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REPRESENTING THE CONDEMNED:  
A CRITIQUE OF CAPITAL PUNISHMENT

CHRISTINE M. WISEMAN*  

Christine, this won’t be an easy letter to write, but it’s one I feel I must write. . . . I thank you for calling my family and talking to them. I am very concerned about my Mother and Barbara. I know it’s not much, but all I can do is thank you for being there for them this next week . . .  

Love & respect,  
Billy

On Thursday, January 25, and Friday, January 26, 1996, the states of Delaware and Utah executed two more death row inmates. News accounts signaling the events opened with the gambit, “[j]ust as capital punishment was becoming somewhat routine, two unusual executions [are] set for this week — one by hanging, the other by firing squad. . . .”2 I thought back once again to the early morning hours of February 16, 1995, when the State of Texas executed our client.3 To us, it was anything but routine. Unfortunately, in the circus-like race to execute death row inmates, neither was it unusual.  

We stood in the black rainy mist across the walkway from the Walls Unit in Huntsville, staring at the oldest prison in Texas. Pictures of it were plastered on the walls of local bars and on the silkscreened sweatshirts worn by their customers. We stared at the barbed wire, eerie yellow lights and girded towers manned by armed guards, and we wondered what purpose had been served by the execution of this fifty-one year old man. Governor George W. Bush had denied the petition

1. Excerpt from the final letter written by Billy Conn Gardner to the author on February 11, 1995, shortly before his death. In our final meeting before his death, Billy Gardner waived his attorney-client privilege with respect to the matters discussed in this essay. This essay is dedicated to Nettie Gardner and Barbara Gray, Billy Gardner’s mother and sister, two of the forgotten victims of capital punishment.  
2. Tony Mauro, Hanging, Firing Squad Executions Set for This Week, USA TODAY, Jan. 22, 1996, News, at 3A.  
3. Billy Conn Gardner was represented by Professor Wiseman from February, 1988, until his death on February 16, 1995. After he graduated from law school, Attorney David Bourne of the Milwaukee law firm Quarles & Brady remained with her as co-counsel on the case. Eventually, the firm adopted Gardner as its client as well.
for executive clemency six hours earlier. Like others before him, he followed the ranks of those governors increasingly unwilling to suffer the political ramifications of extending clemency to death row inmates.

There was nothing more we could do as lawyers so we stayed to do

4. In Texas, the Governor, acting in concert with the State Board of Pardons and Parole, has the ability to commute a death sentence by act of executive clemency. See Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 Tex. L. Rev. 569, 605 n.233 and accompanying text (1991). Since 1976, however, not one appeal for executive clemency on grounds of innocence has succeeded in Texas. As described by one reporter, the process is one “where decisions are meted out by the governor and a parole board consisting of political appointees who follow no fixed set of procedures, are reluctant to second-guess the courts, and are accountable to no one.” Susan Blaustein, *Witness to Another Execution*, Harper’s Magazine, May 1994, at 57. See also, Hugo Adam Bedau, *The Decline of Clemency in Capital Cases*, 18 N.Y.U. Rev. L. & Soc. Change 255, 257 (1990-91) (Despite the diversity in clemency procedures among the states, all "are standardless in procedure, discretionary in exercise, and unreviewable in result.").

5. During her term of office, Governor Ann W. Richards (1990-94) had granted a clemency hearing only twice. The first such hearing was ordered for Gary Graham, who is still alive. The second hearing was ordered for Vietnam Veteran Robert Black in response to a telephone call from the Vatican. Mr. Black’s stay of execution was granted for only 30 days, however. He was later executed in 1992. See Joan M. Cheever, *An Appointment in the Death House: A Lawyer’s Voyage on a Capital Case Comes to an End on an October Night in Texas*, Nat’l L. J., Nov. 14, 1994, at A16. National data available from the Department of Justice’s Bureau of Justice Statistics suggests that executive clemency has become a rarity. In the decade 1960 through 1970, for example, when statistics were first collected, death sentences numbered 1155, and commutations 182. In the decade 1979 through 1988, death sentences numbered 2535, but there were only 63 commutations. See Bedau, supra note 4, at 264.

Among the reasons offered to explain the decline in grants of clemency in capital cases is the observation that a governor might commit “political suicide” by granting clemency in a capital case. See id. at 268. Although there exist some notable exceptions, e.g., Governor Tony Anaya of New Mexico, who granted commutations to all six persons on death row in 1986, and Governor Richard Celeste of Ohio, who granted clemency in 1991 to 68 individuals, including eight death row inmates, both were serving final terms in office. See RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 644 (1994).

More recently, when Governor Jim Edgar of Illinois commuted the death sentence to life imprisonment without possibility of parole for Guinevere Garcia on Tuesday, January 16, 1996, just fourteen hours before her scheduled execution, he realized that political fallout. In a statement read by his attorney, Governor Edgar reasoned that commutation was justified, not because Garcia “was a woman, or a battered and sexually abused woman. . . . It was just that it was not right, . . . as long as other people convicted of more heinous crimes have eluded the death penalty in Illinois.” See Ted Gregory & Christi Parsons, *Edgar’s Power Halts Execution of Garcia*, Chi. Trib., Jan. 17, 1996, § 1, at 1. His announcement was met with “shock” by many Republicans in the Illinois General Assembly, who feared “Edgar’s move could undercut the GOP’s tough-on-crime campaign efforts in key legislative elections this fall that will determine which party will run the legislature for the next two years.” Some Republicans even sought to distance themselves from Edgar, commenting publicly that it was “his decision and his alone” and signaled no “‘red-letter day’” for death penalty opponents. See Rick Pearson, *Edgar’s ’94 Election Ad Echoes After Clemency*, Chi. Trib., Jan. 17, 1996, § 2, at 1, 7. See also, Ted Gregory & Christi Parsons, *Garcia’s Clemency Stokes Calls for New Laws*, Chi. Trib., Jan. 18, 1996, § 2, at 1, 4.
what we could as human beings. We stood in the rain, waiting for Billy Gardner's family to reappear from the Execution Chamber, our purpose now to lend a quiet dignity to the end of his life. As the moments ticked by, we stood side by side, saying nothing. The Walls Unit chaplain had told us that "it always rains in Texas when there's an execution." I wondered why no one got the picture. I thought with bitter regret about a criminal justice system which had failed miserably to protect another of its poor and powerless. It was a system in which we had played a pivotal role for seven years, but it was too little too late.

Billy Conn Gardner stood convicted of the capital murder of a cafeteria worker in Dallas, Texas on May 16, 1983. The bullet punctured the worker's liver and she died eleven days later. Before she died, the victim, Thelma Catherine (Caty) Rowe, identified her assailant as a man over 6 feet in height with medium-length reddish-blond hair and a two-inch red goatee. Billy Gardner stood 5 feet, 11 inches tall, but he had coal black hair and piercing black eyes. He had never worn facial hair, and no one at trial had been asked to explain the reddish-blond hair or the red goatee. The only disinterested eyewitness to the crime was a diminutive custodian from the high school who saw the assailant for two to four seconds standing outside the back door of the cafeteria. He stood six to ten feet away and testified that he took no particular note of the assailant since he thought the man was a school district worker — "out there with the yard pool or something." He also described the assailant as having sandy reddish hair and a little red goatee. His in-court identification of Billy Gardner was based on his personal assessment of what Gardner would look like with red hair and a red goatee. Yet he first identified Billy Gardner's picture from a photographic lineup some three months after the robbery. The police had shown him the photos while he was lying in a hospital bed suffering from a sickle cell crisis.

I thought again about all the arguments I had raised — legal arguments designed to get the state court, the federal district court and eventually the United States Supreme Court to focus on the fact that the wrong man stood convicted of Caty Rowe's murder. As defense counsel,

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6. Trial transcripts supporting the facts recounted in this essay are on file with the author and in the Dallas County Courthouse under the case name, State of Texas v. Billy Conn Gardner, No. F-83-93161-JLR (265th Judicial District Court, Dallas County, Texas). The trial transcripts were filed on April 26, 1984. Other facts are supported by the transcripts of the Evidentiary Hearing conducted on October 20, 1988 and continued on December 12 and 13, 1988, before the Honorable John Ovard, 265th Judicial District Court, Dallas County, Texas, and filed on December 13, 1988.
we were well aware of the Texas courts' reluctance to deal with post-conviction claims of actual innocence.7

The damning evidence in Gardner's case, as in all too many which have preceded his,8 was provided by the state's "star" witness, Melvin Sanders. In reality, of course, Sanders had few if any stellar qualities.

Melvin Sanders had fingered our client. Melvin Sanders testified at trial that the robbery was his idea since his wife Paula worked at the targeted cafeteria. He knew when and where the day's receipts would be counted. But he testified that he waited in the car while Billy went in to do the job. In fact, Melvin Sanders cut himself quite a deal before naming his accomplice. After police successfully prevented Sanders from getting probation on a pending forgery charge, prompted federal firearms authorities to file a case against him, Sanders convinced the district attorney in a nearby community to prosecute him for a distinct robbery, and threatened to file an action against his wife Paula in the matter, Sanders capitulated. And he named Billy Gardner because he owed Billy Gardner about $700 following a drug deal gone bad. In return for accusing Gardner of murder, Sanders was given testimonial immunity in the capital murder case, probation on the robbery charge, and dismissal of the firearms charge. In addition, his wife Paula was never charged in connection with Caty Rowe's murder. Billy's sister swore before the court that following Sanders' testimony at trial, she had overheard him at a restaurant during an adjournment laughing for her benefit about the fact that he had "pulled off" his testimony.9 Sources tell us Sanders has since killed himself in a shootout with a bounty hunter because he had snitched on so many people that he figured he would "buy it" in prison anyhow.

7. Four death-row inmates in the last four years were found to be innocent and were released; at least four more have presented to the courts compelling claims of innocence. But their pleadings have been dismissed repeatedly because Texas law requires an inmate to produce new evidence of his innocence within thirty days of his conviction — an impossibly short time for a newly condemned person to procure trial transcripts (just preparing these often takes the court as long as thirty days), hire a new lawyer to reinvestigate the case, and file a motion for a new trial. Blaustein, supra note 4, at 57.

8. See Michael L. Radelet et al., In Spite of Innocence 43-59, 60-76 (1992). In Chapters 1 and 2 of their book, the authors illustrate both how false testimony which is deliberately fabricated by witnesses who are coached by the prosecution can convict an innocent man and how perjured testimony provided by the real assailant can lead to a defendant's wrongful conviction.

The other "star" prosecution witness was Sanders' wife Paula, who worked at the targeted cafeteria. She had testified at trial that she simply could not identify the assailant because she only saw the back of the assailant's hand. Moreover, she was unaware that her husband Melvin Sanders was planning the robbery. Mr. Gardner's trial counsel never knew that Paula Sanders, who had worked at the cafeteria for only three to four months, had run to the cafeteria phone half a dozen times that afternoon, grabbing the phone before anyone else could answer it — that she was nervous and upset the whole day of the burglary — and that she sat for the entire encounter facing the assailant — because they never questioned any of Paula's co-workers who were present at the scene and who were listed on the police incident report. Instead they hired an investigator who talked with police and simply figured Billy Gardner was "good for" the offense. The investigator never contacted any witnesses listed on the police incident report because he "only did what the attorney instructed me to do," and they had given him no instructions regarding such witnesses. In fact, the investigator never contacted the fact witnesses at all during the entire course of the trial, even when it became apparent that they would be called by the State of Texas. That investigator has since died.

And so, Billy Gardner went to his death proclaiming his innocence of a crime for which he was "justly" convicted.

A. THE RECURRING PROBLEM OF INNOCENCE

During this century alone, more than 7,000 men and women have been legally executed in the United States.\textsuperscript{10} Two hundred fifty of those executions have occurred since the United States Supreme Court reinstated the death penalty\textsuperscript{11} in \textit{Gregg v. Georgia}.\textsuperscript{12} Of those, at least seventy-three (including our client) were executed in Huntsville.\textsuperscript{13}

\begin{itemize}
  \item[10.] RADELET, \textit{supra} note 8, at 19.
  \item[12.] 428 U.S. 153 (1976).
  \item[13.] When the numbers were tallied by a reporter in 1994, Texas had executed seventy-two men at Huntsville since 1976. That number represented twice as many executions as Florida, "the next most productive state in the execution market, and more than three times as many as in Virginia and Louisiana, which rank third and fourth." The author continued: "In the last two years, the rate of Texas executions has more than tripled, and the seventeen men executed in 1993 alone constitute nearly a fourth of those put to death since executions resumed in Texas in 1982." Blaustein, \textit{supra} note 4, at 54. \textit{See also}, David Margolick, \textit{Texas Death Row is Growing, But Fewer Lawyers Will Help}, N.Y. TIMES, Dec. 31, 1993, § b, at 1, 13. "For as long as anyone can remember, Texas's death row was the nation's largest; it lost that distinction only because it executed 17 prisoners in 1993 — more than three times as
More to the point, however, during that same interim, some fifty-three capital defendants have been released from death row because of probable innocence. That number represents nearly 2% of the people sitting on this nation's death rows.

In October 1994, Life Magazine detailed five of the more recent occurrences. They included: Andrew Golden, who was released in many as any other state, and the most here since 1938.” Id.


14. Hayes, supra note 11. See also, Radelet, supra note 8, at 282-356. While there have always been erroneous convictions, some of which resulted in executions, the authors factually document some thirty-nine situations since 1975-76 where a capital defendant, sentenced to death, has been released on grounds of innocence. Among those cases inventoried (including the state of conviction and year of release) were Randall Dale Adams (Texas, 1989); Jerry Banks (Georgia, 1980); Gary L. Beeman (Ohio, 1979); Jerry D. Bigelow (California, 1988); Clarence Lee Brandley (Texas, 1990); Anthony Silah Brown (Florida, 1986); Joseph Green Brown (Florida, 1987); Willie A. Brown and Larry Troy (Florida, 1987); Earl Patrick Charles (Georgia, 1978); James Creamer (Georgia, 1975); Perry Cobb and Darby Williams (a/k/a Darby Tillis) (Illinois, 1987); Robert Craig Cox (Florida, 1989); Henry Drake (Georgia, 1987); Neil Ferber (Pennsylvania, 1986); Charles Ray Giddens (Oklahoma, 1982); Thomas V. Gladish, Richard Wayne Greer, Ronald B. Keine, Clarence Smith (New Mexico, 1975); Timothy B. Hennis (North Carolina, 1989); Larry Hicks (Indiana, 1980); Anibal Jaramillo (Florida, 1981); William Riley Jent and Earnest Lee Miller (Florida, 1988); Lawyer Johnson (Massachusetts, 1982); Wilbert Lee and Freddie Pitts (Florida, 1975); Ralph W. Lobaugh (Indiana, 1977); Gordon Morris (Texas, 1976); Anthony Ray Peek (Florida, 1987); Juan F. Ramos (Florida, 1987); James Richardson (Florida, 1989); Johnny Ross (Louisiana, 1981); Bradley P. Scott (Florida, 1991); Charles Smith (Indiana, 1991); Delbert Tibbs (Florida, 1982); Jonathan Charles Treadaway, Jr. (Arizona, 1976).

In addition to this documentation, the National Coalition to Abolish the Death Penalty in Washington, D.C., listed 51 death row inmates who were freed between 1973 and May, 1994. One of those prisoners, also listed among the Radelet chronicles, was Delbert (the Reverend) Darby Tillis, a minister who frequently works in the Chicago offices of the Illinois Coalition Against the Death Penalty. Tillis had been convicted in 1979 for a double murder and robbery. He protested his innocence at trial, claiming perjured testimony. Eventually, he was released following a fourth retrial in 1987. Amid the testimony which exonerated him was that provided by a former assistant Cook County State’s Attorney. See James Rowen, Saved From Execution, He Saves Others, MILWAUKEE JOURNAL SENTINEL, May 3, 1995, § A, at 1, 8.

Another of those prisoners was Joseph Green Brown, now known as Shabaka WaQlimi, who was released in 1987 after spending fourteen years on Florida’s death row. Id. at 8. The latter appeared with the author at a community brainstorming conference on April 22, 1995 at St. Matthew’s CME Church in Milwaukee, Wisconsin.

15. Statistics demonstrate that as of April, 1994, there were 2804 men and 44 women awaiting execution in the United States. See COYNE & ENTZEROTh, supra note 5, at 55 (citing "Decisions of Death" by David Bruck, as updated by the publication Death Row, U.S.A. (NAACP Legal Defense and Educational Fund, Inc.).
November 1993 after spending 26 months on Florida’s death row for the 1989 murder of his wife—the Florida Supreme Court eventually concluded that the prosecution had failed to prove her death was anything but an accident;16 Walter McMillian, who spent six years on death row in Alabama for the murder of a dry cleaning store clerk in 1987—he was released on March 2, 1993 when all three prosecution witnesses finally recanted;17 Sonia Jacobs, released from prison in 1992—she spent five years on death row in Florida before her sentence of execution by electrocution was commuted to life in 1988;18 Muneer Deeb, a Jordanian immigrant who spoke little English and spent eight years on death row in Texas for the murder of three teenagers—he was eventually released on January 12, 1993;19 and finally, there was Kirk Bloodsworth—after spending ten years on death row in Maryland, Bloodsworth was released by order of a circuit judge when DNA tests demonstrated that semen found in the underclothing of the dead child could not have been his.20

Since October 1994, when *Life* published its expose, those numbers have increased yet again. After spending five years on death row in Illinois for the 1988 slaying of William Dulin, Joseph Burrows was released from prison on September 8, 1994.21 Although no physical evidence had linked Burrows to the crime, he was convicted on the testimony of two state witnesses who had received lighter sentences in exchange for their testimony. Later, one of the witnesses confessed that she alone had killed Dulin, and the other witness recanted his testimony, claiming he had been coerced by prosecutors and police officers.22

Likewise, Adolph Munson, first sentenced to Oklahoma’s death row in 1984, was acquitted on April 5, 1995 after an appeals court ordered him retried amid allegations that the police had withheld hundreds of pages of exculpatory reports and photographs.23 More recently, *The

17. Hayes, supra note 11, at 66.
18. Id. at 68.
19. Id. at 70.
20. Id. at 72-3.
22. Id.
23. See Richard L. Fricker, State Falters in Retrial of Escaped Con, ABA J., June 1995 at 38, 40. An earlier ABA Journal investigation of the Munson case discovered that information which pointed to another suspect had never been turned over to the defense. See Richard L. Fricker, Reasonable Doubts, ABA J., December 1993, at 38, 39. Among the evidence withheld from defense counsel were statements given by three individuals who said
Chicago Tribune detailed the travails of Rolando Cruz, a man who was finally released from Illinois' death row on Friday, November 3, 1995, after having spent 11 years on death row for the murder of a ten-year old child which he did not commit. Prosecutors had ignored the conclusion of the Illinois State Police that another man committed the crime, had ignored the results of their own DNA tests excluding the defendant, and were finally taken to task when a sheriff's lieutenant admitted that he and other law enforcement officers had perjured themselves on the witness stand.24

That these persons were released is a triumph of appellate justice for them, but an unmistakable sign that the criminal justice system in this country has not been able to foreclose the inevitability of wrongful conviction. And, as defense counsel, the inevitability of wrongful conviction is my nightmare. My client Billy Gardner was not as fortunate as these, however, and the inevitability of wrongful conviction has now become my curse.

These people are not just anonymous numbers on someone's tally sheet of death row inmates; they are victims — every bit as much as the people whom they were accused of killing. These inmates are people who should never have been tried or people whose cases were plagued by reasonable doubt, but who did not have the resources to raise that reasonable doubt at trial. As I have stated to those persons aghast at the acquittal of O. J. Simpson, the tragedy is not that the criminal justice system works as it should for the rich man; the tragedy is that so often it does not work as it should for the poor. For Billy Gardner and a whole host of poor defendants, the system has collapsed. Visit this nation's death rows; you may spot one or two monied people in Arizona or Illinois, but they are a rarity. This nation's thirty-eight death rows25

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25. As of April, 1994, 36 states had enacted capital punishment. See COYNE & ENTZEROOTH, supra note 5, at 87-90. See also, State of Wisconsin Legislative Reference
are populated instead by people like Billy Gardner, whose father and cousin injected him with heroin at the age of nine to make him a pliant drug runner, whose father raped his younger sister, and whose mother was simply too poor to keep the man away from the home or obtain the necessary rehabilitative help for her son. But there is one other thing to note as well: the people on death row are disproportionately people of color. Statistics disclose, for example, that while only 12% of the United States population is African American, 46% of the death row population is African American.26

Moreover, nationwide studies reflect overall patterns of racial discrimination in capital sentencing. One of the most sophisticated studies was conducted by Professor David C. Baldus, who examined the Georgia capital sentencing process between 1973 and 1979. He examined over 2,000 cases and considered 230 non-racial variables. He found that Georgia defendants who were charged with killing white persons received the death penalty in 11% of the cases, but that defendants charged with killing black victims received the death penalty in only 1% of the cases. Put another way, a Georgia defendant charged with killing a white victim was 4.3 times more likely to receive a death penalty.

Bureau, Informational Bulletin 95-1, Capital Punishment in Wisconsin and the Nation, Apr. 1995, at 26-7 (prepared by A. Peter Cannon, Senior Research Analyst). Since 1994, that number has grown by two. The state of Kansas authorized capital punishment by lethal injection in 1994 when its governor allowed a bill to become law without her signature. In March 1995, the state of New York enacted legislation permitting capital punishment by lethal injection for the murder of a police officer, judge, or other criminal justice official; for contract and serial killings, torture killings or intentional murder during the course of a felony. See id. at 25. Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin have yet to follow suit, although legislation is currently pending in Wisconsin. See, e.g., S.B.1, 1995-96 Legislature, 1995 Wis. Laws 11.

26. According to the NAACP Legal Defense and Educational Fund, Inc. statistics on the death row population in this country as of April, 1994, there were 1131 black inmates and 287 inmates who were classified as either Asian, Latino, Native American or “Unknown.” These figures compare with the 1427 white inmates on death row and do not account for the death row inmates in the United States military (8) or in federal prisons (5). See COYNE & ENTZEROOTH, supra note 5, at 87-90. Justice Marshall also noted this disparity: “A total of 3,859 persons have been executed since 1930, of whom 1,751 were white and 2,066 were Negro. Of the executions, 3,334 were for murder; 1,664 of the executed murderers were white and 1,630 were Negro; 455 persons, including 48 whites and 405 Negroes, were executed for rape. It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population. Studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination.” Furman v. Georgia, 408 U.S. 238, 364 (Marshall, J., concurring).
sentence than a defendant charged with killing a black victim. Thus, the Baldus study concluded that black defendants who kill white victims have the greatest likelihood of receiving the death penalty.  

Beyond the Baldus study, there have been numerous others, including a nationwide study conducted by Jim Henderson and Jack Taylor, reporters for the *Dallas Times Herald*. That study examined 11,425 capital murders from 1977 to 1984 and concluded that "the killer of a white is nearly three times more likely to be sentenced to death than the killer of a black in the 32 states where the death penalty has been imposed." The study also disclosed that in Maryland, killers of white victims were eight times more likely to receive the death sentence than killers of black victims; that in Arkansas, killers of white victims were six times more likely to receive a sentence of death; and that in Texas, killers of white victims were five times as likely to be sentenced to death than killers of blacks. Even more compelling, the General Accounting Office synthesized 28 different studies and found "a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the Furman decision" in its February 1990 report.

Furthermore, it appears that federal prosecutions reflect this same racial disparity in that federal prosecutors target blacks far more often than whites when seeking the death penalty for drug-related murders. The House Judiciary Committee’s civil and constitutional rights subcommittee reported in March 1994, that in the thirty-seven cases where federal prosecutors had sought the death penalty, twenty-nine were against blacks. Four others were against whites and four were


28. *See id.* at 780 n.9.


30. *Id.*

31. *See U.S. GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES* 5 (Feb. 1990). The Report concluded that "[i]n 82 percent 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." *Id.* (footnote omitted).

against Hispanic defendants.\textsuperscript{33} It is for these same reasons that Justices Brennan,\textsuperscript{34} Marshall,\textsuperscript{35} and most recently Justice Blackmun of the United States Supreme Court have rejected the constitutionality of capital punishment. Despite judicial efforts to devise legal formulae and procedural rules, the death penalty remains “fraught with arbitrariness, discrimination, caprice, and mistake.”\textsuperscript{36} Justice Blackmun has therefore termed capital punishment “an experiment that has failed.”\textsuperscript{37} (And lest you argue death to all first-degree murderers, like other hapless individuals who betray their own ignorance,\textsuperscript{38} the Supreme Court struck that down in \textit{Woodson v. North Carolina} as violative of individualized sentencing in 1976).\textsuperscript{39}

\textsuperscript{33} \textit{Id.}

\textsuperscript{34} See \textit{Furman v. Georgia}, 408 U.S. 238, 305 (1972) (Brennan, J., concurring) (“Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment.”). \textit{See also}, \textit{Gregg v. Georgia}, 428 U.S. 153, 229-31 (1976) (Brennan, J., dissenting).


\textsuperscript{37} From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored — indeed, I have struggled — along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies.

\textit{Id.} at 1130 (Blackmun, J., dissenting).

\textsuperscript{38} Rock County Assistant District Attorney Gerald A. Urbik, in a letter to the editor of the \textit{Wisconsin Lawyer} criticized the death row advocacy of this author as follows: “Wiseman contends that the death penalty cannot be administered in a nondiscriminatory manner. This is untrue, however. If every murderer convicted of first-degree intentional homicide was executed, there would be little if any room for discriminatory enforcement.” \textit{See This Prosecutor Wants the Death Penalty Reinstated}, 69 \textit{Wisconsin Lawyer} 2 (June 1995). One would hope that prosecutors who seek the reinstatement of capital punishment in Wisconsin would at least know the law.

\textsuperscript{39} \textit{Woodson v. North Carolina}, 428 U.S. 280, 303-05 (1976) (respect for human dignity underlying the Eighth Amendment requires judicial consideration of individual aspects of the defendant’s character and the circumstances of the particular offense as a constitutionally indispensable part of the process of imposing the penalty of death; because the North Carolina statute impermissibly treats all persons convicted of a designated offense as members of a faceless, undifferentiated mass, it is unconstitutional).
B. INEFFECTIVE ASSISTANCE OF COUNSEL

There are other, equally compelling inequities that account for many of these egregious errors. As noted above, they are in large measure the product of a lack of resources, including those resources necessary to hire competent counsel. In Billy Gardner's case, his trial counsel had visited with him for fifteen minutes at most before jury selection in this capital case. Gardner informed us of that fact during our initial interview with him, but trial counsel had countered that the visits were much longer and more frequent. When we subpoenaed the jail records, we knew Billy had told us the truth. Those records reflected but one brief visit between the date of Gardner's arrest and the date of jury selection. Nor did trial counsel bother to interview witnesses at the scene who were listed on the police incident report.

Furthermore, although trial counsel knew that Billy Gardner was a drug addict, they were not aware prior to trial that he was a victim of what one doctor has since termed "catastrophic" child abuse, having been injected with heroin by his father at the age of nine to make him a pliant drug runner. There was no mental health expert and no opportunity to investigate the impact of those mitigating circumstances on Gardner's moral culpability for the offense. Gardner's sister responded to the family's dissatisfaction with trial counsel by investigating the costs of retaining private counsel. Yet she stopped her efforts when told that the minimum fee for a capital case like her brother's was $30,000.40 But, of course, Billy Gardner is not alone.

The stories of ineffective assistance in capital cases are legion. While awaiting our client's execution in the wee morning hours of February 16, the chaplain at the Walls Unit in Huntsville told us that one Texas lawyer had ten clients currently facing execution in Huntsville. The Wall Street Journal, on September 7, 1994, reported that the strategy of Texas lawyer Joe Frank Cannon in capital cases was simple: "Work fast."41 Mr. Cannon told reporter Paul Barrett that "[j]uries don't like a lot of questioning, all these jack-in-the-box objections, going into every detail,

40. Texas has some public defenders, but for the most part, counsel in capital cases are appointed by the individual trial judges. See Marcia Coyle, et al., Trial and Error in the Nation's Death Belt: Fatal Defense, 12 NAT'L L. J. 29, 32 (June 11, 1990). See also, Lewin, supra note 13, at A13. Texas requires no special training or qualification for capital defense lawyers and provides no counsel beyond the first appeal. Id.

so I've never done it.'" Instead, he boasts of hurrying through trials "'like greased lightning.'" Appointed by the Texas courts to represent defendants in capital cases at state expense, Cannon has defended eight men who are currently awaiting execution. His collection of ten death sentences is reportedly one of the largest among active defense lawyers. Apparently proud that he spends little time at his office or the law library, Mr. Cannon also boasted, "'I'm not the sort of lawyer who takes a lot of notes.'" A 1995 CNN televised presentation entitled, "On Penalty of Death," reported that in Harris County, Texas, the same county where Mr. Cannon has practiced law for 44 years, fifteen people were sentenced to death in 1994. In each of those cases, the defendant was represented by court-appointed counsel. In another fifteen capital cases where the defendants had privately retained counsel, the district attorney never sought the death penalty in any one of them.

Texas, however, is not the only state to have problems with incompetent lawyers in capital cases. Take the case of former lawyer James Venable in Alabama, reported in the February 1991 issue of the ABA Journal. When Aden Harrison Jr. was tried for murder in March 1986, he was represented by Mr. Venable, who was then 83 years old. According to the Fulton County Superior Court, Mr. Venable "slept a 'good deal' of the time." Harrison's family, which is black, chose Venable because of his low fees. What they did not know was that James Venable was a former imperial wizard of the Ku Klux Klan. Asked by a reporter to confirm the allegation, Venable remarked, "'I've been in the Klan since 1923, when it was over 10 million strong.'"

In order to assess the quality of legal defense in capital cases in the nation's Death Belt, i.e., Alabama, Georgia, Florida, Louisiana, Mississippi and Texas, the National Law Journal in 1990 conducted a comprehensive study. Incident to this investigation, reporters

42. Id.
43. Id.
44. Id.
45. Id. at A4.
46. Id.
47. Harris County, which includes the city of Houston, accounted for 113 of the 397 inmates on Texas' death row in 1995. Of the Texas inmates executed since 1976, 37 were from Harris County, where District Attorney Johnny B. Holmes, Jr., pronounces himself a "proud supporter of the death penalty." Lewin, supra note 13, at A1, A13.
49. Id.
50. See Coyle, supra note 40, at 29-42.
examined thousands of transcript pages in nearly 100 trials; interviewed scores of attorneys who had tried and lost capital cases; and questioned judges, prosecutors and experts in capital law. Its key findings include the following: (1) trial lawyers who represented death row inmates in the particular six states have been disbarred, suspended or otherwise disciplined at a rate 3 to 46 times the discipline rates for those states; (2) more than half the defense counsel surveyed were handling their first capital case when their clients were convicted; (3) unrealistic statutory fee limits on defense representation act as disincentives to thorough trial investigation and preparation; (4) there are inadequate or non-existent standards for appointment of counsel which sometimes result in widely varying levels of experience in capital cases; (5) extant statutory standards for appointment of counsel are routinely ignored by trial judges and violations are viewed on appeal as "harmless error;" (6) capital trials are often completed in one to two days; (7) penalty phases of capital trials commence immediately after the guilt phase and last several hours at best; (8) little effort is expended to present mitigating evidence at the penalty phase; and (9) the Supreme Court test for effective assistance of counsel as articulated in *Strickland v. Washington* is applied in meaningless fashion to capital cases. The study concluded that "fairness is more like the random flip of a coin than a delicate balancing of the scales of justice."

Moreover, at a time when Congress and the states are expanding their efforts to implement capital punishment, they are also cutting back on defense costs. For example, Congress has voted now to defund the Resource Centers across this country which operated in twenty of the death penalty states. These centers not only represented death row inmates directly, they also trained private lawyers to do the same. In the state of Wisconsin, a growing number of legislators want to reinstate capital punishment, yet they sought to reduce funding for the office of the State Public Defender by $22 million. Whom do they expect will represent the bulk of the capital defendants? Politicized legislatures seek to reduce defense costs but only at the expense of justice for the poor and the innocent. And how many "innocent" death row inmates will it take before the public’s lust for blood is sated?

C. THE LENGTHY REVIEW PROCESS

To many proponents of capital punishment, the efficacy of death is lost in a stream of endless delay caused by defense counsel's attempt to pursue successive petitions for writ of habeas corpus. The response is somehow to streamline the post-conviction system in order to execute more quickly. Some have even suggested that my own seven-year odyssey was much too long. Actually, mine is a story of judicial largesse that extended not to defense counsel, as many would believe, but to the State.

My story begins on February 15, 1988, almost seven years to the date before Billy Gardner was executed. I was asked to take Billy's case by a friend of mine who was hired by the Fifth Circuit Court of Appeals to organize death row representation and who feared that Billy Gardner faced an imminent writ of execution without benefit of counsel. On February 26, 1988, I received a copy of the 4,000 page record in the Gardner case from a kindly lady with the Salvation Army who ministered to the death row inmates in Huntsville. She and her son spent days copying the record and sent it to me via Greyhound Bus. I was fortunate to have her assistance because on the same day I received the record, I was notified that the trial judge had ordered Mr. Gardner executed on March 22, only a month away.

From February 19 until April 14, 1988, when I was finally successful, I attempted to locate a local Texas attorney who would agree to appear in the case with me because I was not licensed to practice law in Texas. I spent a minimum of one hour per day in that endeavor, calling everyone from Esther Lardent, the Director of the ABA Death Penalty Representation Project (which was then in its fledgling stages) to the Texas Civil Liberties Union. The former could offer but two suggestions; the latter could barely return my call. No one would touch the case.

When I could wait no longer, I filed a petition seeking an emergency stay of execution until I could file for habeas corpus relief in the Texas trial court. That stay was granted on March 15, 1988 for a period of 60 days. The State of Texas responded on March 30 with a motion to vacate the stay and, summarily remand the case to the trial court for immediate imposition of a death date. The State had argued that my filing a petition for emergency stay constituted the unauthorized practice

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55. Reference is to Attorney James A. Rebholz, now a partner with the Milwaukee firm of Rebholz, Auberry & Malone.
of law, because my papers were filed without the signature of local counsel. I was struck by the paradox: the district attorney’s office in Dallas wanted to protect Mr. Gardner from potentially incompetent out-of-state counsel by killing him.

I eventually secured local counsel and the Texas Court of Criminal Appeals affirmed the stay of execution on April 18, 1988. Judge Teague of the Texas Court of Criminal Appeals noted in his order that the Texas bar could not on the one hand disdain to represent its own death row inmates and on the other object to volunteer counsel from other states.

I then filed for permission to appear in Mr. Gardner's case pro hac vice; the order granting permission was issued on May 12, 1988. I read the 4,000 page transcript and made plans to travel to Texas to investigate the case. Local counsel was successful in hiring an independent investigator in the process. I also obtained the services of two excellent third-year law students to work with me on the case and accepted the volunteer services of another dedicated Wisconsin lawyer because we were running out of time. The stay of execution had since expired and the trial judge had set another execution date for July 20, 1988.

We filed a petition for writ of habeas corpus in state court together with another request for stay of execution on July 13, 1988. We also requested an evidentiary hearing because there were serious issues of ineffective trial counsel and the constitutionality of the Texas death scheme as implemented, not to mention questions regarding the assailant's description. Shortly after July 13, I received a phone call from the Texas appellate district attorney who had been assigned the case.

56. He was Attorney Keith E. Jagmin of Dallas, Texas. We remain indebted for his efforts as well.
57. He also noted that I probably wished I had never heard of the State of Texas and he, for one, would not blame me if I felt that way.
58. These were David Bourne, noted above, and Francis J. Hughes, now with the Milwaukee law firm of Fox, Carpenter, O’Neill & Shannon, S.C.
59. I am, of course, indebted to Atty. Edward J. Hunt of the Edward J. Hunt Law Offices in Milwaukee, Wisconsin, then a supervising attorney with the Legal Defense Program at the University of Wisconsin Law School. My gratitude extends as well to my Marquette Law School colleagues, many of whom spent hours at the copy machine until the wee hours of the morning aiding my efforts to seek emergency stays, or who contributed money from their own pockets to help finance my various trips to Texas.
60. We consistently argued that, as applied, Section 37.01 of the Texas Criminal Code violated Gardner's Eighth and Fourteenth Amendment rights since there was relevant mitigating evidence of which the capital jury could make no use. Eventually, we argued that undisputed evidence of catastrophic childhood abuse introduced during mitigation brought Gardner's case within the purview of Penry v. Lynaugh, 492 U.S. 302 (1989).
She told me that she had spoken with the judge and that initially he was not going to grant the evidentiary hearing. However, because she had her own serious reservations about Mr. Gardner's case, she convinced the trial judge to order a hearing. I was grateful for her efforts, notwithstanding the fact that they were all ex parte. We were to discover that at virtually every stage of the proceedings, Texas prosecutors had no ethical obligation to include defense counsel in substantive discussions with judges about the merits of a case. The judge thereafter issued a stay of execution and scheduled an evidentiary hearing. That evidentiary hearing occurred on October 20 and 21, 1988, and was adjourned for completion to December 12 and 13, 1988.

One of the more interesting developments emanating from those hearings was the surprising testimony of both the original investigator and the district attorney who tried Gardner in 1983. Each testified that Billy Gardner had orally confessed to the offense and had done so weeks before trial. Yet, as trial had commenced on October 17, 1983, that same district attorney represented to the court in response to a defense motion for defendant's statements that "[t]here's [sic] no written confessions of the Defendant. There's no oral confessions of the Defendant, whether recorded or not." We were left to assume that the confession evidence had been manufactured to somehow account for trial counsel's failure to investigate the facts of the case. The presiding judge took judicial notice of the obvious contradiction in the state attorney's testimony, but never again referred to it.

By December 15, 1988, we had submitted 33 pages of proposed findings of fact and conclusions of law. The State responded with ten on December 20. On December 29, the day before his departure to the appellate bench, the presiding trial judge issued his findings of fact and conclusions of law. They were but four pages long. In his brief findings, there was no mention of the district attorney's changed testimony, no citation to the record, and no attempt to cite the law. The only finding with respect to the lead trial lawyer's failure to investigate his own case was the judge's statement that trial counsel had "ample opportunity to meet with and communicate with the defendant personally, through the

61. And I remain indebted to the efforts of then Assistant District Attorney Leslie McFarlane of Dallas, who sometimes joined in the investigative efforts regarding the Gardner case, insofar as she was able. It is my understanding that she left the Dallas prosecutor's office for personal reasons following her attempts to implement the release of Randall Dale Adams in 1989.

62. Evidentiary Hr'g Tr. at 530-32, 534-35.

63. Trial Tr., Vol. 16, at 22.
investigator, and through relatives. He is very competent and experienced. As he testified, he had sufficient time, evidence and was prepared for trial."\textsuperscript{64} The state trial judge then forwarded our petition to the Texas Court of Criminal Appeals, which likewise denied it on February 24, 1989, with three judges dissenting. The trial judge then set another execution date for March 9, 1989.

Following our loss in state court, we filed our first and only petition for writ of habeas corpus in federal district court. That was on March 1, 1989. We again raised constitutional issues about the adequacy of the Texas death scheme and sought permission to hire a psychological expert. We also filed for a stay of execution. The State of Texas was ordered to file its response to our habeas petition by April 25, 1989. Without explanation or word to us from either the State or the federal district court, the State did not file any response until February 23, 1990 — nearly one year later and months beyond the appointed date. It also filed a motion for summary judgment. We moved to strike the State's response because it was so late. That motion, of course, was denied without explanation. The court also denied our motion to order a psychiatric examination for our client, so we paid the doctor ourselves. We then won an evidentiary hearing in federal court in order to present psychological testimony regarding Billy Gardner's moral blameworthiness for the offense. That hearing was held on September 23, 1991. The magistrate issued no findings, however, until February 19, 1993. After filing our objections to the magistrate's determination, we filed an appeal in the Fifth Circuit Court of Appeals on May 28, 1993. Although our supporting brief was due on July 25, we filed it on July 22. The State's brief was due on August 20. Despite an admonition from the Fifth Circuit that delays would only be tolerated for good cause, which would not include the ordinary business of counsel, the State was granted an extension of time to September 13, 1993.

After our brief was filed but before the State's brief was due, the Fifth Circuit Court of Appeals had decided a case virtually identical to ours in which the defendant was awarded a new sentencing hearing. The decision in \textit{Russell v. Collins}\textsuperscript{65} was issued on August 13, 1993, and was required to be cited by the State in its brief under applicable rules of professional conduct. It was not. The Fifth Circuit imposed no sanction and the court never mentioned the omission.

\textsuperscript{64} Findings of Fact and Conclusions of Law No. 11, Ex Parte Billy Conn Gardner, Writ No. W83-93161-R, 265th Judicial District Court of Dallas County, Texas, December 29, 1988.
\textsuperscript{65} 998 F.2d 1287 (5th Cir. 1993).
Then, on September 21, 1993, a three-judge panel of the Fifth Circuit Court of Appeals issued an opinion in \textit{Motley v. Collins},\textsuperscript{66} which again stood as precedent affording our client and those similarly situated a new trial. On April 1, 1994, however, those same three judges withdrew their opinion and substituted a new opinion reaching precisely the opposite conclusion\textsuperscript{67} — a situation so rare it is almost without equal. The Fifth Circuit Court of Appeals subsequently issued a two-page per curiam opinion in our case on April 14, 1994, denying us any relief. We filed a petition for rehearing on April 25, 1994. That petition was likewise denied by the Fifth Circuit on May 13. The Fifth Circuit then vacated all stays of execution.

On August 5, 1994, we filed a petition for certiorari in the United States Supreme Court. The State’s response was due in the United States Supreme Court on September 8, 1994. On September 7, they sought and obtained an extension to October 11. On October 10, they sought and obtained an extension to November 10. On November 10, they sought and obtained an extension of time to December 9, and were finally told by the Clerk of the Supreme Court that no further extensions would be entertained. Each of their extensions was allegedly necessitated by “a number of other previous commitments of the undersigned attorney, including administrative responsibilities.” The “rarity” of that excuse is perhaps matched only by the paucity of courts which accept it.

In retrospect, it appears not a little disingenuous that Justice Antonin Scalia, the assigned administrative justice for the Fifth Circuit Court of Appeals, will no longer entertain the lack of a lawyer as “good cause” for which to extend the time within which a capital defendant must file a petition for writ of certiorari to the United States Supreme Court.\textsuperscript{68} Yet the State of Texas can obtain repeated and successive extensions of time within which to file a 19-page responsive brief without apparent justification.

Gardner’s petition for certiorari was eventually denied by Supreme Court order on January 9, 1995. On January 12, the Texas trial judge set another execution date for February 16. We turned the files over to the

\textsuperscript{66} 3 F.3d 781 (5th Cir. 1993). The Fifth Circuit there determined that substantial evidence of childhood abuse introduced at trial properly preserved a \textit{Penry} claim for collateral review and declined to require a strict nexus or expert testimony that the abuse suffered by a capital defendant probably caused the defendant to commit the crime in question in order to warrant a \textit{Penry} instruction.

\textsuperscript{67} 18 F.3d 1223 (5th Cir. 1994).

Texas Resource Center to assure ourselves that there was no further legal issue which could be pursued. The Resource Center petitioned for executive clemency on February 9, 1995, and within seven days, Billy Gardner was dead.

Billy Gardner was hardly the beneficiary of a system manipulated by defense counsel. To suggest greater restrictions on time and issues without seeking parity from prosecutors is folly. If the sanction for the defendant is a hastened death, the State must at least lose the right to be heard. Yet repeatedly, the State faces no sanction at all.

D. THE "ECONOMICS" OF CAPITAL PUNISHMENT

Beyond the powerful evidence which suggests that the death penalty cannot be meted out fairly as between black and white, rich and poor, there are other concerns. When the United States Supreme Court reinstated capital punishment in *Gregg v. Georgia*, it recognized that contemporary values reflected in public attitudes toward a given punishment played a role in Eighth Amendment analysis and application.69 However, public perceptions of standards of decency do not conclude the constitutional analysis.70 The penalty for an offense also must accord with "the dignity of man."71 That is, a punishment may not be excessive;72 it may not involve the unnecessary and wanton infliction of pain, nor may it be grossly disproportionate to the severity of the crime.73 Furthermore, in order to obviate the "unnecessary and wanton infliction of pain," the sanction or penalty imposed cannot be so totally devoid of penological justification that it results in the gratuitous infliction of suffering.74 It is at this juncture that deterrence becomes significant.

The Supreme Court responded to the issue of penological justification

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70. *Id.* ("[O]ur cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive.").
71. In *Furman v. Georgia*, the Supreme Court had concluded that the cruel and unusual punishments clause of the eighth amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Furman*, 408 U.S. 238, 269-70 (1971) (Brennan, J., and Marshall, J. concurring) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958)). "The Clause 'may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'" *Id.* at 270 n.10 (Brennan, J., concurring) (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)).
73. *Id.*
74. *Id.* at 183.
by suggesting two purposes for the death penalty: retribution and deterrence. However, while retribution is not a forbidden objective, nor one which is inconsistent with prevailing constitutional standards, it is no longer the dominant objective of American criminal law. Considered in light of this legitimate objective, capital punishment has been viewed as an expression of society's outrage at particularly offensive conduct. The constitutional question as yet unresolved is whether retribution alone suffices to bring a particular punishment in compliance with the Eighth Amendment. Thus, the proponents' insistence on deterrence. If indeed capital punishment serves no deterrent function or is no more a deterrent to violent crime than life imprisonment without possibility of parole, it may not withstand constitutional scrutiny. As Justice Marshall wrote in Furman:

The fact that the State may seek retribution against those who have broken its laws does not mean that retribution may then become the State's sole end in punishing. Our jurisprudence has always accepted deterrence in general, deterrence of individual recidivism, isolation of dangerous persons, and rehabilitation as proper goals of punishment. Retaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government in a free society.

Punishment as retribution has been condemned by scholars for centuries, and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance.

Indeed, Justice Marshall's sentiments are also reflected in the determination of the newly-created South African Supreme Court, which abolished capital punishment on June 6, 1995. Announcing the unanimous decision of the court, Mr. Arthur Chaskalson, President of the Constitutional Court, stated:

Retribution cannot be accorded the same weight under our Constitution as the right to life and dignity. . . . It has not been shown that the death sentence would be materially more effective to deter or prevent murder than the alternative sentence of life imprisonment.

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75. Id. (citing Williams v. New York, 337 U.S. 241, 248 (1949)).
76. Gregg, 428 U.S. at 184.
77. Furman, 408 U.S. at 238 (Marshall, J., concurring) (emphasis added) (footnotes omitted).
79. Id.
As noted by Mr. Chaskalson, there is serious question whether capital punishment acts as a deterrence, either to society in general or to the individual criminal. The F.B.I publication *Crime in the United States* demonstrates that 1994 murder rates in states which do not have the death penalty averaged 3.85 murders per 100,000 of population, while states which use the death penalty averaged 8.07 murders.  

Furthermore, capital punishment is more costly than any other option, including life imprisonment. North Carolina conducted a comprehensive study on the issue which was published in 1993. According to that study, North Carolina taxpayers pay $163,000 more to convict and execute an inmate than they do to convict and imprison an inmate for twenty years. Estimates are that each execution in North Carolina costs the state approximately $2.16 million. The *Miami Herald* has similarly reported that the State of Florida spends $3.2 million per execution. Likewise, the Kansas Legislative Research Department has concluded that capital trials can last up to three-and-one-half times as long as non-capital trials, and in California, capital trials cost nearly six times more than other murder trials. Texas taxpayers similarly spend an estimated $2.3 million for each capital prosecution, which is three times the cost of incarcerating an inmate in a maximum security prison for forty years. As of 1993, Maryland has followed suit at a cost of approximately $2 million each year. And finally, the State of New York estimates that costs incurred for attorneys' fees, investigators, experts and other trial and appellate costs would equal nearly $1.7 million per capital case.

Comparable estimates for the cost of life imprisonment are much reduced. A 1985 California study estimated that sentencing a murderer

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80. *See Crime in the United States 1994 (Uniform Crime Reports)* 60-67 (Nov. 19, 1995), published by the United States Department of Justice, Federal Bureau of Investigation. Statistics were calculated by averaging the 1994 murder rates per 100,000 population of those states which have the death penalty and the 1994 murder rates per 100,000 population of those states which do not have capital punishment.

81. COYNE & ENTZEROTH, *supra* note 5, at 84.

82. *Id.*


84. *See Wisconsin Department of Justice Fiscal Estimate, LRB 0270/1 SB1* (Jan. 26, 1995), at p. 3.

85. COYNE & ENTZEROTH, *supra* note 5, at 84.

86. *Id.* at 85.

87. Wisconsin Department of Justice Fiscal Estimate, *supra* note 84, at 3.
to life imprisonment would cost approximately $440,000, whereas the New York State Defenders Association in 1982 estimated the cost of life imprisonment for forty years at just over $600,000.88

E. THE MORAL "COSTS" OF CAPITAL PUNISHMENT

With the abolition of capital punishment in South Africa on June 6, 1995,89 the United States stands as one of only two industrialized nations which execute their citizens.90 In this regard, the United States is allied with such stalwarts as China, Egypt, Iraq, Iran, Russia and Singapore.91 Most damning of all, however, we execute our children92 and we execute our mentally infirm.

Of the thirty-eight states which endorse capital punishment, sixteen authorize imposition of the death penalty as against juvenile offenders below the age of eighteen.93 Nine states express no minimum age for the imposition of capital punishment, and three permit executions for offenders as young as fourteen or fifteen.94

The United States Supreme Court first confronted the constitutionality of executing juveniles in Eddings v. Oklahoma.95 Although the Court there was able to avoid considering the issue of the defendant's age because the trial court had refused as a matter of law to consider other relevant mitigating evidence,96 it faced the issue squarely six years later in Thompson v. Oklahoma.97 In Thompson, a five-member plurality of the Court reversed the death penalty as assessed against a

88. STATE OF WISCONSIN LEGISLATIVE REFERENCE BUREAU, supra note 25, at 18.
89. French, supra note 78.
90. See COYNE & ENTZEROTH, supra note 5, at 685, 703.
91. Id. Even Russia, however, has only about 400 death row prisoners. That is one for every 370,000 Russians. By contrast, the United States has more than 2,700 death row prisoners. This represents one death row prisoner for every 97,000 Americans. See On Death Row, It's Wait, Wait, Wait, THE MILWAUKEE J., Dec. 28, 1992, § A, at 5.
93. These are Alabama, Arkansas, Delaware, Georgia, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Nevada, New Hampshire, North Carolina, Oklahoma, Texas, Virginia, and Wyoming. See STATE OF WISCONSIN LEGISLATIVE REFERENCE BUREAU, BULL. 95-1, supra note 25, at 26-7.
94. Id. The latter group includes Arkansas (14), Louisiana (15) and Virginia (15).
95. 455 U.S. 104 (1982).
96. Id. at 112-13. The court ruled that the trial judge had violated the constitutional premise of Lockett v. Ohio, 438 U.S. 586 (1978), when it refused as a matter of law to consider Eddings' turbulent family history and serious emotional disturbance.
fifteen-year-old defendant, but only four members of the majority found that the execution of anyone under the age of sixteen was unconstitutional as against contemporary values.98

The Oklahoma statute at issue authorized capital punishment for murder, but did not specify any minimum age at which the commission of murder might lead to the imposition of death.99 The plurality reasoned that evolving standards of decency, as reflected by state statutes and the sentencing patterns of capital juries, prohibited the execution of a person under the age of sixteen at the time of his or her offense.100 Its conclusion in this regard was supported by the juvenile's reduced culpability and the failure of the penological purposes of retribution or deterrence when the penalty of death is exacted against such young offenders.101

However, at least one justice who joined in reversing the sentence was reserved about the breadth of the Thompson holding. Justice Sandra Day O'Connor noted that because Oklahoma's statutes did not specify a minimum age for capital punishment, yet separately provided that fifteen-year-old murder defendants might be treated as adults in some circumstances, there existed a risk that the Oklahoma legislature did not intend that the waiver of a juvenile into adult court should also expose the juvenile to capital punishment.102 Under such circumstances, the execution of a fifteen-year-old could not be constitutional. She intimated, however, that where that risk is obviated by a statute which specifies a minimum age for the imposition of capital punishment, the execution of younger offenders might yet be constitutional.103 Moreover, in Stanford v. Kentucky,104 decided less than two years later, the Supreme Court used the same factors delineated in Thompson to arrive at a determination that there exists no national consensus against sentencing to death juveniles who are sixteen or seventeen years of age at the time of the offense.

According to statistics compiled by Amnesty International in 1994,
only seven countries had executed persons under the age of eighteen for capital crimes within the previous five years. These included Iran, Iraq, Nigeria, Pakistan, Saudi Arabia, Yemen — and the United States. Moreover, although the United Nations General Assembly had passed the Convention on the Rights of the Child on November 20, 1989, the United States did not sign the Convention until February 16, 1995. Among the Convention’s provisions is Article 37(a), which provides that “[n]either capital punishment nor life imprisonment without possibility of release shall be imposed for offenses committed by persons below eighteen years of age. . . .” Although 181 other nations have done so, the United States Senate has yet to ratify the Convention, which has been opposed by various senators who cite the death penalty prohibition, among others.

The United States’ stance on the execution of juveniles has also subjected it to criticism from international human rights experts. When it acceded to the International Covenant on Civil and Political Rights in 1992, the United States reserved, as against Article 6 of the Covenant, the right to impose capital punishment on “persons below 18 years of age.” The United States Government had argued that its reservation expressed the will of the majority and was constitutional. When filing its responsive report before members of the United Nations Human Rights Committee, however, committee member P. N. Ghagwati of India chastened John Shattuck, Assistant United States Secretary of State. Ghagwati argued that defending the death penalty as a democratic

105. See Robert A. Jordan, A Cry for Death — To the Death Penalty, BOSTON GLOBE, Jan. 23, 1994, Focus, at 71. Amnesty International had argued that “the USA is one of only seven countries worldwide to have executed people in the last five years for crimes committed while they were still minors under 18 — the others are Iran, Iraq, Nigeria, Pakistan, Saudi Arabia and Yemen.”


108. See supra note 107.


expression of the majority was "an explanation but not a justification."\textsuperscript{112} Similar objections to the United States report were lodged by representatives from Chile, Australia, Cyprus and Venezuela. The latter cautioned that the United States "should not end up being the last country to ensure the fundamental right to life."\textsuperscript{113}

Consistent with its ambivalence toward juvenile executions, the United States Supreme Court refused to ban the execution of mentally disabled persons in \textit{Penry v. Lynaugh}.
\textsuperscript{114} Rejecting public opinion polls conducted in Florida and Georgia as well as the arguments of the American Association on Mental Retardation, the Supreme Court concluded that there existed insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses. Thus, such executions could not be categorically prohibited by the Eighth Amendment on that ground.\textsuperscript{115} Fearful that any such determination would have a disempowering effect if applied in other areas of the law,\textsuperscript{116} the Court instead left to a case-by-case determination whether individual mentally retarded defendants lacked "the cognitive, volitional and moral capacity to act with the degree of culpability associated with the death penalty."\textsuperscript{117} It is thus possible, under the American scheme, to execute a person who is mentally retarded by clinical standards but who is deemed by a jury to act with a legal degree of culpability.

F. SOME TOUGH FINAL QUESTIONS

Society has a moral right to protect itself, but if it can do so by imprisoning its most dangerous members for life, the principle of nonmaleficence certainly precludes it from doing any more. Though some would argue that life without possibility of parole is less merciful than death,\textsuperscript{118} I have yet to converse with a death row inmate who would trade the continued hope of a claim of innocence for the opportunity to end it all. And somehow, a moral society must find a way to deal with its "problems," particularly its "problem children," short of exterminating them.

A person with far more experience than I has cogently expressed

\begin{itemize}
\item \textsuperscript{112} Id.
\item \textsuperscript{113} Id.
\item \textsuperscript{114} 492 U.S. 302 (1989).
\item \textsuperscript{115} Id. at 335.
\item \textsuperscript{116} Id. at 340.
\item \textsuperscript{117} Id. at 338.
\item \textsuperscript{118} \textit{See} Peter Kendall & Paul Galloway, \textit{The Quality of Mercy: Life Sentence Strains Meaning of Clemency}, CHI. TRIB., § 1, at 1.
\end{itemize}
these sentiments. Sister Helen Prejean, author of *Dead Man Walking* and consultant for the movie of the same name, responded during an interview that capital punishment is an act of murder which contributes to the moral deterioration of society. In her words, it "let[s] the behavior of the criminal be the norm which we imitate." She also reserves a just anger for the politicians who pander to the public's fear of crime by "celebrating" a few cases when they know capital punishment is void of any deterrent value. "It keeps them from having to deal with the real sources of crime [such as poverty], which are complex and long-term."

With the increased public fervor to kill criminals and kill them sooner after conviction, we clearly run the increased risk of executing the wrongfully convicted. To my Christian brethren, I offer this analogy:

He stood before Pontius Pilate, accused of high treason and blasphemy — proclaiming Himself a King in derogation of Caesar and of Herod. The State had its laws, and the people of Judea agreed that they were just laws. After all, it was important to the survival of those people that they be protected from profligate kings who might form sinister groups of zealots and threaten the welfare of the State. Some might argue that treason to such a society was as significant a crime as murder is to us. And so evidence was taken before the Sanhedrin and before the Procurator Pilate. And the public sought its just sentence under the law — death.

Was it a legitimate exercise of state power under the Law? Of course. Was it carried out according to the technicality demanded by the Law? Absolutely. Was there evidence to support the conviction? Beyond a reasonable doubt. Did the people of Judea act within their rights to demand His death to assuage the outrage committed against their society? Surely. Just as our society purports to act within its legal and moral rights when it demands the death of one person to avenge another. Just as Judean society demanded the death of Christ to avenge the treason He had committed under their laws. It is fair for us; it was fair for them.

121. Id. at E4.
122. Id.
123. Id.
Under these circumstances, it seems to me there is only one relevant question to ask: would we kill Him again?

And to those for whom that message holds no particular significance but who are yet willing to risk sacrificing a few innocents to bring justice to the guilty, I have this challenge. If you are indeed willing to take the risk of killing an innocent, then you take it. You substitute your son, your daughter, your brother, your innocent, for my client. Because his mother and sister were not willing to take that risk.