuperscript{32} Id. at 19.


\textsuperscript{34} Bedau & Radelet, \textit{supra} note 33, at 23-24, 91-172, and passim.

\textsuperscript{35} Id. at 36 (Table 2).

\textsuperscript{36} Id.

\textsuperscript{37} Id. at 57 (excerpting Table 6).
OPPOSING CAPITAL PUNISHMENT

E. Erroneous judgment on cause of death 16
F. Fraudulent alibi or false guilty plea made by defendant 17
G. Conviction demanded by community outrage 70
H. Unknown 14

Number of cases counted once: 198 (including all "unknown" cases)
Number of cases counted twice: 120
Number of cases counted three times: 32

In their article, Bedau and Radelet discuss each of the 350 cases identifying the circumstances of the prosecution and the critical elements that caused the erroneous conviction. The scenarios presented occurred in many different states and could recur in any state.

The Bedau and Radelet study included five Wisconsin cases in which murder convictions were returned by the jury, and the verdicts were later overturned:

Johnson, John (white). 1911. Wisconsin. John Johnson was convicted of murder and sentenced to life imprisonment. A former mental patient, Johnson feared being lynched. When told that a mob was about to break into his cell, he confessed. A former judge, however, was convinced of Johnson's innocence and continued to pursue the case. Governor Blaine commuted Johnson's sentence, and in 1922 Johnson was released after the victim's father was shown to have committed the crime.

Long, Eli J. (white). 1918. Wisconsin. Long was convicted of murder and sentenced to life imprisonment. In 1920, he was released by court action on the basis of newly discovered evidence. Efforts to obtain compensation from the state failed.

LeFevre, Frank B. (white). 1942. Wisconsin. LeFevre was convicted of first-degree murder and sentenced to life imprisonment. Alibi testimony and results of lie detector tests (not admitted at trial) supported his claim of innocence. On appeal, the conviction was reversed on the ground that the evidence was insufficient to sustain the conviction, and LeFevre's release was ordered.

38. Id. at 91-172 (Appendix A).
39. Id. at 131.
40. Id. at 141; Long v. State, 176 Wis. 361, 187 N.W. 167 (1922).
41. Bedau & Radelet, supra note 33, at 140; LeFevre v. State, 242 Wis. 416, 8 N.W.2d 288 (1943).
Kanieski, Edward F. (white). 1952. Wisconsin. Kanieski was convicted of first-degree murder and sentenced to life imprisonment. Kanieski consistently maintained his innocence, but his petitions for a writ of error and habeas corpus were denied. In 1972, on further appeal, the conviction was reversed, and the state supreme court ordered Kanieski released after he had served nearly twenty years. The court found the evidence was not sufficient to sustain the conviction and directed that Kanieski "is thus entitled to release from custody and his freedom, without the possibility of a new trial." 

Reichhoff, Kenny Ray (white). 1975. Wisconsin. Reichhoff was convicted on two counts of first-degree murder and sentenced to life imprisonment. In 1977, an investigation by Wisconsin State Journal reporter Richard Jaeger raised many doubts and revealed major discrepancies in the prosecutor's case. On appeal the conviction was overturned on the technical grounds that the judge erred in allowing the jury to infer that the defendant's silence at the time of his arrest was a tacit admission of guilt. Later in 1977, Reichhoff was acquitted at retrial; after nearly three years in prison he was released.

Three additional cases from Milwaukee County also highlight how errors can occur:

State v. Fillyaw relied on circumstantial evidence for the conviction and life sentence of a black defendant for the 1977 slaying of his girlfriend. An appeal based on legal issues was unsuccessful. Later retesting of the defendant's blood raised a question as to the accuracy of a state crime laboratory serologist's trial testimony, possibly occasioned by malfunctioning testing equipment, which matched the defendant's blood to a blood stain on the victim's purse. The court determined that the new test raised such doubt as to merit vacation of the conviction under which the defendant had served ten years. As the blood stain on the purse had been completely consumed in the original testing, none was available for retesting for a new trial and the defendant was

42. Bedau & Radelet, supra note 33, at 133 (citing Kanieski v. Gagnon, 427 F.2d 401 (7th Cir. 1970)); State v. Kanieski, 30 Wis. 2d 573, 141 N.W.2d 196 (1966).
43. Bedau & Radelet, supra note 33, at 133 (citing Kanieski v. Gagnon, 54 Wis. 2d 108, 194 N.W.2d 808 (1972)).
44. Id. (quoting Kanieski, 54 Wis. 2d at 117, 194 N.W.2d at 813).
45. Id. at 153 (citing Reichoff v. State, 76 Wis. 2d 375, 251 N.W.2d 470 (1977)).
46. Id.
47. 104 Wis. 2d 700, 312 N.W.2d 795 (1981).
discharged from custody. Another instructive case, *State v. Hemauer*, did not relate to murder but to counts of attempted murder and sexual assault; the case involved strong eyewitness testimony by the victim and other circumstantial inculpatory evidence. The proffered alibi of an acquaintance of the white defendant persuaded neither the District Attorney's Office nor the jury, and the defendant was convicted of abduction, rape, and attempted murder. He served eight years in prison before newly available scientific testing of seminal deposits on the victim's underwear excluded the defendant as her assailant.

In *State v. Sanders*, the defendant was charged with the 1973 slayings of on-duty Milwaukee Police Officers Gerald Hempe and Charles Smith. There was good reason to believe that several friends of the accused saw the killings, but full, continuing cooperation was not forthcoming. A young parolee came forward, however, who had particular knowledge regarding the shooting: (1) he was able to describe the shooting, (2) he related details such as where the police van stood and where the officers bodies lay, and (3) he described the conduct of police on the scene during the investigation. The fact that the parolee had sought no parole advantage as confirmed by police and his agent, that he did not seem to stand to benefit from his cooperation, that he seemed sincere, and that his details concerning (2) and (3) above were accurate, all led police officers and the district attorney to believe he was truthful about seeing the shooting of the officers. On motion of the defendant because of pretrial publicity, the case was transferred to Green Bay in Brown County. The parolee testified forcefully in court concerning the slayings, identifying the defendant as the shooter. Cross-examination, hailed by Wigmore as "beyond any doubt the greatest legal engine ever invented for the discovery of truth," was conducted by skilled and experienced defense counsel but did not shake the parolee.

48. The decision releasing Fillyaw from custody was signed on Mar. 3, 1987. The case, No. I-9490, is on file with the Milwaukee County District Attorney.

49. 64 Wis. 2d 62, 218 N.W.2d 342 (1974).

50. Id. at 64, 218 N.W.2d at 343.

51. The decision releasing Hemauer from custody was signed on Apr. 8, 1981. The case, No. H-4499, is on file with the Milwaukee County district attorney.

52. 69 Wis. 2d 242, 230 N.W.2d 845 (1975).

53. Id. at 244-45, 230 N.W.2d at 848.

54. Id. at 252-55, 230 N.W.2d at 851-53.

55. Id. at 260-61, 230 N.W.2d at 855-56.

56. 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 32 (James H. Chadbourn rev. 1974).
The testimony of the parolee was broadcast on television in Milwaukee, and a young man immediately contacted authorities and stated that he had been with the parolee a few blocks from the shooting and that the parolee had been drawn to the homicide locus by the sirens of responding squads, and arrived there to observe the scene and the conduct of investigators moments after the shooting. The parolee continued to insist he was telling the truth, recanting only as he was being hooked up to a polygraph machine. The prosecution offered to join in a mistrial motion, but the defense declined, strategically anticipating benefit from the prosecutor's statement to the jury at its next session that the parolee had given false testimony. While the defendant was properly found guilty by the jury of both murder counts, the case illustrates that even good faith conduct of police and prosecutor can still fail on occasion to identify false testimony and that cross-examination cannot always insure that a perjurious witness will be unmasked.

Murder at the hands of a wrongdoer is tragic. Intentional execution of an innocent person at the hands of the government, after the disgrace attendant upon wrongful adjudication of guilt, no matter how the error occurred, is, simply put, horrendous. Because we do not tolerate murder, faulty executions by the government must be stopped as well. Can such official erroneous executions be prevented short of ending capital punishment?

**THE ROLE OF THE PROSECUTOR**

Virtually all cases resulting in a murder conviction, well founded or not, were initiated by a prosecuting attorney acting within the broad discretion traditionally accorded district attorneys in all states. In most cases, it is the prosecutor who decides whether to seek the death penalty or not. In view of the key role that district attorneys clearly play in all capital punishment cases, especially those in which error begets conviction and execution of the innocent occur, we must ask what measures can be taken with respect to the prosecution function to flatly ensure that such miscarriages of justice do not occur.

A number of carefully crafted precepts have been advanced by the American Bar Association (ABA), the National District Attorneys Association (NDAA), and the American Bar Association Ethics and Professional Responsibility Committee whose Model Rules of Professional Conduct have correlates in most states, that are designed in part to

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57. *Sanders*, 69 Wis. 2d at 264, 230 N.W.2d at 857.
reduce the possibility that prosecutors will convict the innocent.

The ABA Standards for Criminal Justice: Prosecution Function and Defense Function, section 3-3.9, provides:

(a) A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support the conviction.

(b) ... Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are:

(1) the prosecutor's reasonable doubt that the accused is in fact guilty.

Similar standards are found in the NDAA National Prosecution Standards. Tracking the ABA Model Rules of Professional Conduct,
Wisconsin Supreme Court Rule (S.C.R.) 20:3.8 provides that “[t]he prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." 60

Essentially, these guidelines and rules provide that a district attorney may charge a homicide case on probable cause grounds and ought not proceed to trial without substantially stronger evidence. However, the far better charging practice, and one which emphasizes justice and substantially reduces the possibility of charging and convicting an innocent person, is “but for the exceptional case, not to invoke the awesome power of the state unless the crime in all likelihood can be proved beyond a reasonable doubt.” 61

The ABA Criminal Justice Standards: Prosecution Function and Defense Function, section 3-3.11, targeting the problem of concealed exculpatory evidence, provides:

(a) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate

Factors to Consider.
The prosecutor should exercise his discretion to file only those charges which he considers to be consistent with the interests of justice. Factors which may be considered in this decision include:

a. The probability of conviction;
b. The nature of the offense;
c. The characteristics of the offender;
d. Possible deterrent value of prosecution to the offender and society in general;
e. Likelihood of prosecution by another criminal justice authority;
f. The willingness of the offender to cooperate with law enforcement;
g. Aid to other criminal justice goals through non-prosecution;
h. The interests of the victim;
i. Possible improper motives of a victim or witness;
j. The availability of adequate civil remedies;
k. The age of the offense;
l. Undue hardship caused to the accused;
m. A history of non-enforcement of a statute;
n. Excessive cost of prosecution in relation to the seriousness of the offense;
o. Recommendations of the involved law enforcement agency;
p. The expressed desire of an offender to release potential civil claims against victims, witnesses, law enforcement agencies and their personnel, and the prosecutor and his personnel, where such desire is expressed after the opportunity to obtain advice from counsel and is knowing and voluntary; and
q. Any mitigating circumstances.

Id. § 43.6.
60. Wis. S.C.R. 20:3.8.
the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.
(b) A prosecutor should not fail to make a reasonably diligent effort to comply with a legally proper discovery request.
(c) A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.\textsuperscript{62}

The \textit{NDAA National Prosecution Standards} and the Wisconsin counterparts to the \textit{ABA Model Rules of Professional Conduct} impose similar requirements on district attorneys.\textsuperscript{63} Numerous cases spell out and elaborate this duty of the prosecution.\textsuperscript{64}

The \textit{ABA Criminal Justice Standards: Prosecution Function and Defense Function} targets perjured and erroneous evidence, providing that "[a] prosecutor should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity."\textsuperscript{65} Following the \textit{ABA Model Code}, Wisconsin S.C.R. 20:3.3(a)(4) provides a similar ethical stricture relating to evidence known to be false.\textsuperscript{66} Under \textit{Mooney v. Holohan}, knowing use of false testimony and evidence by a prosecutor violates constitutional due process and constitutes reversible error.\textsuperscript{67} Wisconsin S.C.R. 20:3.3(c) provides that "[a] lawyer may refuse to offer evidence that the lawyer reasonably believes is false."\textsuperscript{68} The rules ought to provide that no prosecutor should ever present evidence he or she reasonably believes is false.

In a nutshell, the relevant standards, ethical rules, and cases provide that a prosecutor ought not proceed with a case without solid evidence of guilt, ought never use false testimony or evidence, and should promptly provide all information and material to the defense which tends to exculpate the offender or mitigate the penalty. The rules are well known to prosecutors. Tragically, they are occasionally violated in capital cases in which a conviction can cost an innocent person, or one

\begin{itemize}
\item \textsuperscript{62} \textit{PROSECUTION FUNCTION}, \textit{supra} note 58, at § 3-3.11.
\item \textsuperscript{63} \textit{NAT'L PROSECUTION STANDARDS, supra} note 59, at §§ 25.4, 52.2, 53.1-.5; Wis. S.C.R. 20:3-4(d), 20:3.8(d).
\item \textsuperscript{64} \textit{See, e.g., Kyles v. Whitley}, 115 S. Ct. 1555 (1995); United States v. Agurs, 427 U.S. 97 (1976); Giglio v. United States, 405 U.S. 150 (1972); Brady v. Maryland, 373 U.S. 83 (1963); State v. Gibas, 184 Wis. 2d 355, 516 N.W.2d 785 (Ct. App. 1994); State v. Ruiz, 118 Wis. 2d 177, 347 N.W.2d 352 (1984); Wold v. State, 57 Wis. 2d 344, 204 N.W.2d 482 (1973).
\item \textsuperscript{65} \textit{PROSECUTION FUNCTION, supra} note 58, at § 3-5.6(a).
\item \textsuperscript{66} Wis. S.C.R. 20:3.3(a)(4).
\item \textsuperscript{67} Mooney v. Holohan, 294 U.S. 103, 112-13 (1935).
\item \textsuperscript{68} Wis. S.C.R. 20:3.3(c) (emphasis added).
\end{itemize}
in truth guilty of a lesser charge, his or her very life. Even in the absence of a violation of such rules, how is it that an innocent person can be charged and convicted by a district attorney? Why are the rules sometimes violated and why must one fear, or indeed even anticipate, that they will be violated in Wisconsin in capital cases?

Consider first the possibility of good faith error by the district attorney in charging a case. Prosecutors are drawn from the public at large, and the available pool of attorneys in particular. Inevitably there will be variances from one district attorney to another in the skills, experience, and acumen available to understand the facts, organize the materials, and assess whether appropriate evidence exists to charge and convict. In less populated counties in Wisconsin, even with salary increases over the past five years, the pay is sometimes not sufficient to attract or long retain the most capable lawyers. Differences in experience at evaluating the authenticity and accuracy of witnesses can be vital. Conscientious witnesses can make erroneous identifications. The young, inexperienced prosecutor, not having confronted erroneous or biased or perjurious witnesses, is more likely to accept their credibility than the more seasoned, veteran district attorney who has encountered many such persons over years of practice. Some slayings, particularly gang murders, are prosecutable only through the testimony of criminally involved co-conspirators. In other cases, informers involved in pernicious relationships will covertly offer information. Sometimes a cellmate of an offender will claim the accused has made damaging admissions. In many

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69. The salary of the elected district attorney is determined by the state legislature. Each district attorney is compensated according to his or her category, determined by the population of the "prosecutorial unit" in which he or she serves. Wis. Stat. § 978.12(1)(a) (1993-94).

The Joint Committee on Employment Relations (JCOER) approved the following salaries for district attorneys on June 27, 1995:

<table>
<thead>
<tr>
<th>Population Category</th>
<th>1995-96 DA Term</th>
<th>1997-98 DA Term</th>
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<tr>
<td>&gt; 500,000</td>
<td>$92,442</td>
<td>$95,236</td>
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<tr>
<td>&gt; 250,000 to 500,000</td>
<td>83,328</td>
<td>85,850</td>
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<tr>
<td>&gt; 100,000 to 250,000</td>
<td>78,772</td>
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<td>&gt; 75,000 to 100,000</td>
<td>74,214</td>
<td>76,458</td>
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<td>&gt; 50,000 to 75,000</td>
<td>69,658</td>
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<td>&gt; 20,000 to 35,000</td>
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<td>&lt; 20,000</td>
<td>55,988</td>
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State Prosecutor's Office Memorandum (SPO) 95-44, June 20, 1995, and updated to reflect the approval of the JCOER on Feb. 29, 1996.

Assistant district attorneys (ADAs) salaries for the 1995-97 term are set at a minimum of $17.762 per hour ($36,944.96 per year), $18.296 per hour ($38,053.60) after a six-month raise, to a maximum of $44.592 per hour ($92,751.36). SPO 95-44, at 2.
such cases, the potential witness has a substantial criminal record and is seeking some benefit from the system, often the reduction or dismissal of a charge pending against him or her.

It falls to the district attorney to consider all witnesses, whether they appear honorable or dishonorable, to determine what opportunity and capability they had to see or hear the facts alleged, to discern motives or biases, to confront them aggressively or disarm them with graciousness, to examine (and in effect cross-examine) them, always probing for the truth or falsity of their statements, and to cause as careful a check as possible for corroboration or conflict with the known facts. Some district attorneys may not have the energy, time, know-how, will, skill, or the patience to so scrutinize witnesses. Some prosecutors may simply work off police reports and undertake no independent assessment of witness reliability. Clearly the impact of the prosecutor and the manner in which he or she assesses and handles the witnesses in a homicide case can result in an effective prosecution of the guilty or a tragic persecution of the innocent. Indeed, some Wisconsin prosecutors, acting in good faith but lacking experience, skill or dedication, have obtained convictions of innocent persons. However, even extensive experience, superb skills, and intense dedication are no guarantee against a miscarriage of justice. It is inevitable that other innocent persons will also be convicted. Execution, of course, ends all potential for undoing such errors.

Because many offenders do not kill in the presence of others, homicide prosecutions are frequently based on circumstantial evidence. The competence or incompetence of crime laboratory work and whether there has been effective collection of both potentially inculpatory and exculpatory information is critical. Some police officers involved in murder investigations are indefatigable in their efforts to lawfully secure every relevant physical item, to carefully record where it was found or received, to appropriately handle, mark, and package it, and forward it as may be proper for expert evaluation. Other officers negligently miss both inculpatory and exculpatory items, inadequately record their receipt of evidence, fail to mark or package it properly, casually retain it unduly long in personal custody rather than promptly inventory it, and sometimes do not forward items that should be sent to a crime laboratory. In less populous jurisdictions, an experienced district attorney may

70. See supra notes 34-46 and accompanying text.
71. See supra notes 47-57 and accompanying text.
work directly in the field with officers insuring better preparation of cases, but running the risk of getting so caught up in the pursuit as to lose appropriate distance for assessment. An inexperienced prosecutor attempting to direct the field investigation raises the likelihood of impairing a case rather than enhancing it. In large jurisdictions with specialized homicide investigation units, quality of work can vary from excellent to deficient, depending upon the team of detectives. In circumstantial evidence cases, a lack of quality in physical evidence collection and crime laboratory analysis can result not only in the guilty escaping punishment but in the innocent being convicted.

During several years of experience, a district attorney will work closely with many law enforcement officers, talk informally with them, and learn of their biases or prejudices, as well as of their rectitude. He or she will observe their testimony, and that of their witnesses, in the great mine run of cases, especially those involving resistance to arrest. The prosecutor may see the officers interrogate prisoners and hear their testimony, as well as that of the interrogated prisoners, during motions to suppress confessions. This experience can materially aid the conscientious prosecutor in a hard-nosed assessment as to whether police overreaching was involved in securing a confession and how much reliance should be placed on inculpatory statements reported but challenged by the accused. However, while long-term working relationships with officers can provide significant information as to their credibility or suspected mendacity, such contacts can also give rise to friendships that may impair the prosecutor’s capacity for critical assessment of claims of police overreaching in securing confessions.

The terrible menace of such a confession containing unfounded admissions by a person of marginal intelligence, whose will is easily overborne, secured by excessively zealous or overreaching officers, about whose credibility the prosecutor feels visceral suspicions (the so-called “gut” test), is that it may lead directly to the conviction of an innocent person. A key concern, in the case of jury trials, is not that the officers would fabricate the confessions but that their testimony about the manner in which the confessions were secured would lack the candor critical to the jurors’ determination as to how trustworthy the confessions are. The confession of a retarded person, particularly when that person was in spatial propinquity to the locus of the offense at the critical time and there is a dearth of corroborating or conflicting evidence, must be scrutinized with great care, even when taken by an upright officer, to reject unfounded admissions of wrongdoing yielded from the highly suggestible, limited intellect of the accused. Any prosecutor worth his
or her salt, confronted with such confessions must employ all the experience, skill, and discernment at his or her command to determine the reliability of each respective confession and thereupon to use or not use the confession. On occasion, either in response to the district attorney's question or by a volunteered comment, an officer or commander of integrity will tell the district attorney that he or she has doubts about the veracity of a confession. In the end, there can be no guarantee that the district attorney's decision is right and, if wrong, an innocent person might be convicted of a murder. Unfortunately, some prosecutors may not even sense the tenuous aspects of such confessions or because of friendship with the officers may take all such confessions at face value. Other prosecutors, being of unconscionably timorous bent, may be unwilling to confront police hostility occasionally triggered by a decision not to use a confession with the adverse implications that such a determination has for a conviction.

Experience as a prosecutor working with various officers can help distinguish between, on one hand, the hard-working officer who secures in an unbiased fashion all the information a witness may have and conducts lineup investigations so as to carefully avoid influencing the selection of a suspect, and on the other hand, the overzealous officer who inappropriately suggests information to a witness and who pushes an identification witness for more certainty than the witness has. Some officers carefully record both inculpatory and exculpatory information. Other officers tend to brush aside exculpatory statements and record principally inculpatory ones, failing to properly appreciate that while some exculpatory information may turn out to be true (or believed by a jury) and thus lead to exoneration, some seemingly exculpatory information might be shown to be false and thus undercut the credibility of the accused. However, falsity in responding to police questions concerning a homicide is not a definitive indication of guilt; even innocent persons sometimes lie for a variety of reasons when questioned about their activities and whereabouts at the time of a slaying.

Every good district attorney, exercising his or her best judgment, has occasionally told detectives seeking the filing of a homicide charge, "You may have the right person, but you don't have the right evidence," or, when appropriate, "You've got the wrong person." It is sad for both the accused and the community when a prosecutor, for want of experience or skill or because of a flawed investigation, files a murder charge against an innocent person. Even more sad is the ineluctable reality that issuing homicide charges is a human enterprise and even the most experienced, capable and conscientious prosecutor, concerned for justice, working with
a competent team of upright investigators, can make a mistake in relying on an erroneous identification, in misreading circumstantial evidence, in believing a lying co-conspirator or err in good faith in some other fashion and improvidently issue a murder charge against an innocent person.

Confidence that the great writ of habeas corpus stands as a guarantee against erroneous conviction is eroding. From the Supreme Court perspective, as Mr. Justice Blackmun stated in Callens v. Collins,\(^72\) "the Court has 'erected unprecedented and unwarranted barriers' to the federal judiciary's review of the judicial claims of capital defendants."\(^73\) Thereafter, Blackmun cited a series of Supreme Court cases which have materially reduced the reach of habeas corpus.\(^74\) Further, both the United States House of Representatives and the United States Senate are moving aggressively to diminish the reach of the Federal Habeas Corpus statute.\(^75\) On March 15, 1996, H.R. 2703,\(^76\) a gutted anti-terrorism bill still containing sections cutting back on federal statutory habeas corpus, passed the House by a vote of 229-191.\(^77\) Earlier, the House had rejected an effort by liberal North Carolina Representative Melvin Watt, who represents a district with a majority of black voters, and conservative Idaho Representative Helen Chenowith, who had defended the militia movement, in their effort to strike from the bill the habeas corpus sections.\(^78\) Chenowith reminded the House that the limits would bear not only on death row inmates but also to those "wrongfully prosecuted for exercising their constitutional right to bear and keep arms."\(^79\) H.R. 2703 has been referred to a conference committee as has been S. 735\(^80\) which earlier passed the Senate and contains federal habeas corpus statutory changes similar to those in H.R. 2703. Former United States Attorney Generals Benjamin R. Civiletti,

\(^72\) 114 S. Ct. 1127 (1994).

\(^73\) Callens, 114 S. Ct. at 1138 (Blackmun, J., dissenting) (quoting Sawyer v. Whitley, 112 S. Ct. 2514, 2525 (1992)).

\(^74\) Id. Extensive treatment of this issue is beyond the scope of this Article. Others have ably treated this issue. See, e.g., Stephen B. Bright & Patrick J. Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 73 B.U. L. REV. 759, 794 (1995).


\(^78\) Id.

\(^79\) Id.

Jr. and Elliot L. Richardson have called on Congress to reject these proposed limitations on federal habeas corpus statutes.81 Expectations that Congress will heed the call of Civiletti and Richardson are not sanguine. It appears probable, whether constitutional or not, that Congress will diminish the statutory reach of federal habeas corpus even as the Supreme Court develops ever more labyrinthine procedures for a defendant to adequately protect his or her habeas corpus rights.

POLITICS, CAPITAL PUNISHMENT AND THE DISTRICT ATTORNEY

A broad perspective of the power of politics and the death penalty in the criminal justice system can be derived from examining *Harris v. Alabama.*82 The Court examined an Alabama capital punishment scheme, similar to that proposed in the Wisconsin bills, which permitted the trial judge to overrule the jury recommendation as to whether a convicted defendant should be executed or sentenced to life imprisonment without parole.83 In *Harris,* the trial jury had recommended by a seven to five vote that the defendant be imprisoned for life without parole but the court instead imposed the death penalty.84 The majority opinion, in upholding the death sentence, noted that "Alabama's sentencing scheme has yielded some ostensibly surprising statistics,"85 and quoted a report of the Alabama Prison Project, which stated that "there have been only 5 cases in which the judge rejected an advisory verdict of death, compared to 47 instances where the judge imposed a death sentence over a jury recommendation of life."86 In a stinging dissent, Justice Stevens attributed the explanation to politics:

The "higher authority" to whom present-day capital judges may be "too responsive" is a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty. Alabama trial judges face partisan election every six years. The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III.87

83. Id. at 1033.
84. Id.
85. Id. at 1036.
86. Id. (citation omitted).
87. Id. at 1039 (Stevens, J., dissenting).
Justice Stevens noted statistics in Florida indicating that judges there had overridden jury recommendations of life in prison and imposed death sentences 134 times, a substantially higher number than the 51 instances in which they had overridden jury recommendations of capital punishment and imposed life imprisonment. In Indiana, "judges had used overrides to impose eight death sentences and only four life sentences." Wisconsin judges, who will face the same options as judges in Alabama, Florida, and Indiana are elected every six years. In Delaware, where judges do not stand for election, the first seven times judges used the recently provided override power they overturned jury recommendations of death and imposed life sentences. The figures speak for themselves, and are a testimony to the power of electoral politics on the judiciary.

In the Wisconsin 1994 attorney general's race, the challenger identified as a key issue his support of capital punishment and the incumbent's opposition to it. It can be safely anticipated that in district attorney races across the state, the same issue will be raised.

The danger arises not from the stated position of the district attorney, either for or against capital punishment, but that the prosecutor will be guided not by the appropriate legal considerations of a particular case but rather by extraneous pressures that should not influence the charging decision as to whether to file for capital punishment. The discretion of the district attorney is broad and subject to almost no control or judicial review. The burden of proving that a district attorney has abused his or her discretion in seeking the death penalty because of political ambition or community pressure will be extremely difficult, if not impossible to prove.

88. Id. at 1040 n.8 (citations omitted).
89. Id. (citations omitted).
90. WIS. CONST. art. VII, § 7; WIS. STAT. § 753.01 (1993-94).
91. Bright & Keenan, supra note 74, at 794 (footnotes omitted).
92. Amy Rinard & Mary Zahn, Doyle Wins Re-election Handily, MILWAUKEE SENTINEL, Nov. 9, 1994, at 12A.
94. See, e.g., McCleskey v. Kemp, 481 U.S. 279, 296 (1987) ("[T]he policy considerations behind a prosecutor's traditionally 'wide discretion' suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties, 'often years after they were made.'" (citations omitted)); id. at 311-12 ("[T]he capacity of prosecutorial discretion to provide individualized justice is 'firmly entrenched in American law.' . . . [A] prosecutor can decline to charge, offer a plea bargain, or decline to seek a death penalty in any particular

88. Id. at 1040 n.8 (citations omitted).
89. Id. (citations omitted).
90. WIS. CONST. art. VII, § 7; WIS. STAT. § 753.01 (1993-94).
91. Bright & Keenan, supra note 74, at 794 (footnotes omitted).
92. Amy Rinard & Mary Zahn, Doyle Wins Re-election Handily, MILWAUKEE SENTINEL, Nov. 9, 1994, at 12A.
Thirty-two years in the prosecution field have persuaded this writer that most district attorneys are conscientious about their responsibilities; they attempt to prosecute only those persons they believe have truly committed the charged offense, usually employ a charging standard of proof beyond a reasonable doubt when probable cause would be sufficient, and are genuinely appalled upon discovering they have prosecuted an innocent person or convicted an accused of a higher degree of crime than appropriate. Unfortunately, a few prosecutors fall measurably below such standards. Some murder cases, by virtue of the status of the offender (often low, rarely high) the status of the victim, or the heinous nature of the offense, command the attention of the media and deeply stir the passions of the public. The less-than-ethical prosecutor, seeking to assure retention of position, or beset by vaulting ambition to rise to higher office, may seize upon such a situation to initiate either an ill-founded charge seeking capital punishment or overcharge a case in order to invoke capital punishment. There can be no doubt that the district attorney announcing a capital charge before news cameras, pressing the case in Wisconsin courts where still and TV cameras are allowed, and then vehemently pressing after conviction for capital punishment before the jury and the cameras, can emerge as a folk hero. In a high profile homicide case, a pusillanimous prosecutor, yielding to pressure from the press or perceived community demand for action, may bring a capital punishment prosecution lacking commensurate merit, potentially resulting in conviction and execution. On occasion

Of course, ‘the power to be lenient [also] is the power to discriminate,’... but a capital punishment system that did not allow for discretionary acts of leniency ‘would be totally alien to our notions of criminal justice.’” (citations omitted); Wayte v. United States, 470 U.S. 598, 607 (1985) (“selective prosecution” not found even though government prosecuted for failure to register for Selective Service only those whose refusal to register was “vocal.”); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (“[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”).

95. That a district attorney should have the ambition for higher office is perfectly appropriate. Edmund G. (Pat) Brown rose from elected San Francisco District Attorney to Attorney General, and then Governor of California. Earl Warren rose from elected District Attorney of Alameda County to Attorney General, then Governor of California, and finally to Chief Justice of the United States. Thomas Dewey rose from the position of Manhattan District Attorney to Governor of New York and 1948 Republican candidate for President of the United States. Francis McGovern rose from Milwaukee County District Attorney to Governor of Wisconsin. Robert “Fighting Bob” LaFollette rose from Dane County District Attorney to Governor of Wisconsin to United States Senator to candidate of the Progressive Party for President of the United States in 1924. The district attorneys of Wisconsin have historically risen to various levels of the State judiciary in substantial numbers.
a young and inexperienced prosecutor, such as are not infrequently elected in rural counties, may be induced by well-intentioned but ill-advising senior law enforcement officials to press a capital punishment charge on inadequate evidence.

Prosecutors concerned with justice are troubled by fact patterns that can tempt the conscience of the jury. Such a situation arises when a child has been kidnapped, sexually assaulted and slain, or a vulnerable victim has been tortured before being killed, or a respected police officer has been murdered on duty, but the evidence supporting the charge against an unattractive or minority accused falls short of proof beyond a reasonable doubt. An articulate prosecutor senses that a closing argument artfully orchestrated to stoke the passions of the jury but not so fevered as to trigger reversal will surely tempt those jurors to convict, overriding doubts that ought to persist due to deficiencies in the evidence. In such cases, often only the district attorney will know what the defense attorney, the judge, and the investigating officers may suspect (and the jury never perceive) that the district attorney has compromised the precious integrity of his or her office in filing a charge that ought not have been brought.

The prosecuting attorney initiating a capital punishment charge will learn more about the case as trial preparation proceeds. Interviews of witnesses, testimony at the preliminary hearing, receipt of the more detailed autopsy protocol, and evidence analysis from reports coming in from the crime lab bring a better understanding of the facts. Further, as the defense emerges with the approach of trial, the prosecutor often learns of aspects of the case not known at the time of issuance. Occasionally, problems in the case, whether with a prosecution witness' lack of credibility, disappearance of a witness, or suppression of evidence will arise. Now better informed, the prosecutor may determine that the crime was overcharged as a capital offense and that a less serious charge is more appropriate to the facts and that a negotiated plea to a lesser charge would better protect the interests of the public. Alternatively, the prosecutor may determine that justice would be better served by simply filing a lower charge. However, in the minds of some commentators and part of the public, the initial charge brought by the prosecutor, at that stage at which he or she was least informed, is misperceived as being garbed with a pristine quality, and any reduction therefrom appears to cast the district attorney in an adverse light and to compromise the integrity of the criminal justice system. The prosecutor may fear adverse publicity before trial if there is a reduction of charge or after conviction on a lesser charge during victim allocution, when the grieving family may
fiercely criticize the district attorney for the decision to reduce the charge. Concern must arise that in the glare of public attention that would be natural in a capital punishment case, a less-than-ethical prosecutor would proceed on a capital punishment charge, possibly to conviction, when a lower charge in fact ought justly to have been pressed instead.

In some cases, an elected district attorney, not wishing to reach a politically unpalatable (but proper) decision to reduce a charge justifies inaction by saying, "Let the jury decide." While this may appear to be graced with a patina of deference to the jury system, it is in fact an abdication of the district attorney's responsibilities. The jury will rarely, if ever, know as much about the case as the prosecutor and without the district attorney's training and skills will fail to appreciate inadequacies in the evidence or, moved by revulsion stirred by the facts, will feel strongly prompted to convict. Although ethically the prosecutor may be constrained from articulating an opinion on guilt, it must be assumed that most jurors seeing a prosecutor present a case and argue for conviction will conclude that the prosecutor firmly believes the accused to be guilty, or why else would a prosecutor of integrity be arguing for conviction? Were the prosecutor to stand before the jury and candidly say, "I struggled with this case myself and had some doubts about whether it should be a capital punishment charge or a lesser homicide, and determined to let you decide," which would very accurately capture the ethos of "leaving it to the jury," he or she would bring an entirely different presentation to the jury than the prosecutor, entertaining the same reservations but quietly deciding to "leave it to the jury," who argues aggressively for conviction. Recognizing that a capital punishment case is possibly overcharged, and then "leaving it to the jury" while at the same time pressing for conviction, thereby leading the jury to divine that the prosecutor thoroughly believes in the prosecution, seriously lacks the integrity that ought to attend upon a matter as grave as a capital punishment prosecution. The not uncommon situation in which a young assistant district attorney, lacking confidence in his or her own judgment, prosecuting a battery charge filed by a senior assistant and struggling to determine whether the charge ought to be reduced to a disorderly conduct charge and deciding to "leave it to the jury" poses its worst danger in initiating what may become a habit and later be applied to more serious charges.

The *ABA Standards For Criminal Justice: Prosecution Function and Defense Function* provides that, "In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages
or disadvantages which might be involved or to a desire to enhance his or her record of convictions." 96 The NDAA National Prosecution Standards provide that factors which should not be considered in the charging decision include "[p]ersonal advantages which prosecution may bring to the prosecutor" 97 and "[p]olitical advantages which prosecution may bring to the prosecutor." 98 These standards properly summon a prosecutor to ideals. Certainly, it will almost inevitably occur to an elected prosecutor reviewing a murder case that his or her personal and political interests could be well served by a highly publicized capital punishment prosecution. One would expect that a community, even one fevered by a heinous homicide, would not want its prosecutor's decision guided by that prosecutor's personal and political interests. 99 The Wisconsin Supreme Court, in O'Neil v. State, 100 in words echoed in Supreme Court decisions in many other states, summoned its district attorneys to high standards:

The district attorney represents the commonwealth,—a commonwealth which demands no victims,—a commonwealth which "seeks justice only,—equal and impartial justice. . . . It is as much the duty of the district attorney to see that no innocent man suffers as it is to see that no guilty man escapes."

A prosecutor should act not as a partisan eager to convict, but as an officer of the court, whose duty it is to aid in arriving at the truth in every case. His object, like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success.

No court has taken a higher view of the dignity of the office of district attorney than this court. "He is an officer of the state, . . . to see that the criminal laws of the state are honestly and impartially administered . . . ." The district attorney is not a mere legal attorney. "He is a sworn minister of justice." 101

96. PROSECUTION FUNCTION, supra note 58, § 3-3.9(d).
97. NAT'L PROSECUTION STANDARDS, supra note 59, § 42.4.
98. Id.
99. Kenneth Bresler in Seeking Justice, Seeking Election, and Seeking the Death Penalty: The Ethics of Prosecutorial Candidates' Campaigning on Capital Convictions, 7 GEO. J. LEGAL ETHICS 941 (1994), highlights the ethical conflicts that an elected district attorney potentially confronts between his own or her own political interests and the duty to the state to do justice first.
100. 189 Wis. 259, 207 N.W. 280 (1926).
101. Id. at 261-62, 207 N.W. at 281 (citations omitted).
These words were occasioned by comments made by the district attorney during final argument that the court described as "improper and inflammatory statements" in a prosecution of a man for taking indecent liberties with a girl under the age of sixteen years. Might the district attorney's remarks have been even more incendiary had the child been slain and the case a capital punishment prosecution?

That some district attorneys are and will be influenced by personal and political considerations is beyond cavil. In the 1916 Preparedness Day Parade in San Francisco, California, a bomb exploded killing ten citizens and injuring others. Tensions in San Francisco already ran high between those urging entry into World War I to aid England, the Irish angry at British suppression of the recent Dublin Easter Rebellion and opposed to assisting the English, those agitated by the massing of troops preparing to pursue Poncho Villa into Mexico, and persisting fierce antipathies flowing from bitter management resistance to labor organizing efforts in the city. The San Francisco District Attorney, in a highly dubious case, secured multiple first degree murder count indictments against Tom Mooney, Warren Billings and others. The cases were prosecuted to conviction and sentence of execution for Mooney and life sentence for Billings.

Several years later, James Brennan, the Assistant District Attorney in charge of the prosecution of Billings stated: "Had I been a juror sitting in the case and heard the evidence which I myself presented, I could not and would not have voted for Billings' conviction. There was the element of doubt. There was wanting the final link in the chain forging Billings to the crime." Brennan further stated, in words unfairly tarnishing most district attorneys but highlighting the deficiencies of some:

Like all prosecutors, I was blind to all but the pursuit—the chase which would end with the conviction of my quarry.

I was cursed with the psychology of the prosecution. To my mind, and it is in the mind of every district attorney and his assistants, conviction is the only goal.

Unconsciously, and with no wrong intent, the prosecutor retains the facts which further his case. Others, perhaps vital to

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103. See id. at 19-70.
104. The history of the Mooney-Billings prosecution is the subject of several books, two of which are FROST, supra note 102 and CURT GENTRY, FRAME-UP (1967). Additionally, the text of Mooney v. Holohan, 294 U.S. 103 (1935), captures in part the intensity of the prosecutorial pursuit of Mooney.
105. GENTRY, supra note 104, at 281.
the proof of innocence of the accused, are cast aside. He is a keen-scented hound on a trail. He has become obsessed with his case. Given the slightest evidence supporting his theories, which he has already framed in his own mind, he weaves these into a web of circumstances which are oftentimes damning to the accused, and against which even the innocent may not be able to stand.\textsuperscript{106}

Brennan went on to state:

Witnesess whose testimony is wholly false or founded on little fact can make almost any case for such a prosecutor. The fair minded district attorney constantly has to guard against them.

I would say that, as a general rule, no man wants to put an innocent person in prison. The prosecutor's motives can not in a majority of cases be questioned.

But he is biased toward a conviction, and this is uppermost in his mind. Every public prosecutor wants to make a record. He sees as his goal political preferment, applause of his constituents, his personal aggrandizement. This can be gained only by conviction of the accused, against whom the public mind in sensational cases has already been poisoned.\textsuperscript{107}

Brennan concluded that:

The case has been a nightmare since the date of the trial. My motives have been misconstrued, and in view of my own personal doubts as to the guilt of Billings, I regard it as an evil day in my life that I was given charge of the prosecution.\textsuperscript{108}

The quote captures the dark side of a few district attorneys, and highlights the problems that may arise for some district attorneys in high profile cases, but does substantial injustice to the vast majority of prosecutors who, it is hoped, would sooner forgo public office than compromise their integrity and corrupt their office.

In \textit{Wainwright v. Witt},\textsuperscript{109} Justice Brennan stated:

Passions, as we all know, can run to the extreme when the State tries one accused of a barbaric act against society, or one accused

\textsuperscript{106.} Id.

\textsuperscript{107.} Frost, \textit{supra} note 102, at 344.

\textsuperscript{108.} Id. (citations omitted). Brennan was quoted in \textit{Call} in November 13, 1920. Frost notes that "[i]n 1930 Brennan testified that [Edgar T.] Gleeson [a reporter for \textit{Call}] had garbled this account, but Gleeson responded that Brennan had never complained of it to him or to the \textit{Call}.... Brennan acknowledged later that Gleeson was 'probably one of the most respected men of the newspaper fraternity.'" Id. (citations omitted). Eventually, confidence in the integrity of the prosecutions against Mooney and Billings collapsed and both men were released from prison.

\textsuperscript{109.} 469 U.S. 412 (1985).
of a crime that—for whatever reason—inflames the community. Pressures on the government to secure a conviction, to "do something," can overwhelm even those of good conscience. . . . When prosecutors and judges are elected, or when they harbor political ambitions, such pressures are particularly dangerous.\textsuperscript{110}

It is an unpalatable reality that eventually, over time, such a capital case will come into the hands of a prosecutor in Wisconsin. When execution may eventually follow, the danger of a miscarriage of justice occurring in a prosecution conceived between public passion and political ambition is high.

\section*{Race Matters}

If there is any place in this land that ought to be free of racism, it is the courthouse. If there is any type of case from which every vestige of racism ought be extirpated, it is a capital punishment case. Yet, racism persists. In \textit{Strauder v. West Virginia},\textsuperscript{111} the Court struck down a prosecution of a black man for murder on grounds that African-Americans, on the basis of their race, had been excluded from the grand jury that handed down the indictment.\textsuperscript{112} In \textit{Rose v. Mitchell},\textsuperscript{113} a similar challenge was raised by two African-Americans indicted for murder in Tennessee. The Court stated:

For we also cannot deny that, 114 years after the close of the War Between the States and nearly 100 years after \textit{Strauder}, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious.\textsuperscript{114}

The impact of racism, when present in a district attorney's decision as to whom to charge, at what level to charge, whether to seek capital punishment, and whether to negotiate a plea to a lower charge and avoid capital punishment cannot be exaggerated. Racism can also play a role in the district attorney's exercise of peremptory strikes to remove certain persons from a jury panel. Racism, of course, can play a role as well in a jury's decision as to guilt and as to the imposition of capital punishment.

\begin{footnotes}
\item[110] \textit{Id.} at 459 (Brennan, J., dissenting).
\item[111] 100 U.S. 303 (1880).
\item[112] \textit{Id.} at 312.
\item[113] 443 U.S. 545 (1979).
\item[114] \textit{Id.} at 558-59.
\end{footnotes}
Before *Coker v. Georgia*, in which the United States Supreme Court struck down capital punishment as an unconstitutional penalty for rape, 455 persons had been executed in the United States for that offense. Almost 90% of those executed, over 400, were black. A study by Wolfgang and Riedel, not surprisingly, found that race was the critical differential in the capital punishment rape cases they studied and that black men who raped white women stood a higher chance of being sentenced to capital punishment than any other racial combination provided.

In *McCleskey v. Kemp*, the Court reviewed the conviction and imposition of capital punishment on a black defendant for the slaying of a white police officer during the robbery of a furniture store. By a five to four decision, the majority rejected the defendant’s claim of unconstitutional denial of equal protection. In evidence before the Court was the Baldus Study, a sophisticated multiple-regression analysis. This study was assumed to be statistically valid by the justices. Still, that assumption did not include, according to the majority, the fact that the study showed race actually entered into any sentencing decision. The analysis showed that defendants killing whites are 4.3 times more likely to be sentenced to death in Georgia than defendants killing blacks. The dissent noted that “just under 59%—almost six in ten—defendants comparable to McCleskey would not have received the death penalty if their victims had been black.” The dissent further noted that “data unadjusted for other mitigating and aggravating factors” showed that the capital sentencing rate for all white-victim cases was 120% greater than the rate for black-victim cases.

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117. *Id.*
120. *Id.* at 283.
121. Justice Powell delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices White, O’Connor, and Scalia joined. The dissenting justices were Brennan, Marshall, Blackmun, and Stevens. *Id.* at 282.
122. *Id.* at 286-87.
123. *Id.* at 291 n.7.
124. *Id.* at 321 (Brennan, J., dissenting).
125. *Id.* at 325 (footnote omitted).
126. *Id.*
127. *Id.* at 326.
“blacks who kill whites are sentenced to death at nearly 22 times the rate of blacks who kill blacks, and more than 7 times the rate of whites who kill blacks,”\textsuperscript{128} that “prosecutors seek the death penalty for 70\% of black defendants with white victims, but for only 15\% of black defendants with black victims and only 19\% of white defendants with black victims.”\textsuperscript{129} That race played a role in the Georgia criminal justice system in capital punishment cases appears beyond cavil.

In \textit{Furman v. Georgia},\textsuperscript{130} and the accompanying cases, the statutory capital punishment schemes of Georgia and Texas were struck down with the Court holding “that the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments,”\textsuperscript{131} essentially because of the arbitrary and capricious manner in which unguided discretion was exercised to impose it on a few.\textsuperscript{132} In \textit{Gregg v. Georgia},\textsuperscript{133} one of the grounds of attack on the new Georgia statute was that it failed to control the broad discretion of the district attorney, noting that “the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them.”\textsuperscript{134} Responding in a concurring opinion, Justice White held:

Petitioner’s argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies is unsupported by any facts. Petitioner simply asserts that since prosecutors have the power not to charge capital felonies they will exercise that power in a standardless fashion. This is untenable. Absent facts to the contrary it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts.\textsuperscript{135}

In \textit{McCleskey v. Kemp},\textsuperscript{136} the defendant argued that the substantial statistical findings of the Baldus Study should be relied upon to find that Georgia prosecutors were using the unconstitutional consideration of the defendant’s race and more so the victim’s race in determining when to

\textsuperscript{128} \textit{Id.} at 327 (citation omitted).
\textsuperscript{129} \textit{Id.} (citation omitted).
\textsuperscript{130} 408 U.S. 238 (1972).
\textsuperscript{131} \textit{Id.} at 239-40.
\textsuperscript{132} \textit{See, e.g., id.} at 249-50 (Douglas, J., concurring).
\textsuperscript{133} 428 U.S. 153 (1976).
\textsuperscript{134} \textit{Id.} at 199.
\textsuperscript{135} \textit{Id.} at 225 (White, J., concurring).
\textsuperscript{136} 481 U.S. 279 (1987).
seek capital punishment. The defendant urged that the Court's reliance on statistics as proof of racial discrimination in employment cases under Title VII of the Civil Rights Act of 1964 as in Bazemore v. Friday, and in venire-selection cases such as Whitus v. Georgia, should apply for a finding of racial discrimination in the prosecutor's use of discretion in selecting cases for capital punishment.

On various grounds, the court rejected the use of statistical evidence to prove prosecutorial racial discrimination. The Court required that the defendant would have to prove "the existence of purposeful discrimination." He would also have to prove that the "decision-makers in his case acted with discriminatory purpose." The Court noted, however, that McCleskey offered "no evidence specific to his own case that would support an inference racial considerations played a part in his sentence." The Court held that "the policy considerations behind a prosecutor's traditionally 'wide discretion' suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties, 'often years after they were made.'" The Court further held that "[b]ecause discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused." The Court noted that "a prosecutor can decline to charge, offer a plea bargain or decline to seek a death sentence in any particular case," and that "the power to be lenient [also] is the power to discriminate." The Court found that the Baldus Study was "clearly insufficient to support an inference that any of the decision makers in McCleskey's case acted with discriminatory purpose," and that "[a]t most, the Baldus Study indicates a discrepancy that appears to correlate with race." Clearly, under the

137. Id. at 291-93.
138. Id. at 293-94 (citing Bazemore v. Friday, 478 U.S. 385, 400-01 (1986) (Brennan, J., concurring in part)).
139. Id. at 292 (citing Whitus v. Georgia, 385 U.S. 545, 550 (1967)).
140. Id. at 291-96.
141. Id. at 292-97.
142. Id. at 292 (quoting Whitus, 385 U.S. at 550).
143. Id. at 292.
144. Id. at 292-93.
145. Id. at 296 (citations omitted).
146. Id. at 297.
147. Id. at 312 (citation omitted).
148. Id. (citation omitted) (alteration in original).
149. Id. at 297.
150. Id. at 312.
majority opinion, a defendant would virtually have to prove the district attorney said that he or she was pursuing capital punishment against a particular defendant because that defendant was black or because the victim was white. This is an unreasonable burden of proof which even in a large urban center with many murders and a heterogeneous population could rarely be met though racism might in fact be playing a role in a district attorney’s prosecution of capital punishment cases. Justice Brennan, in his dissent, accused the majority of seeking to impose a “crippling burden of proof” on a defendant.151 Both Brennan and Blackmun, in their dissents, deemed use of statistical evidence to prove racial discrimination proper.152 Blackmun noted McCleskey’s claim that racial factors influenced various steps of the capital punishment scheme and observed that “[t]he primary decision maker at each of the intervening steps of the process is the prosecutor, the quintessential state actor in a criminal proceeding.”153 Blackmun focused much of his dissent on the role of the prosecutor,154 and stated that McCleskey “presented evidence of numerous decisions impermissibly affected by racial factors over a significant number of cases. The exhaustive evidence in this case certainly demands an inquiry into the prosecutor’s actions.”155

No fair minded prosecutor, white or black, ought be able to read McCleskey without sensing grave reservations and without knowing that even in the halls of justice, in an issue as grave as capital punishment, race matters.156

151. Id. at 337 (Brennan, J., dissenting) (citation omitted).
152. Id. at 327-28; id. at 350-56 (Blackmun, J., dissenting).
153. Id. at 350 (Blackmun, J., dissenting).
154. Id. at 356-65.
155. Id. at 364.
156. The defendant Warren McCleskey appeared again before the United States Supreme Court in McCleskey v. Zant, 499 U.S. 467 (1991). On that appeal, McCleskey argued that his alleged statement to fellow inmate Offie Evans introduced at his trial was secured in violation of his right of assistance to counsel as defined within Massiah v. United States, 377 U.S. 201 (1964). McCleskey, 499 U.S. at 472. It had been learned that Evans had been promised by a detective that the detective would say a “word” for Evans before Evans was moved in the jail to a cell from which he could talk to McCleskey and where Evans secured the alleged statement of McCleskey that he had fired the bullet that killed Officer Schlatt. Id. The Supreme Court ruled in this later case that McCleskey had earlier knowledge of this information, and his failure to promptly pursue it constituted an abuse of Federal habeas corpus and the Court accordingly denied relief to McCleskey. Id. at 502-03. In a final clemency proceeding before the Georgia Board of Pardons on September 23, 1991, two members from the jury which had imposed the death penalty on McCleskey told the board they would not have voted for the death penalty had they known at the trial that Evans was a police informant who was offered the chance of a lighter sentence in exchange for testifying
The United States General Accounting Office, in its Report to Senate and House Committees on the Judiciary, set forth its conclusion from a careful review of twenty-eight studies relating to capital punishment cases:

Our synthesis of the 28 studies shows a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the Furman decision.

In 82% of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks. This finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques. The findings held for high, medium, and low quality studies.

The race of victim influence was found at all stages of the criminal justice system process, although there were variations among studies as to whether there was a race of victim influence at specific stages. The evidence for the race of victim influence was stronger for the earlier stages of the judicial process (e.g., prosecutorial decision to charge defendant with a capital offense, decision to proceed to trial rather than plea bargain) than in later stages. This was because the earlier stages were comprised of

to McCleskey's alleged statement that he had shot the police officer. *Inmate Whose Appeal Shook System Faces Execution*, N.Y. TIMES, Sept. 24, 1991, at A20. One of the two jurors, Robert Burnette, a forty-nine-year-old postal worker, stated his belief that "If you take a life, death is the right punishment. But when you take that person's life, you have to be sure beyond a shadow of a doubt that person committed the crime, and I don't feel that way about this case. If we knew more about Offie Evans, his credibility would have been shot to hell." *Id.*

The pardon board denied clemency and McCleskey was executed shortly thereafter on Sept. 25, 1991. Mark Curriden, *McClesky Put to Death After Hours of Delays, Final Apology*, ATLANTA CONST., Sept. 26, 1991, at D3. Final sympathy must lie with Police Officer Fred Schlatt and the family who suffered his violent loss. However, Warren McCleskey's execution is a tragedy as well because it is a low mark in judicial acceptance of the racist reality within capital punishment that whether one is executed for a murder or not may well depend on the race of the offender or the race of the victim. Mr. Justice Powell, who cast the deciding vote and wrote the majority opinion in McCleskey v. Kemp, 481 U.S. 279 (1987), later advised his biographer, John C. Jeffres, Jr. that he had "come to think that capital punishment should be abolished." David Von Drehle, *The American Way of Justice*, WASHINGTON POST NATIONAL WEEKLY EDITION, Feb. 13-19, 1995, at 9. When asked by the biographer if there was a case he wished he had decided otherwise, Powell responded, "McCleskey v. Kemp." *Id.*

McCleskey v. Kemp is a case one can only hope will some day join the sodden ash heap of *Dred Scott*, *Plessy*, and *Korematsu*.

larger samples allowing for more rigorous analyses.\textsuperscript{158}

In March of 1994, the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, published a study\textsuperscript{159} of persons brought under the "drug kingpin" death penalty provisions of the Anti-Drug Abuse Act of 1988.\textsuperscript{160} The report noted:

Three-quarters of those convicted of participating in a drug enterprise under the general provisions of § 848 have been white and only about 24% of the defendants have been black. However, of those chosen for death penalty prosecutions under this section, just the opposite is true: 78% of the defendants have been black and only 11% of the defendants have been white.\textsuperscript{161}

The report went on to note:

[\textit{E}vidence of racial discrimination in the application of capital punishment continues. Nearly 40% of those executed since 1976 have been black, even though blacks constitute only 12% of the population. And in almost every death penalty case, the race of the victim is white. Last year alone, 89% of the death sentences carried out involved white victims, even though 50% of the homicides in this country have black victims. Of the 229 executions that have occurred since the death penalty was reinstated, only one has involved a white defendant for the murder of a black person.\textsuperscript{162}]

The report also found that of the thirty-seven defendants prosecuted under the "drug kingpin" death penalty law, "[t]wenty-nine of the defendants have been black and 4 have been Hispanic."\textsuperscript{163}

The United States Supreme Court has granted certiorari in \textit{Loving v. United States}.\textsuperscript{164} Loving, a military private, argues that capital
punishment has historically been unequally applied in the military and is therefore unconstitutional. As of November of 1995, six of the eight men in the military death row are African-American. During World War II, while blacks accounted for less than ten percent of the army population, fifty-five of the seventy soldiers executed in Europe were African-American. In eleven of the twelve executions conducted by the military since 1951, the man executed was African-American. In every case the victim was white.

In *McCleskey v. Kemp,* addressing the issues raised by the racial disparity evidence, the Court stated that "McCleskey's arguments are best presented to the legislative bodies. . . . Legislatures also are better qualified to weigh and 'evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the Courts[.]"] At its annual convention in 1988, the American Bar Association, which has never taken a position either favoring or opposing capital punishment, adopted a policy opposing "discrimination in capital sentencing on the basis of the race of either the victim or the defendant" and supported "enactment of federal and state legislation which strives to eliminate any racial discrimination in capital sentencing which may exist."

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167. Id.
168. *Id.* at A19-A20.
169. *Id.* at A20.
171. *Id.* at 319 (quoting Gregg v. Georgia, 428 U.S. 153, 186 (1976)).
172. SUMMARY OF ACTION OF THE HOUSE OF DELEGATES, 1988 A.B.A. ANN. MEETING 35. The complete text of the Individual Rights and Responsibilities Section's resolution was:

The Section's second recommendation (Report No. 109), presented jointly with the Sections of Criminal Justice and General Practice, was revised by the proponents and approved by voice vote. As approved, it reads:

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

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

**Be It Further Resolved,** That this resolution does not create a position for the American Bar Association on whether or not capital punishment is an appropriate criminal sanction.

*Id.*
Attempts to enact "The Racial Justice Act," (RJA) which would effect such a legislative change, were unsuccessful in the 100th and 101st Sessions of Congress. In the 103rd Congress, the RJA was designed to respond to the Supreme Court's invitation in McCleskey, by amending Title 28 of the United States Code by adding new sections 2921-24. The central thrust of the RJA was captured in section 2921(a), which read: "No person shall be put to death under color of State or Federal law in the execution of a sentence that was imposed based on race." The RJA would allow the use of valid statistical evidence in death cases to show that a particular defendant's sentence was based on race. The prosecutor would have full opportunity to dispute the relevance and validity of the statistical and other evidence to show that there was no racial pattern of sentencing or that, even if there was one, the particular case under scrutiny did not fall within it. The proposed Act expressly required a defendant to present valid evidence "demonstrating that, at the time the death sentence was imposed, race was a statistically significant factor." Such evidence was to take into account all relevant statutory aggravating factors. On rebuttal, the prosecution burden of proof would be mere preponderance of the evidence. A defendant successfully invoking the Racial Justice Act would succeed only in overturning the sentence and not the conviction.

On April 20, 1994, the House of Representatives, with strong support from the Black Caucus, the Hispanic Caucus, and the Democratic leadership, passed the Bill 217-212. The House report, which

173. SUBCOMM. ON CIV. & CONST. RTS., HOUSE JUDICIARY COMM., 103D CONG. 2D SESS. BRIEFING BOOK ON THE RACIAL JUSTICE ACT 3.
177. Id. § 2921(b)-(d).
178. Id. § 2921(e).
179. Id. § 2921(b).
180. Id. § 2921(d).
181. Id. § 2921(e).
183. House Backs Death Penalty Defense Tactic, MILWAUKEE SENTINEL, Apr. 21, 1994, at 3A.
184. 140 CONG. REC. H2528-33 (daily ed. Apr. 20, 1994). The house voted against an amendment that would have struck the RJA from a larger crime bill. Id.
included dissenting views, captured the issues in dispute. The majority report noted that in 1972 in Furman v. Georgia, the Supreme Court held the death penalty unconstitutional as then applied because imposition was in an arbitrary and capricious manner. The report went on to note:

A number of states responded to Furman by adopting "guided discretion" statutes, which require jurors to focus on specific aggravating and mitigating circumstances in choosing from the many homicides the few cases that will receive the death penalty. In 1976, in Gregg v. Georgia, 428 U.S. 153, the Supreme Court held that such statutes offered the possibility of eliminating bias and whim from capital sentencing. "Absent facts to the contrary," Justice White observed prosecutors must be presumed to exercise their charging duties properly.

Eighteen years after Gregg the facts are in, and it is clear that the guided discretion statutes have failed in their objective of eliminating bias from capital sentencing. Recent evidence overwhelmingly and consistently demonstrates that death sentencing decisions in some jurisdictions are still influenced by race.

Apparently adverting to prosecutors and judges, the report noted, "[F]ew people today would admit an intent to discriminate. Therefore, the Supreme Court has usually recognized that the existence of illegal discrimination can be established by showing that the results of a decisionmaking process are discriminatory." The Judiciary Committee supported its recommendation that statistical evidence be used by stating:

Statistical analysis are [sic] generally accepted as reliably measuring the influence of racial discrimination in complex decision-making processes. The Racial Justice Act is consistent with other civil rights laws under which an inference of racial discrimination can be established through the use of statistical evidence showing a significant racially discriminatory effect.

Many disagree with the use of statistics, however. As the dissenting committee members stated:

185. H.R. Rep. No. 458, supra note 175, at 1-12, 14-17.
186. 408 U.S. 238 (1972).
188. Id.
189. Id. at 6.
190. Id. at 5; Ralph Z. Hallow, Death-Row "Racial Justice" Splits Democrats, WASH. TIMES, May 2, 1994, at A1.
We are opposed [to] the "Racial Justice Act" because its likely effect will be the invalidation of every capital sentence now in effect as well as prevention of the use of capital punishment in the United States. This is not because racial prejudice permeates the criminal justice system, but because the proposal would impose unrealistic burdens of proof on the prosecution in response to alleged statistical disparities.  

The National District Attorneys Association vigorously opposed introduction of the Racial Justice Act into the Senate version of the Crime Bill, arguing that its passage would effect abolition of capital punishment in all states.  

The issue of the Racial Justice Act threatened passage of crime legislation keenly desired by President Clinton and the Democratic leadership.  

Liberals in Congress, particularly members of the Congressional Black Caucus and the Hispanic Caucus threatened to vote against the bill if it did not include the Racial Justice Act while conservatives in the Senate threatened a filibuster if the conference committee report contained the Act. On July 20, 1994, Senator Joseph Biden, then chair of the Senate Judiciary Committee, stated that he lacked the sixty votes necessary to overcome a filibuster and predicted that the 30 billion dollar crime bill would not pass the Senate if it contained any version of the Racial Justice Act. On July 26, 1994, Representative Kweisi Mfume, then chairman of the Congressional Black Caucus, wrote:

Throughout history, minorities have received a disproportionate share of society's harshest punishments, from slavery to lynchings.

...  

If an individual may use statistics to defend his or her right to vote, obtain adequate education and gainful employment, Congress would be remiss to deny an individual the right to use

191. Id. at 14.
192. Letter from William C. O'Malley, President of the NDAA, to all NDAA Board Members & Prosecutor Coordinators. Apr. 29, 1994 (on file with author). The Violent Crime Control and Law Enforcement Act of 1994 emerged from the Senate without the Racial Justice Act and was referred to a conference committee. 140 CONG. REC. S6018 (daily ed. May 19, 1994).
racially significant statistics if those same statistics would mean the difference between life imprisonment and death." 196

The conference committee on the crime bill ended its work on July 28, 1994, and cut the Racial Justice Act from the final legislation. 197 It was reported that, "President Clinton has indicated that he will implement the provisions of the Act, within the Department of Justice, by Executive Order and will direct the appointment of a commission to study the need for further legislation. This compromise was worked out with the Congressional Black Caucus to end their opposition to the Crime Bill." 198 In addition to not containing the Racial Justice Act, the final version of the law 199 signed by President Clinton on September 13, 1994, 200 increased to sixty the number of federal crimes which carry death as a potential punishment. 201 Gail Hoffman, Director of the Office of Public Liaison and Governmental Affairs of the United States Department of Justice, advised that the department "will continue to work with Congress to ensure that the death penalty is available for appropriate federal crimes through the adoption of constitutional procedures which will enable federal prosecutors to seek the death penalty where appropriate—and will ensure that this penalty is used fairly and justly." 202 Hoffman went on to state that "the Administration believes that the greatest possible care must be taken to be certain that the death penalty is meted out in a fair, even-handed and non-discriminatory manner. To that end we are committed to working with Congress to prevent discrimination in the implementation of capital punishment, or any other aspect of the criminal justice system." 203

198. Id.
200. 30 WEEKLY COMP. PRES. DOC. 1789 (Sept. 19, 1994).
203. Id. Attorney General Janet Reno on January 27, 1995, issued modifications of the United States Attorneys' Manual detailing circumstances under which the United States would seek the death penalty, tightly controlling the decision to her office and a committee she was appointing, and noting that "[t]he committee will consider all information presented to it, including any evidence of racial bias against the defendant or evidence that the Department has engaged in a pattern or practice of racial discrimination in the administration of the
defeat of the Racial Justice Act for the present forecloses any serious, nationwide challenge to the racially disparate sentencing patterns identified in the studies noted above. Statistics no doubt will continue to accumulate demonstrating the disparity. Hopefully, sooner rather than later, the outhouse stench of racism in capital punishment will move the various states or the nation to remedy this wrong by an enactment similar to the Racial Justice Act or will drive the United States Supreme Court to reverse McCleskey v. Kemp.204

In McCleskey, the Court explained its rejection of McCleskey's racial disparity claim, noting that "[t]he Eighth Amendment is not limited in application to capital punishment, but applies to all penalties. Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty."205 In a footnote, the Court cited the existence of studies allegedly demonstrating racial disparity in sentencing in various types of crimes.206 The Court feared that if racial disparity in sentencing is permitted to subvert capital punishment, the presence of racial disparity across the board in all criminal case sentencing will subvert the whole system of punishment. Rather than dealing with this issue with a legalistic dance, as five of the justices did when McCleskey reached the Supreme Court level, a far more candid and just approach to this painful issue was suggested by Judge Clark in his dissent in the McCleskey case at the Appeals Court level:

Finally, the State of Georgia also has no compelling interest to justify a death penalty system that discriminates on the basis of race. Hypothetically, if a racial bias reflected itself randomly in 20% of the convictions [in all types of cases], one would not abolish the criminal justice system. Ways of ridding the system
of bias would be sought but absent a showing of bias in a given case, little else could be done. The societal imperative of maintaining a criminal justice system to apprehend, punish, and confine perpetrators of serious violations of the law would outweigh the mandate that race or other prejudice not infiltrate the legal process. In other words, we would have to accept that we are doing the best that can be done in a system that must be administered by people, with all their conscious and unconscious biases.

However, such reasoning cannot sensibly be invoked and bias cannot be tolerated when considering the death penalty, a punishment that is unique in its finality.207 Justice Brennan, in his *McCleskey* dissent, implied that a different standard might apply for lesser punishments.208 While such an admission is acutely embarrassing for a system that lays claim to pristine integrity, it is accurate and will, hopefully, summon the judges and lawyers of this nation to the worthy cause of extirpating every vestige of racism that remains in our criminal justice system.

There can be no doubt that African-Americans have an average lower income than whites,209 a shorter life span,210 more unemployment,211 and a greater percentage under the federal poverty level.212 While some believe government can do more to alleviate these situations, few suspect government of actively seeking to impose such conditions. Tragically, suspicion exists that the government plays just such a role in the criminal justice system. Indeed, many who have labored long in the criminal justice system know, supported by a variety of studies and extensive personal experience, that blacks get the harsher hand in criminal justice and particularly in capital punishment cases.

In *Swain v. Alabama*,213 an African-American defendant convicted of rape appealed on the basis that the prosecutor had used his peremptory challenges to strike all blacks from the petit jury and that through the

210. *Id.* at 50-51.
211. *Id.* at 108-10.
212. *Id.* at 105-07.
use of the peremptory strike system in Talladega County by prosecutors, no black had served on a petit jury in that county "since about 1950." 214

The Supreme Court upheld the conviction, noting the "very old credentials" of the peremptory challenge system 215 and ruled that "we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws." 216 The Court further ruled, "we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case." 217 The Court noted that the record was insufficient to establish that prosecutors had used the peremptory system to strike every black from a petit jury in Talladega County through the years and accordingly did not rule on that issue. 218

In Batson v. Kentucky, 219 the prosecutor used his peremptory challenges to strike all four blacks on the venire leaving only white jurors to decide the black defendant's case. 220 In overturning the conviction, the Court ruled that:

Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges "for any reason at all, as long as that reason is related to his view concerning the outcome" of the case to be tried, . . . the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant. 221

The Court ruled that "[O]nce the defendant makes the requisite showing, the burden shifts to the State to explain adequately the racial exclusion." 222 Furthermore, "[t]he State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties." 223 The Court went on to note: "[T]he prosecutor's explanation need not rise to the level justifying exercise of challenge for cause . . . [b]ut the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that

214. Id. at 205.
215. Id. at 212.
216. Id. at 221.
217. Id. at 222.
218. Id. at 224.
220. Id. at 83.
221. Id. at 89 (citations omitted).
222. Id. at 94 (citations omitted).
223. Id.
the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race." 224 In a concurring opinion, Justice Marshall stated that "[m]isuse of the peremptory challenge to exclude black jurors has become both common and flagrant," 225 and that "[i]n 100 felony trials in Dallas County in 1983-1984, prosecutors peremptorily struck 405 out of 467 eligible black jurors" 226 ascribing it in part to an instruction book used by prosecutors in Dallas County, Texas. 227 The manual 228 exhorted:

"You are not looking for a fair juror, but rather a strong, biased and sometimes hypocritical individual who believes that Defendants are different from them in kind, rather than degree . . . . You are not looking for any member of a minority group which may subject him to suppression—they almost always empathize with the accused . . . . Minority races almost always empathize with the Defendant . . . . Jewish veniremen generally make poor State's jurors. Jews have a history of oppression and generally empathize with the accused." 229

Allegations continue that some prosecutors violate the spirit of Batson by striking black jurors on the unarticulated grounds that they will prove

224. Id. at 97 (citations omitted).

225. Id. at 103 (Marshall, J., concurring). Justice Marshall went on to suggest that the practice of peremptory challenges be abolished urging, "only by banning peremptories entirely can such [racial] discrimination be ended." Id. at 108. Wisconsin Senator Lynn Adelman has submitted S.B. 531, Wis. 92d Leg. Sess., 1995-96 Reg. Sess. (1995), which if adopted would end peremptory challenges in both civil and criminal cases.

226. Id. at 104 (Marshall, J., concurring).

227. Id.

228. Jury Selection in Criminal Cases was a chapter in a manual titled Prosecution Course, prepared by the Dallas County District Attorney's Office "to help train prosecuting attorneys office in Texas." Jon M. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels 152 (1977). The manual came to light when the Texas Observer "obtained and reprinted" parts of it. Id. The Jury Selection chapter "was written by an assistant district attorney in Dallas named Jon Sparling, who had become locally famous for persuading a jury to impose a 1,000-year sentence on a convicted felon . . . ." Id. Justice Marshall cites to the Van Dyke book when referring to this manual. Batson, 476 U.S. at 103, 104 n.3.

more sympathetic to black defendants.\textsuperscript{230}

In \textit{Powers v. Ohio},\textsuperscript{231} the Court expanded \textit{Batson} to rule that a prosecutor could not use the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, even if the accused was not of the same race.\textsuperscript{232} In that case, involving two counts of aggravated murder and one count of attempted aggravated murder by the white defendant Powers, the prosecutor used seven of his ten peremptory challenges to strike blacks from the venire.\textsuperscript{233}

In steps backward, the United States Supreme Court in \textit{Hernandez v. New York}\textsuperscript{234} and in \textit{Purkett v. Elem}\textsuperscript{235} substantially diminished the impact of \textit{Batson}. The Court held in \textit{Hernandez} that "[u]nless a discriminatory intent is inherent in the prosecutor's explanation [for the strike], the reason offered will be deemed race neutral."\textsuperscript{236} The Court further held in \textit{Purkett} that the reason provided by the prosecutor as justification for the complained-of peremptory strike "does not demand an explanation that is persuasive, or even plausible."\textsuperscript{237} Clearly, under these later cases, appellate court review of trial court findings that a prosecutor acted in good faith in striking a black juror cannot be very aggressive.\textsuperscript{238}
The Reverend Jesse Jackson, in an often-quoted remark, told of walking down the street one night and, upon hearing footsteps behind him, turned and was relieved to see that the man behind him was white. Many white night walkers would feel the same way. Now summon the same white walker into a courtroom as a venireman for a capital punishment, felony robbery-murder case with the accused being a black man. Is the presumption of innocence all that it ought to be in the mind of the walker-now-venireman? The problem of potential racism, whether conscious or unconscious, in a juror is very real. As the majority in *Turner v. Murray* noted:

Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. On the facts of this case, a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factor specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.

The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence. "The Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."
The *Turner* case involved appeal from the refusal of a state trial judge to permit voir dire questions of the prospective jurors directed to whether they would be prejudiced by the fact that the defendant was black and the slain victim was white. The Court found reversible error in the trial court's decision. Who can believe, however, that the possibility of racial prejudice influencing a capital punishment decision can be adequately dealt with through several voir dire questions to which potential jurors must respond? The potential for grave injustice in a prosecutor's appeal to racial bias during a trial or in a closing argument to a jury in a capital punishment prosecution of a black male is manifest.

If a district attorney takes an oath to treat equally all who come before him, but then upon seeing in a murder case that the victim is white or the defendant is black undertakes to violate that oath, is it too much to ask that he either resign office or bung out his own eyes? Is it not greater fealty to justice that the oath-taker be blind and abide by the sworn commitment than that the oath be breached and color play a role in determining who the government executes? Rather than require a corps of sightless prosecutors, end capital punishment. Failing that goal, the racial disparity in capital punishment cases must be addressed, at the minimum, with a carefully crafted statute such as the Racial Justice Act.

PROSECUTOR ATTITUDES

As the New York State Legislature approached passage of a capital punishment bill, long-time Manhattan District Attorney Robert Morgenthau, in a public call for rejection of the proposed legislation, stated: "Prosecutors must reveal the dirty little secret they too often share only among themselves: The death penalty actually hinders the fight against crime." Morgenthau noted that resources spent on

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242. *Id.* at 29.
243. *Id.* at 33.
244. In adopting capital punishment, the State of New York amended its criminal procedure law by adding a new section, 270.16, which provides an opportunity to either party in a case involving a crime punishable by death to examine prospective jurors individually and outside the presence of the other prospective jurors concerning their general qualifications and particularly regarding the possibility of racial bias. 1995 N.Y. Laws ch. 1 § 14.
capital punishment litigation can bear much better fruit directed at recidivists and career criminals.\textsuperscript{247} He predicted that innocent persons will be executed.\textsuperscript{248} He further stated that, "It has long been argued, with statistical support, that by their brutalizing and dehumanizing effect on society, executions cause more murders than they prevent."\textsuperscript{249} Morgenthau failed to dissuade the legislature and New York adopted a capital punishment law,\textsuperscript{250} leaving only Wisconsin and eleven other states without such a law.\textsuperscript{251}

As the Wisconsin Senate considered a capital punishment bill in October of 1993, eleven experienced Wisconsin lawyers drawn from both political parties who were serving or had served as elected state district attorneys or appointed United States Attorneys wrote a letter to every state senator urging a vote against the bill on five grounds.\textsuperscript{252} First, their experience as prosecutors had not persuaded them that capital punishment deters murder and they pointed out that Wisconsin in 1992, then one of fourteen states without capital punishment, ranked the thirty-fifth lowest in the nation in murder and non-negligent homicides with 4.4 per hundred thousand population as opposed to the national average of 9.9.\textsuperscript{253} Second, the letter urged that "[c]onsideration must be given to the well-documented, disturbingly high number of cases wherein the defendant received the death sentence but was later revealed to be innocent of the crime."\textsuperscript{254} Third, the letter noted,

\begin{itemize}
  \item \textsuperscript{247} Id.
  \item \textsuperscript{248} Id.
  \item \textsuperscript{249} Id. \textit{See also} Harris v. Alabama, 115 S. Ct. 1031, 1041 and n.9 (1995) (Stevens, J., dissenting), which discusses this phenomenon, citing to the Morgenthau article and other studies.
  \item \textsuperscript{250} 1995 N.Y. Laws ch. 1.
  \item \textsuperscript{251} The other states are Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, and West Virginia. \textsc{Bureau of Justice Statistics, U.S. Dep't of Justice, Capital Punishment 1994}, at 1 (1996) [hereinafter \textsc{Capital Punishment 1994}].
  \item \textsuperscript{253} Id. (citing 1992 \textsc{FBI Unif. Crime Rpts.} (1992)).
  \item \textsuperscript{254} Id. (citing to Bedau & Radelet, \textit{supra} note 33).
\end{itemize}
"racism has historically infected the application of capital punishment laws." The letter continued:

Fourth, the government’s use of capital punishment sends the wrong message. Mr. Justice Brandeis in his dissenting opinion in Olmstead v. United States noted that “Our government is the potent, the omni-present teacher. For good or for ill, it teaches the whole people by its example.” Sadly, our land is awash with violence. We must strive ceaselessly to inculcate in our young the lesson that violence directed toward another is not the answer. Yet, with capital punishment, our government engages in the penultimate act of violence, the execution killing of a human being. The safety of the public and the punishment of the offender—the raison d’etre of the criminal justice system—can be instead better served by a defendant’s sentence to life imprisonment without parole. The danger is thus removed, the violator punished, and more killing is not legitimized.

Finally, the letter pointed out the very substantial expenditures involved in sustaining a capital punishment law. The State Senate defeated the 1993 proposal on a vote of twenty-one to twelve.

In connection with the filing of capital punishment bills in the 1995-1996 session of the Wisconsin Legislature and the public interest stirred by these bills, the State Bar of Wisconsin polled 380 of the district attorneys and assistant district attorneys in the state as to their attitudes on the issue. Two hundred and forty-seven returned the questionnaire, a 65% response rate.

Responses to a series of questions in the poll were as follows: 82% responded “yes” to the question, “Do you think Wisconsin’s ‘life means life’ law is a good way to remove dangerous persons from society?” Eighty percent responded “yes” to the question, “Would you prefer expanding the ‘life means life’ law by allowing judges to deny the

255. Id. at 2.
258. See supra note 22.
259. See supra notes 3-6.
261. Id.
262. Id.
possibility of parole absolutely?" Twenty-three percent said "no" to that question and 10% responded "don't know."

For many years prior to January 1, 1989, Wisconsin law provided that for first degree murder, a defendant was to be sentenced to life. Under the parole statute, however, generally a person could qualify for parole on the life sentence within thirteen years. Effective January 1, 1989, modification of the homicide statutes resulted in authority for the judge in a first degree intentional homicide case as an alternative to set parole at such date as the judge wished, implicitly including at a date beyond the normally expected lifetime of the convicted offender. A further modification of the homicide statute, which took effect on August 31, 1995, permits the sentencing judge in a first degree intentional homicide case to sentence the defendant to imprisonment explicitly for the rest of his life without parole. It would appear then that Wisconsin district attorneys, by a majority of at least 65% to 23% favor the existing intentional homicide sentencing pattern over adoption of a capital punishment law.

In responding to the question, "Regardless whether you do or do not favor reinstatement of the death penalty in Wisconsin, what are the concerns you would have about the death penalty?", the following percentages expressed concerns about the following problems: 70% were concerned with "Possible mistaken convictions or executions," 43% about "Possible racial disparity," 28% about "Ending Wisconsin's tradition of no death penalty," 38% about "Disproportionate impact on the poor," 44% about "Arbitrariness," 65% about "Costs," and 80% about "Lengthy appeals, with delay in closure for victim's families."

The 70% of responding prosecuting attorneys articulating concern about convictions and executions of the innocent are expressing their

263. Id.
264. Id.
265. Id.
266. Wis. Stat. §§ 939.50(3), 940.01(1) & 973.014 (1987-88) (prior to amendments).
271. Id.
272. Id.
recognition that even with the commitment to do justice that they bring to the prosecution of criminal cases, and even with the existing burdens of proof, they are but human beings capable of fallible error that can result in death for the innocent. Concerns expressed by the district attorneys concerning racial disparity, arbitrariness, and disproportionate impact on the poor simply reflect a recognition that these problems attend upon capital punishment despite the goodwill the prosecutor himself or herself may bring to a capital punishment prosecution. The 80% concerned about the impact of lengthy appeals on a victim’s family no doubt are aware that capital punishment appeals extend for in excess of ten years on average before execution, with a substantial percentage resulting in reversal.

The 65% of prosecutors who expressed concern about the costs of a capital punishment program are no doubt influenced by reports of costs experienced by other states in adopting capital punishment. The cost of prosecuting a capital case per execution in North Carolina is $2.16 million. Reporter Dave Von Drehle of the Miami Herald studied capital punishment in Florida and reported that it was costing the state $3.2 million per execution, that this cost was premised on the most conservative figures available, and that the cost is growing. In Texas, a death penalty case on the average costs $2.3 million. The New York Department of Correctional Services has estimated that enactment of the death penalty will cost the state about $118 million annually.

California capital trials are six times more expensive than other murder trials, and “one report estimated that California could save $90 million each year by [ending] capital punishment.” The financial impact on a county can be even more painful:

273. Capital Punishment 1994, supra note 251, at 10. In 1994, the average elapsed time from sentence to execution was 122 months. Id.
274. Id. at 14. By comparison, the average time between initial appearance and verdict in contested first degree intentional homicide cases in Milwaukee County is 118 days. Milwaukee County Homicide Courts Report 10/14/91 - 2/29/96 (on file with author). To date, only two such verdicts have been overturned on appeal. Id.
276. Dave Von Drehle, Bottom Line: Life in Prison One-Sixth as Expensive, Miami Herald, July 10, 1988, at 12A.
279. Dieter, supra note 277, at 3 (footnote omitted).
280. Id. (footnote omitted).
In Sierra County, California authorities had to cut police services in 1988 to pick up the tab of pursuing death penalty prosecutions. The County’s District Attorney, James Reichle, complained, “If we didn’t have to pay $500,000 a pop for Sacramento’s murders, I’d have an investigator and the sheriff would have a couple of extra deputies and we could do some lasting good for Sierra County law enforcement. . . .” The county’s auditor, Don Hemphill, said that if death penalty expenses kept piling up, the county would soon be broke. Just recently, Mr. Hemphill indicated that another death penalty case would likely require the county to layoff 10 percent of its police and sheriff force. 281

Norman Kinne, the Dallas County District Attorney, concerned about the costs of a capital prosecution stated:

[Even though I’m a firm believer in the death penalty, I also understand what the cost is. If you can be satisfied with putting a person in the penitentiary for the rest of his life . . . I think maybe we have to be satisfied with that as opposed to spending $1 million to try and get them executed. . . . I think we could use (the money) better for additional penitentiary space, rehabilitation efforts, drug rehabilitation, education, (and) especially devote a lot of attention to juveniles. 282

Fiscal estimates attached to SB 1, AB 298, and AB 352 warn of the many millions of dollars adoption of capital punishment in Wisconsin will cost the state and the millions it will cost counties which bear a portion of criminal prosecution costs. 283 Wisconsin district attorneys no doubt understood the fiscal pressures at the state and county levels. Their salaries and the salaries of their assistants are paid from state funds, 284 while all other costs of a district attorney’s office must be paid by the counties. 285 It is from this position that district attorneys see and feel the intense fiscal pressures on state and county budgets, particularly as those budgets are confronted with diminishing federal support and increasing citizen resistance to tax increases. In such a climate, it is not surprising that 65% of the district attorneys express concern about the costs of capital punishment. 286 Indeed, in the Wisconsin prosecutors survey, fully 63% of the prosecutors responded “no,” 15% responded

281. Id. at 5 (footnotes omitted).
282. Id. at 6-7 (footnotes omitted) (alterations in original).
“don’t know,” and only 19% responded “yes” to the question, “do you believe that a death penalty would be the best use of state and county criminal justice system funds?”

To accurately price out the cost of each execution, one must add together all those additional costs involved in every prosecution seeking the death penalty. Every such prosecution would be a bifurcated trial, with the guilt phase first and the sentencing phase second. Clearly, investigation and vigorous preparation by teams of prosecutors and defense attorneys would be involved. Added costs for trial security, lengthier detention in the county jail, and many other costs of longer trials would be carried by the county. The county would also carry the added costs attendant upon more space for prosecutors, additional clerical and investigative support needed to prepare for and respond to motions of the defense, and the fees of a broad range of experts addressing such issues as the prosecution and defense raise with respect to the aggravating and mitigating factors. In those cases resulting in life imprisonment with the jury rejecting capital punishment, all the costs attributable to the fruitless attempt to secure an execution verdict in excess of what a first degree intentional homicide prosecution presently costs would be added to the gross figure of overall costs of capital punishment in the state. A capital punishment conviction is almost always appealed to the state supreme court and such would be provided automatically in the currently proposed Wisconsin bills. Substantial costs often are incurred thereafter within the federal system as relief is pursued on direct appeal to the United States Supreme Court and later by collateral appeal through state and federal habeas corpus statutes. As experience in other states suggests that over 40% of capital cases are overturned on appeal, retrial pursuing capital punishment can add measurably to the costs. Emerging from these very expensive prosecutions would be several executions a year. When one divides those several executions a year into the overall added costs of all the cases that started out as capital punishment prosecutions, one readily sees why each execution can cost a state millions of dollars. Hence the accurate conclusion, that it is far cheaper to sentence those who would otherwise

287. Id.
288. SB 1, supra note 3, § 36; AB 298, supra note 4, § 36; AB 352, supra note 5, § 36, AB 937, supra note 6, § 35.
289. See Fiscal Estimates to SB 1, AB 298, and AB 352, supra note 283, for detailed discussions regarding the costs associated with all these aspects of capital cases.
290. William J. Brennan, Foreword: Neither Victims Nor Executioners, 8 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1, 3 (1994).
be executed to life imprisonment instead. In Milwaukee County over the past five years since initiation of speedy trial courts, first degree intentional homicide cases, the very substantial majority of which were contested jury trials, averaged 118 days from initial appearance to the return of a jury verdict.\(^\text{291}\) To date, only 2 of those 125 contested first-degree homicide cases have been overturned on appeal.\(^\text{292}\) In Milwaukee County, the healing process for family members suffering from the loss of a slain loved one begins, on average, within five months, with no likelihood of suffering the average ten years of ups and downs, some of which result in execution and some of which do not, in states with capital punishment.

In response to the Wisconsin prosecutors survey question, "Regardless whether you do or do not favor reinstatement of the death penalty in Wisconsin, what are the benefits you would anticipate with the death penalty?" only 33\% of prosecutors identified deterrence.\(^\text{293}\) Apparently 67\%, two-thirds of the prosecutors in this state, do not anticipate that the adoption of capital punishment would deter murder. Indeed, studies of numerous deterrence research projects have concluded that one cannot prove or disprove that capital punishment deter murder.\(^\text{294}\) In 1994, nine of the ten states with the highest murder and non-negligent homicide rates had capital punishment laws.\(^\text{295}\) Texas, which led the nation as of December 31, 1994 with the highest number of executions since 1977 (85),\(^\text{296}\) the highest number of executions in 1994 (14),\(^\text{297}\) and the highest number of death row inmates (394),\(^\text{298}\) had the tenth

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\(^{291}\) Milwaukee County Homicide Courts Report 10/14/91 - 2/29/96 (on file with author). Sentencing usually follows within 30 days.

\(^{292}\) Id.

\(^{293}\) Prosecutors Survey, supra note 215.

\(^{294}\) For a survey of these studies, see Hans Zeisel, The Deterrent Effect of the Death Penalty: Facts v. Faith, in HUGO A. BEDAU, THE DEATH PENALTY IN AMERICA 116-38 (3d ed. 1982), and sources cited therein. W. Espy in The Death Penalty in America—What the Record Shows, 11 CHRISTIANITY IN CRISIS 191 (1980), points out that even short term deterrence is not guaranteed stating that on "May 9, 1879, two black men, Tom Jones and Henry McLeod, were hanged at Appling, GA. Some white citizens of McDuffie County who had traveled to Appling to join the festivities got into a brawl immediately after the execution and 25 shots were fired. One man was fatally wounded and three others injured less seriously." Id.

\(^{295}\) CRIME IN THE UNITED STATES, supra note 28, at 68-78. The rates per 100,000 inhabitants were: Louisiana—19.8, Mississippi—15.3, Arkansas—12.0, Alabama—11.9, California—11.8, Illinois and Nevada—11.7, Maryland—11.6, New York (not a death penalty state in 1994)—11.1, and Texas—11.0. Id. The national average was 9.0. Id. at 60.

\(^{296}\) CAPITAL PUNISHMENT 1994, supra note 251, at 10.

\(^{297}\) Id. at 1.

\(^{298}\) Id. at 6.
highest murder and non-negligent homicide rate in the country,\textsuperscript{299} a rate almost two and a half times that of Wisconsin.\textsuperscript{300} North Dakota, the state with the lowest per capita murder and non-negligent homicide rate in the country\textsuperscript{301} does not have capital punishment.\textsuperscript{302} Five of the ten states with the lowest rates have no capital punishment.\textsuperscript{303} Nine of the ten states without capital punishment are among the sixteen lowest states.\textsuperscript{304} Wisconsin, with a rate of 4.5 per hundred thousand, half that of the national rate of 9.0, ranked sixteenth lowest in the nation in 1994.\textsuperscript{305} Indeed, suggesting the brutalizing effect of capital punishment, as opposed to its supposed deterrent effect, Bowers and Pierce found that in New York State, over the period from 1907 to 1963, there occurred, on average, two additional homicides in the month following an execution.\textsuperscript{306}

Forty-nine percent of the prosecutors responding to the Wisconsin prosecutors survey stated their belief that in actual application the death penalty is morally wrong, while 23\% thought it morally right, 14\% thought it morally neutral, and 13\% did not know.\textsuperscript{307} Dane County District Attorney William Foust no doubt articulated the position of many prosecutors in stating that he opposed the death penalty "for a very simple, very fundamental reason; it stems from my belief that murder is wrong, whether it's committed by the government or someone

\textsuperscript{299.} CRIME IN THE UNITED STATES 1994, supra note 28, at 76.
\textsuperscript{300.} Wisconsin's 1994 rate was 4.5 per 100,000 inhabitants, just one-half the national average. \textit{Id.} at 60, 78.
\textsuperscript{301.} \textit{Id.} at 74.
\textsuperscript{302.} CAPITAL PUNISHMENT 1994, supra note 251, at 1.
\textsuperscript{303.} The ten states with the lowest rates per 100,000 were: North Dakota (no death penalty)—0.2, Vermont (no death penalty)—1.0, New Hampshire (death penalty) and South Dakota (death penalty)—1.4, Iowa (no death penalty)—1.7, Maine (no death penalty)—2.3, Utah (death penalty)—2.9, Nebraska (death penalty)—3.1, Minnesota (no death penalty)—3.2, and Montana (death penalty)—3.3. CRIME IN THE UNITED STATES 1994, supra note 28, at 68-78.
\textsuperscript{304.} The remaining six states with the lowest rates after the lowest ten are: Wyoming (death penalty)—3.4, Massachusetts (no death penalty)—3.5, Idaho (death penalty)—3.5, Rhode Island (no death penalty)—4.1, Hawaii (no death penalty)—4.2, and Wisconsin (no death penalty)—4.5. \textit{Id.}
\textsuperscript{305.} \textit{Id.} at 60, 78.
\textsuperscript{307.} Prosecutors Survey, supra note 260.
It is clear that approximately half the prosecutors in the state, knowing that individuals convicted of violating the first degree intentional homicide statute and sentenced to life without parole will never be released, have grave moral reservations concerning the alternative of becoming personally involved in killing those offenders.

OPPOSITION TO CAPITAL PUNISHMENT IN WISCONSIN

As the Wisconsin legislature approached a vote on capital punishment in October of 1993, Jack Murtaugh, executive director of the Interfaith Conference of Greater Milwaukee, announced that “[s]ome of the faith groups will be very active” in opposing the capital punishment bill. Opposition at that time, which continues, includes Baptist, Catholic, Episcopalian, Jewish, Lutheran, Presbyterian, United Methodist, and state and local interfaith conferences. A statement from the Milwaukee Jewish Council at that time noted, “We believe that capital punishment is no greater a deterrent to crime than other forms of punishment and that it is unequally applied against the poor and against minority groups.” The Evangelical Lutheran Church in Wisconsin stated that “the death penalty is not fair by gender, race, age or economic status. Rich people don’t get put to death.”

A statement issued in October of 1993 by the Interfaith Committee on Social and Economic Justice in Madison, in reiteration of a 1980 General conference of the United Methodist Church stated:

In spite of a common assumption to the contrary, “an eye for an eye and a tooth for a tooth,” does not give justification for the imposing of the penalty of death. Jesus explicitly repudiated the lex talionis (Matthew 5:38-39) and the Talmud denies its literal meaning, replacing it with financial indemnities.

By the 1970s and 1980s, numerous religious communities had articulated opposition on religious and other grounds against capital punishment. These positions have evolved in some denominations

310. Id.
311. Id.
312. Id. at 10A.
314. See id., passim, in which the following organizations’ official positions on the death penalty were published: American Baptist Churches in the USA, American Ethical Union,
from earlier positions which emphasized the licitness or authority of the state to execute while the more recent statements emphasize the approach of charity set forth in Chapter 5 of the Biblical book of Matthew. Saint Augustine, in his *De Civitate Dei* (The City of God), emphasized the authority of the state to take life.\(^{315}\) Students at Jesuit universities in the 1950s were exposed to the thinking of scholastic philosopher, Thomas Aquinas, who had considered questions on capital punishment in his *Summa Theologica*. A moral ethics textbook in use in the 1950s, citing Aquinas, stated:

> A state . . . may kill a criminal who has seriously offended against the common good of the community. Just as it is reasonable to cut off a diseased member of the human body, when this member threatens the welfare of the whole body, so it is reasonable to permit the body politic to cut off a bad member of society for the sake of the good of the whole society.

Capital punishment may also be justified on the reasoning that a serious criminal has receded so far from the order of reason that he is no longer worthy of treatment as a rational being.\(^{316}\)

Reflecting the metamorphosis in approach, without denying the state’s authority to take life, the United States Catholic Conference of Bishops in a 1980 Statement on Capital Punishment, reiterating that man is made in the image of and likeness of God, called for the abolition of capital punishment based on numerous considerations, among them the beliefs that: (1) “infliction of the death penalty extinguishes possibilities for reform and rehabilitation for the person executed . . .;”\(^{317}\) (2) “abolition sends a message that we can break the cycle of violence . . .;”\(^{318}\) (3) “imposition of capital punishment involves the possibility of mistake;”\(^{319}\) (4) “racist attitudes and the social consequences of racism have some influence in determining who is sentenced to die in our

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\(^{317}\) UNITED STATES CATHOLIC CONF., U.S. BISHOPS’ STATEMENT ON CAPITAL PUNISHMENT 9 (1980).

\(^{318}\) *Id.* at 7.

\(^{319}\) *Id.* at 9.
society [which the Bishops] do not regard as acceptable;"320 (5) society must contemplate the suffering and destruction of lives brought by violent crime, but the answer is not vengeance. A special responsibility lies with the church to "provide a community of faith and trust in which God’s grace can heal the personal and spiritual wounds caused by crime and in which we can all grow by sharing one another's burdens and sorrows;"321 and (6) "that abolition of the death penalty is most consonant with the example of Jesus, who both taught and practiced the forgiveness of injustice. . . ."322

In 1993, in anticipation of the State Senate vote on capital punishment, both the Wisconsin Catholic Conference and the Catholic Archbishop of Milwaukee issued statements in opposition to capital punishment.323 The catechism of the Catholic Church, an official document published in 1994, noted that "the traditional teaching of the Church has acknowledged as well-founded the right and duty of legitimate public authority to punish malefactors by means of penalties commensurate with the gravity of the crime, not excluding, in cases of extreme gravity, the death penalty."324 The catechism went on to state, however, that "[i]f bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons, public authority should limit itself to such means, because they better correspond to the concrete conditions of the common good and are more in conformity to the dignity of the human person."325 In his encyclical Evangelium Vitae, Pope John Paul II provided:

It is clear that, for these purposes to be achieved, the nature and extent of the punishment must be carefully evaluated and decided upon, and ought not go to the extreme of executing the offender except in cases of absolute necessity: in other words, when it would not be possible otherwise to defend society. Today however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically non-existent.326

320. Id. at 10.
321. Id. at 11.
322. Id. at 8.
325. Id. ¶ 2267.
In August of 1995, a coalition of individuals and groups opposing capital punishment formally incorporated into the Wisconsin Coalition Against Capital Punishment. The chair of the group is Carolyn Smith, the District Attorney of Iowa County. Others on the board are reflective of the opposition to the death penalty of many of the groups with which they are affiliated.\(^3\) As is apparent, the opposition to capital punishment, premised on moral grounds, continues from the churches.

CONCLUSION

Wisconsin employed capital punishment from 1848 to 1853.\(^3\)\(^2\) Apparently, only John McCaffary, who had slain his wife, was subjected to this extreme penalty.\(^3\)\(^2\)\(^7\) He was publicly hanged in Kenosha before some three thousand people.\(^3\)\(^2\) Another defendant, William Radcliffe, was tried in Milwaukee in 1852 for murder in a circumstantial evidence case and was found not guilty reportedly in part because of jurors' reluctance to return a verdict of guilt on the murder charge knowing that the punishment had to be execution.\(^3\)\(^3\)\(^3\) In two trials in Waukesha County in the early 1850s, juries did not convict of willful murder reportedly because of antipathy to capital punishment.\(^3\)\(^3\) Sentiment rose against capital punishment and with the construction of Wisconsin's first state prison (Waupun) nearing completion, life imprisonment posed a preferable alternative to capital punishment.\(^3\)\(^3\) In July of 1853, the capital punishment law was repealed.\(^3\)\(^3\)

\(^{327}\) Other members include Bruce Colburn of the Milwaukee County Labor Council AFLCIO, Jon Nelson of the Wisconsin Association for Retarded Citizens, Kathleen Krenek of the Wisconsin Coalition Against Domestic Violence, Felmers Chaney of the Milwaukee NAACP, Jackie Austin of Wisconsin CURE, Anne Luber of the Benedict Center, Michael Blumenfield of the Milwaukee Jewish Council, Sister Mary Christine Fellerhoff of the Leadership Conference of Women Religious, Jerry Folk of the Wisconsin Conference of Churches, John Huebscher of the Wisconsin Catholic Conference, Rev. Sue Larson of the Lutheran Office for Public Policy, Marcus White of the Interfaith Conference of Greater Milwaukee, and Marjorie Morgan of the Archdiocese of Milwaukee. Also on the board are Rev. Tim Kuehl of Madison, Rev. Roy Nabors of Milwaukee, Milwaukee County Supervisor Dorothy Dean, Mary Bottari of Madison, and Attorney Dean Strang of Milwaukee.


\(^{329}\) Id. at 28-29.

\(^{330}\) Id. at 29.

\(^{331}\) Id. at 28.

\(^{332}\) Id. at 29.

\(^{333}\) Id.

\(^{334}\) Id.
Extensive experience with capital punishment in this country teaches that innocent persons have been and will be erroneously executed,\textsuperscript{335} that racism plays and will continue to play a role in who is executed,\textsuperscript{336} and that capital punishment is more expensive per execution than life imprisonment.\textsuperscript{337} Extensive research provides no convincing evidence that capital punishment deters murders,\textsuperscript{338} and limited research suggests executions may occasion later homicides.\textsuperscript{339} Sixty-five percent of the prosecutors in the state favor the imposition of life without parole over capital punishment with forty-nine percent citing moral reasons among the grounds for their opposition to executions.\textsuperscript{340} Many religious bodies in Wisconsin oppose capital punishment.\textsuperscript{341} Justice is well served in Wisconsin with the present life without parole punishment for intentional homicide.

In \textit{Callins v. Collins},\textsuperscript{342} Justice Blackmun, after supporting the theory of capital punishment throughout his long judicial career, held that "despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice and mistake."\textsuperscript{343} He went on to note that "the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants."\textsuperscript{344} His conclusion: "From this day forward, I no longer shall tinker with the machinery of death."\textsuperscript{345} The legislature and the people of Wisconsin would be well served by not engaging the hellish machinery of capital punishment.

\textsuperscript{335} See supra notes 29-59 and accompanying text.
\textsuperscript{336} See supra notes 111-245 and accompanying text.
\textsuperscript{337} See supra notes 275-292 and accompanying text.
\textsuperscript{338} See supra notes 293-306 and accompanying text.
\textsuperscript{339} See supra note 306 and accompanying text.
\textsuperscript{340} See supra notes 307-308 and accompanying text.
\textsuperscript{341} See supra notes 309-326 and accompanying text.
\textsuperscript{342} 114 S. Ct. 1127 (1994) (Blackmun, J., dissenting from the denial of certiorari).
\textsuperscript{343} \textit{Id.} at 1129.
\textsuperscript{344} \textit{Id.} at 1130.
\textsuperscript{345} \textit{Id.}