

**THE FAILURE TO ACHIEVE FAIRNESS: RACE AND POVERTY  
CONTINUE TO INFLUENCE WHO DIES**

*Stephen B. Bright\**

Despite the promise of “Equal Justice Under Law” etched on the Supreme Court building, the outcomes of criminal cases continue to be influenced by race and poverty. Race comes into play in the discretionary decisions made by actors, primarily prosecutors, in how cases are treated. It is often hard to ferret out the effect of racial animus on cases because racial attitudes may be subconscious and race may be one of many factors which influence a prosecutor or a jury. Courts are generally unwilling to wrestle with these issues, and when they do address them, the available remedies are completely inadequate.

The impact of a defendant’s poverty is more apparent. As a result of poverty, a person accused of a crime may be unable to contest the prosecution’s case and present a defense due to the inability to obtain a competent lawyer and investigative and expert assistance.

Two aspects of the system are important in addressing the impact of race and poverty. First, the overwhelming majority of those accused of crimes are poor. There are of course some white collar cases, some cases involving big drug dealers, and some cases involving middle class people or their children who have run afoul of the law. But for the most part, the people accused are poor. For the most part, if you visit the courtrooms where criminal cases are being heard, you will see poor people being processed.

Because the criminal justice system deals almost exclusively with poor people, it is out of sight and out of mind for most Americans. They do not know what happens in the criminal courts. They may assume that it is operating justly and fairly, or they may not even think about it. I hope that as a result of the information provided here, those of you who graduate from this law school will care about the

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\* Stephen B. Bright is president and senior counsel of the Southern Center for Human Rights. He is the J. Skelly Wright Fellow and a Visiting Lecturer of Law at Yale Law School, and is also a visiting lecturer at the Georgetown University Law Center. He received his B.A. (1971) and J.D. (1975) from the University of Kentucky.

quality of justice for poor people whose lives and liberty are at stake in the criminal justice systems of this county.

Second, the overwhelming majority of criminal cases—90% to 95%—are resolved with plea bargains. Only a few minutes are spent in court on each case—just long enough for the defendant to waive his or her rights in answers to a judge's questions. This means that prosecutors—not judges or juries—have most of the power with regard to how cases are resolved. Prosecutors decide what charges to file, whether to seek enhanced penalties, such as death sentences or mandatory minimums, and whether to agree to plea bargains that resolve the cases with less severe sentences than those originally sought. The extraordinary breadth of this discretion—whether to charge at all, whether to seek death or settle for lesser penalties—makes it possible for racial biases to enter the process.

### I. THE INFLUENCE OF RACE

Almost every study of capital sentencing practices has found racial disparities that are striking, powerful, and undeniable. The United States General Accounting Office reviewed twenty-eight studies published from 1972 to 1990,<sup>1</sup> and more recently, David Baldus and George Woodworth, the leading scholars in the field, reviewed eighteen studies reported or published from 1990 to 2003.<sup>2</sup> Both reviews concluded that almost all of the studies found that death is more likely to be imposed in cases involving white victims.

These studies tell us about racial disparities which result—at least in part—from the exercise of prosecutorial discretion. But because prosecutorial practices are shrouded in secrecy in most jurisdictions, the public seldom sees the attitudes of those making the decisions. However, two events, a scandal and a political campaign, have provided rare glimpses into the attitudes and motives of those who exercise discretion as prosecutors.

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1 U.S. GEN. ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990) [hereinafter GAO STUDY], available at <http://archive.gao.gov/t2pbat11/140845.pdf>.

2 David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1479 (2004) [hereinafter Baldus & Woodworth, *Reflections*]; David C. Baldus & George Woodworth, *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 501 (James R. Acker et al. eds., 2d ed. 2003) [hereinafter Baldus & Woodworth, *Overview*].

The district attorney of Houston, Texas, Charles Rosenthal, resigned from office on February 15, 2008 in the midst of a scandal, which developed in a civil case when some e-mails he had written were publicly disclosed.<sup>3</sup> Among the e-mails were some romantic notes to his executive assistant and messages to assistant prosecutors regarding a campaign event, in apparent violation of a Texas law that prohibits office seekers from using state equipment for campaign purposes.<sup>4</sup> Rosenthal also destroyed about 2,500 e-mails, which raised questions of obstruction of justice.

Most disturbing, however, were other e-mails which revealed a great deal about Rosenthal's attitudes toward African Americans. For example, Rosenthal forwarded to friends an e-mail containing a joke comparing Bill Clinton to a black man, because Clinton played the saxophone, received a government check, smoked marijuana, and "had his way with ugly white women."<sup>5</sup> Another e-mail had attached to it a photograph of an African American man lying on the ground with a bucket of Kentucky Fried Chicken and watermelon rinds strewn around him. The caption read, "Fatal Overdose."<sup>6</sup> A former assistant district attorney described Rosenthal's office as "a very sexist and racist office," because "[t]he attitudes about people of color follow the message of the leadership."<sup>7</sup>

Rosenthal had the ultimate authority for eight years to decide whether to seek death and whether to see cases through to trial instead of agreeing to plea bargains. And it is even more troubling because Houston is the capital of capital punishment. At the end of 2007, 103 people sentenced to death in Houston had been executed, more than any state except Texas as a whole.<sup>8</sup> Only five *states* have executed more than fifty people since the resumption of capital punishment in 1976.<sup>9</sup>

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<sup>3</sup> Miriam Rozen, *HLA Calls for DA's Resignation, Questions Office's Practices*, TEX. LAW., Jan. 28, 2008, at 1.

<sup>4</sup> TEX. PENAL CODE ANN. § 39.02(a)(2) (Vernon 2003) (prohibiting misuse of government property with intent to benefit).

<sup>5</sup> Rozen, *supra* note 3.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *See* TEX. COALITION TO ABOLISH THE DEATH PENALTY, TEXAS DEATH PENALTY DEVELOPMENTS IN 2007: THE YEAR IN REVIEW (2007), <http://www.tcadp.org/uploads/File/2007annualreport.pdf> (providing statistics for the death penalty in Texas).

<sup>9</sup> Those states are Texas, which has carried out 413 executions, Virginia 102, Oklahoma 87, Missouri 66, and Florida 65. DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY (2008), <http://www.deathpenaltyinfo.org/FactSheet.pdf>.

Moreover, race appeared to be a significant factor in influencing who was sentenced to death in Houston even before Rosenthal took office. A study found that in the eight years before he became district attorney, death was more likely to be imposed on black defendants than on white defendants and more likely to be imposed in cases with white victims than in cases with black victims.<sup>10</sup> Most studies in other states have found that race of the victim makes the death penalty more likely, while race of the defendant does not.<sup>11</sup> However, in Houston, both factors increased the likelihood of death sentences.

Racial attitudes in another prosecutor's office came to light in 1977 when the District Attorney of Philadelphia, running for reelection, released a videotape of her Republican opponent instructing new lawyers in the office how to strike jurors in criminal cases. Her opponent, Jack McMahon, was a senior assistant district attorney when the tape was made. Despite the Supreme Court's decision in *Batson v. Kentucky*, reiterating that discriminatory use of jury strikes violates the Fourteenth Amendment,<sup>12</sup> a large part of McMahon's message was to make strikes based on race, such as his admonition to keep "blacks from the low-income areas" off juries.<sup>13</sup> During the period when the training tape was made, Philadelphia rivaled Houston in terms of the number of people sentenced to death.<sup>14</sup> And, as with Houston, studies of Philadelphia have shown the influence of both

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10 Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 HOUS. L. REV. (forthcoming 2008), available at [http://graphics8.nytimes.com/packages/pdf/national/20080429\\_sidebar\\_study.pdf](http://graphics8.nytimes.com/packages/pdf/national/20080429_sidebar_study.pdf).

11 E.g., GAO STUDY, *supra* note 1; Baldus & Woodworth, *Reflections*, *supra* note 2; Baldus & Woodworth, *Overview*, *supra* note 2.

12 *Batson v. Kentucky*, 476 U.S. 79 (1986). The Court had previously held in *Swain v. Alabama*, 380 U.S. 202 (1965), that the use of peremptory strikes on the basis of race was a violation of equal protection, but required a showing of systematic exclusion based on race in case after case.

13 L. Stuart Ditzen, Linda Loyd & Mark Fazlollah, *Avoid Poor Black Jurors, McMahon Said*, PHILA. INQUIRER, Apr. 1, 1997, at A1; *see also Some of McMahon's Tips for Rookie Prosecutors*, PHILA. INQUIRER, Apr. 1, 1997, at A9. Courts later held that the video tape was circumstantial evidence of McMahon's intent in striking jurors. *See, e.g., Wilson v. Beard*, 314 F. Supp. 2d 434, 441 (E.D. Pa. 2004); *Commonwealth v. Basmore*, 744 A.2d 717, 727-34 (Pa. 2000). But this evidence was not sufficient to establish a policy of discrimination in jury selection by the prosecutors in the Philadelphia District Attorney's Office. *Commonwealth v. Lark*, 746 A.2d 585, 589-90 (Pa. 2000); *Commonwealth v. Rollins*, 738 A.2d 435, 443 n.10 (Pa. 1999).

14 Tina Rosenberg, *Deadliest D.A.*, N.Y. TIMES, July 16, 1995, § 6 (Magazine), at 21, 23 (reporting that "no one is more zealous in seeking the death penalty" than Philadelphia District Attorney Lynne Abraham).

the race of the defendant and the race of the victim in the imposition of the death penalty.<sup>15</sup>

The racial attitudes of prosecutors are seldom on display as clearly as they were in these instances in Houston and Philadelphia. In most jurisdictions, there is virtually no transparency in prosecutorial practices, and even when racial disparities are shown to result from certain practices, the Supreme Court has refused to allow their discovery.<sup>16</sup>

The refusal to allow discovery is one of many ways in which the courts have failed to do anything about the influence of race on the outcomes of criminal cases. The criminal justice system is the part of American society that has been least affected by the Civil Rights Movement. Many courthouses throughout the country look about the same today as they did in the 1940s and 1950s. The judges are white, the prosecutors are white, and the court-appointed lawyers are white. Even in communities with fairly substantial African American populations, all of the jurors at a trial may be white.

In many jurisdictions, when the court calls criminal cases for arraignments, it looks like a slave ship has docked outside the courthouse. African American men in orange jumpsuits, handcuffed together, are paraded into the courtroom. In some places this is followed by a process known as “meet ’em and plead ’em.” A haggard court-appointed lawyer meets each defendant, talks to him or her for five or ten minutes—in some instances with other men handcuffed on either side of the client—and then announces that a guilty plea will be entered pursuant to a deal with the prosecution. The judge races through plea colloquies like an auctioneer, eliciting waivers of constitutional rights from people who often look like they do not quite understand what is happening. The judge accepts the pleas and pronounces sentences.

That may be all the legal representation and all the judicial involvement in the cases. Some defendants will plead not guilty. Their

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15 David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1675–1710 (1998) (presenting extensive empirical evidence that the imposition of the death penalty in Philadelphia was affected by the race of both the defendant and the victim, and that prosecutors used peremptory strikes to keep blacks off juries).

16 See *United States v. Bass*, 536 U.S. 862 (2002) (per curiam) (reversing an order allowing discovery of information relating to the prosecution’s practices in federal capital cases); *United States v. Armstrong*, 517 U.S. 456 (1996) (holding that defendants are not entitled to discovery of changing prosecutorial practices in cases involving crack and powdered cocaine).

cases will be put on a trial calendar. If not resolved with dismissal or a plea, they will go to trial and, if convicted, the defendant will pay the “trial tax”—a more severe sentence than he or she would have received as part of a plea bargain.

The Supreme Court seldom addresses prosecutorial discretion or the right to counsel in the context of plea bargaining. Many of its decisions on race and the death penalty are in the context of trials. Trials are infrequent and the Court’s decisions have been largely ineffectual in dealing with racial discrimination.

Some people believe there is no discrimination in the selection of juries because of the Supreme Court’s decision in *Batson v. Kentucky*, which reaffirmed the Court’s previous holdings that discrimination in the selection of juries violates equal protection.<sup>17</sup> However, in *Batson*, the Court held only that where there is a disparity in the exercise of strikes, upon motion of the defense, the trial judge can require the prosecutor to give reasons for the strikes and then decide whether discrimination has been established.

Justice Thurgood Marshall warned that this approach would fail to prevent unconstitutional discrimination in the selection of jurors.<sup>18</sup> The experience since *Batson* has proven him right. Almost anyone who has graduated from law school can come up with reasons that will be found to be race neutral. And some trial judges will find every reason race neutral even if the prosecutor strikes every black person in the venire.

An Illinois court referred to the *Batson* process as a “charade” and speculated that “new prosecutors are given a manual, probably entitled, ‘Handy Race Neutral Explanations’ or ‘20 Time-Tested Race Neutral Explanations.’”<sup>19</sup> An observer of proceedings in criminal cases in one courtroom in Chicago commented that “the process is anything but color-blind” and reported that racially-neutral reasons to strike a juror, because the juror had “indicated that he would use objective reasoning” and had a demeanor that was “not satisfactory to the state,” were upheld as race neutral.<sup>20</sup>

Occasionally, prosecutors who have not seen a training tape like the one made by the Philadelphia District Attorney’s Office or read a manual like the one described by the Illinois court strike so many

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17 *Batson*, 476 U.S. 79; see also *supra* note 12 (describing *Batson* and *Swain*).

18 *Batson*, 476 U.S. at 102–03 (Marshall, J., concurring).

19 *People v. Randall*, 671 N.E.2d 60, 65 (Ill. App. Ct. 1996).

20 STEVE BOGIRA, COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE 260–62 (2005) (internal quotation marks omitted).

black or brown jurors, and give such poor reasons for some of their strikes, that a *Batson* violation is found.<sup>21</sup>

But for the most part, prosecutors get away with removing members of racial minorities from juries. This is particularly true in white-flight suburban communities where there are not many blacks in the venire to begin with. There are such jurisdictions in every state and they usually produce a disproportionate number of death sentences. Only a few strikes are necessary to remove all the prospective jurors who are members of a racial minority. The prosecutor can give just about any reason. The reason can be based on a hunch or a prosecutor's claim about the demeanor of a juror.<sup>22</sup> It need not be related to the case.<sup>23</sup> And the trial judge's ruling will be reviewed on appeal under the highly deferential "clear error" standard.<sup>24</sup>

One reason that *Batson* does not prevent discrimination is because the trial judge and the prosecutor may have a good working relationship—they may even be friends or former co-workers in the prosecutor's office. The judge may be unwilling or very reluctant to make a finding that the prosecutor intentionally discriminated in striking a juror and gave a pretext as his or her reason for the strike, even if the judge knows this to be the case. Of course, the judge may also have racial biases which make the finding of a *Batson* violation unlikely.<sup>25</sup>

Striking jurors on the basis of race is not only unfair to the defendant on trial and the jurors eliminated because of their race, but it also undermines the credibility and legitimacy of the courts as democratic institutions. Minority citizens who are repeatedly excluded from jury selection get the message that they are not to participate in the important decisions being made by the courts in deciding guilt or

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<sup>21</sup> See, e.g., *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008) (finding a *Batson* violation when the prosecutor struck all five blacks in the venire and gave reasons to strike one black juror that would have applied equally to white jurors who were not struck); *Miller-El v. Dretke*, 545 U.S. 231 (2005) (finding a *Batson* violation where the evidence of discrimination included a disproportionate use of strikes to remove blacks (ten of eleven), the reasons for striking blacks applied equally to whites, and the prosecutor used a Texas procedural device in an attempt to exclude blacks).

<sup>22</sup> See, e.g., *Purkett v. Elem*, 514 U.S. 765 (1995) (per curiam) (finding no *Batson* violation where the prosecutor said he struck one black juror because he had long curly hair, a goatee, and mustache, and another black juror because he also had a goatee and mustache).

<sup>23</sup> See, e.g., *id.*

<sup>24</sup> See *Rice v. Collins*, 546 U.S. 333, 338–39 (2006); *Hernandez v. New York*, 500 U.S. 352, 364–66 (1991) (plurality opinion).

<sup>25</sup> See, e.g., *Peek v. State*, 488 So. 2d 52, 56 (Fla. 1986) (per curiam) (warning judges not to make racial slurs); *State v. Smulls*, 935 S.W.2d 9, 27 (Mo. 1996) (en banc) (requiring the trial judge to recuse himself due to his comments regarding race during *Batson* hearing).

innocence, life or death. And the white populace understands it as well. Verdicts rendered by juries from which a part of the population has been excluded are not seen as legitimate or credible by those in the community.

As Justice Breyer has pointed out, there is “an unresolvable tension between, on the one hand, what Blackstone called an inherently ‘arbitrary and capricious’ peremptory challenge system, and, on the other hand, the Constitution’s nondiscrimination command.”<sup>26</sup> In the last half century, several members of the Supreme Court have called for the abolition of peremptory strikes as the only way to prevent discrimination,<sup>27</sup> but the rest of the Court has rejected the suggestion. As a result, discrimination in jury selection continues largely unchecked.

In *Turner v. Murray*,<sup>28</sup> the Court acknowledged that white jurors may be influenced in deciding between life and death by a “[f]ear of blacks, which could easily be stirred up by the violent facts of [the] crime,” a belief “that blacks are violence prone or morally inferior,” as well as other “subtle, less consciously held racial attitudes.”<sup>29</sup> But the Court did almost nothing about it. It held only that in a *capital case* involving an *interracial crime*, the defense has a right to question prospective jurors about their racial attitudes.<sup>30</sup>

While some trial judges allow extensive questioning of jurors about their racial attitudes, the Supreme Court’s decision in *Turner* gives trial judges discretion to limit the form and number of questions, and even allows collective questioning of the jurors.<sup>31</sup> Thus, it may be enough for the judge to say, “Ladies and Gentlemen, you will notice that the defendant is African American, and I am informing you that the victim was white. Do any of you have any racial prejudice which would influence your deliberations in this case? If you do, please raise your hand.” Such an inquiry is simply pointless. Deeply felt attitudes are not revealed by such superficial inquiry.

The Court’s greatest failure to deal with racial discrimination in the infliction of the death penalty is its decision in *McCleskey v. Kemp*, in which it rejected a challenge based upon the pronounced racial

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26 *Rice*, 546 U.S. at 344 (Breyer, J., concurring) (citation omitted).

27 *See, e.g.*, *Miller-El v. Dretke*, 545 U.S. 231, 266–67 (2005) (Breyer, J., concurring); *Batson v. Kentucky*, 476 U.S. 79, 107 (1986) (Marshall, J., concurring); *Swain v. Alabama*, 380 U.S. 202, 244 (1965) (Goldberg, J., dissenting).

28 476 U.S. 28 (1986).

29 *Id.* at 35.

30 *Id.* at 36–37.

31 *Id.* at 37.



disparities in the imposition of the death penalty in Georgia.<sup>32</sup> The Court suggested that racial disparities may be inevitable and held that they do not violate either the equal protection guarantee of the Fourteenth Amendment or the procedural protections of the Cruel and Unusual Punishment Clause of the Eighth Amendment.

Justice William Brennan described the terrible reality of the impact of racial bias in capital cases in his dissenting opinion in *McCleskey*:

At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of McCleskey's past criminal conduct were more important than the fact that his victim was white. Furthermore, counsel would feel bound to tell McCleskey that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks. In addition, frankness would compel the disclosure that it was more likely than not that the race of McCleskey's victim would determine whether he received a death sentence: 6 of every 11 defendants convicted of killing a white person would not have received the death penalty if their victims had been black, while, among defendants with aggravating and mitigating factors comparable to McCleskey's, 20 of every 34 would not have been sentenced to die if their victims had been black. Finally, the assessment would not be complete without the information that cases involving black defendants and white victims are more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim. The story could be told in a variety of ways, but McCleskey could not fail to grasp its essential narrative line: there was a significant chance that race would play a prominent role in determining if he lived or died.<sup>33</sup>

Justice Brennan ended his opinion by concluding:

The Court's decision today will not change what attorneys in Georgia tell other Warren McCleskeys about their chances of execution. Nothing will soften the harsh message they must convey, nor alter the prospect that race undoubtedly will continue to be a topic of discussion. McCleskey's evidence will not have obtained judicial acceptance, but that will not affect what is said on death row. However many criticisms of today's decision may be rendered, these painful conversations will serve as the most eloquent dissents of all.<sup>34</sup>

Twenty years after Justice Brennan wrote that dissent, lawyers are still having those conversations with their clients. They still must tell their

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<sup>32</sup> 481 U.S. 279 (1987).

<sup>33</sup> *Id.* at 321 (Brennan, J., dissenting) (citations omitted).

<sup>34</sup> *Id.* at 344–45.

clients that race may be more important than anything else in influencing the outcome of their cases.

## II. THE IMPACT OF POVERTY

The most fundamental element of fairness in an adversary system of justice is representation of the accused by competent counsel. The legal system is so complex and contains so many procedural traps that a lay person accused of a crime can no more navigate it alone than a passenger arriving at an airport can fly a plane across the country in the absence of the pilot. People accused of crimes rely upon lawyers to protect all of their legal rights, to investigate the facts thoroughly, to test the prosecution's case against them through cross-examination of witnesses and other means, to produce evidence that casts doubt upon guilt, and, for those found guilty, to present evidence and argument regarding the appropriate sentence.

Justice Hugo Black stated for the Supreme Court in *Griffin v. Illinois*,<sup>35</sup> "There can be no equal justice where the kind of [justice] a [person] gets depends on the amount of money he [or she] has."<sup>36</sup> However, all too often the kind of justice people get depends very much upon how much money they have.

Although the Constitution requires that a person accused of a crime be provided a lawyer at trial,<sup>37</sup> many states still lack comprehensive and adequate indigent defense systems.<sup>38</sup> Even in capital cases, the representation provided in many jurisdictions is simply a disgrace to the legal profession and the criminal justice system. There have been capital cases in which the lawyers appointed to represent the defendant have failed to investigate the facts of the crime or the background of the client, but have still been found to be sufficient counsel for purposes of the Sixth Amendment.<sup>39</sup> Death sentences have

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<sup>35</sup> 351 U.S. 12 (1956).

<sup>36</sup> *Id.* at 19.

<sup>37</sup> See *Argersinger v. Hamlin*, 407 U.S. 25, 31-32 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

<sup>38</sup> See generally AM. BAR ASS'N STANDING COMM'N ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* (2004), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/>.

<sup>39</sup> See, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91 (1995); Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433 (1993); Stephen Henderson, *Defense Often Inadequate in 4 Death-Penalty States*, MCLATCHY NEWSPAPERS, Jan. 16, 2007, available at [www.mcclatchydc.com/201/story/15394.html](http://www.mcclatchydc.com/201/story/15394.html) (presenting the first of six articles published in January

even been imposed and upheld in cases in which the defense lawyers were asleep, intoxicated, or under the influence of drugs.<sup>40</sup>

Of course, most lawyers do not sleep during trial. But all too often, lawyers appointed to defend poor people facing the death penalty fail to investigate, do not know the law, or are at best mediocre in their representation. One federal judge, in reluctantly upholding a death sentence, observed that, as interpreted by the Supreme Court, the Constitution “does not require that the accused, even in a capital case, be represented by able or effective counsel.”<sup>41</sup> Richard Posner, a highly respected judge on the Court of Appeals for the Seventh Circuit, has written:

I can confirm from my own experience as a judge that indigent defendants are generally rather poorly represented. But if we are to be hard-headed we must recognize that this may not be an entirely bad thing. The lawyers who represent indigent criminal defendants seem to be good enough to reduce the probability of convicting an innocent person to a very low level. If they were much better, either many guilty people would be acquitted or society would have to devote much greater resources to the prosecution of criminal cases. A bare-bones system for the defense of indigent criminal defendants may be optimal.<sup>42</sup>

The “bare-bones system” Judge Posner finds so attractive is only for poor people in criminal cases. He does not suggest a bare-bones system for cases involving wealthy people, for commercial cases, or for any other kinds of cases.

Judge Posner writes that if public defenders were much better, some guilty people might be acquitted; but he does not mention the most important difference that would be made by better public defenders—some *innocent people*, who are now being convicted, would be acquitted also. We should be most concerned about that. And some people who are being condemned to die and being executed would not be receiving death sentences.

The bare-bones system produces some spectacularly egregious cases of bad lawyering that are found to pass constitutional muster. For example, Jeffery Leonard, a twenty-year old, brain-damaged, African American man, was tried and sentenced to death in Kentucky by

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2007 regarding the poor quality of legal representation found in a study of eighty death-penalty cases from Alabama, Georgia, Mississippi, and Virginia).

40 See Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 455–60 (1996) (citing cases in which convictions were upheld even though defense lawyers were intoxicated, abusing drugs, or mentally ill).

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

42 Richard A. Posner, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 163–64 (1999).

a jury that did not even know his real name or anything else about him. He was tried under the name of James Slaughter because his lawyer did not know his client's actual name, even though it was contained in the prosecution's file and in the trial court record in four different places. Because he conducted no investigation, the lawyer never found out that his client was brain-damaged and had a horrific childhood. When challenged about the quality of his work, the lawyer testified that he had tried six capital cases and headed an organized crime unit for a New York prosecutor's office.<sup>43</sup> Neither statement was true.<sup>44</sup>

The Court of Appeals for the Sixth Circuit, still referring to Leonard by the inaccurate name, concluded that the lawyer's performance was deficient because his failure to investigate his client's background "resulted from inattention, not reasoned strategic judgment."<sup>45</sup> Nevertheless, it upheld the death sentence based upon its conclusion that the outcome would not have been different even if the lawyer had known his client's name and presented evidence of his brain damage, childhood abuse, and other mitigating factors. In dissenting from denial of rehearing en banc, Judge Cole summed up the sad state of the right to counsel:

We are uneasy about executing anyone sentenced to die by a jury who knows nearly nothing about that person. But we have allowed it. We are also uneasy about executing those who commit their crime at a young age. But we have allowed that as well. We are particularly troubled about executing someone who likely suffers brain damage. We rarely, if ever, allow that—especially when the jury is not afforded the opportunity to even consider that evidence. Jeffrey Leonard, known to the jury only as "James Slaughter," approaches the execution chamber with all of these characteristics. Reaching this new chapter in our death-penalty history, the majority decision cannot be reconciled with established precedent. It certainly fails the Constitution.<sup>46</sup>

Leonard was not executed only because Ernie Fletcher, the Republican Governor of Kentucky, commuted his sentence before leaving of-

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<sup>43</sup> The lawyer was indicted for perjury. The charges were dismissed in exchange for his resignation from the bar. See Andrew Wolfson, *Lawyer Radolovich to Give Up License*, COURIER-JOURNAL (Louisville, Ky.), Feb. 6, 2007, at 1A.

<sup>44</sup> *Id.*

<sup>45</sup> *Slaughter v. Parker*, 450 F.3d 224, 234 (6th Cir. 2006) (internal quotation marks omitted) (quoting *Wiggins v. Smith*, 539 U.S. 510, 526 (2003)), *reh'g en banc denied*, 467 F.3d 511 (2006), *cert. denied sub nom.*, *Leonard v. Simpson*, 127 S. Ct. 2914 (2007).

<sup>46</sup> *Slaughter*, 467 F.3d at 512 (Cole, J., dissenting).

face. Fletcher recognized the denial of the right to counsel, even if the courts did not.<sup>47</sup>

Others have not been so fortunate. Robert Conklin was executed by Georgia in 2005, even though his lawyer, a single public defender who was appointed to defend him only thirty-seven days before the trial, was provided no funds for an investigator or an expert witness. Even though guilt was determined by expert opinion and no evidence was presented in mitigation, the Court of Appeals for the Eleventh Circuit, over the dissent of Judge Rosemary Barkett, upheld the conviction and sentence.<sup>48</sup> Samuel Roberts was sentenced to death in South Carolina just sixty days after a lawyer was appointed to defend him, and executed in 1998 after the state and federal courts found sixty days to be sufficient time for counsel to prepare for a capital case.<sup>49</sup>

In both the *Conklin* and the *Roberts* cases, the courts dusted off a 1940 case, *Avery v. Alabama*,<sup>50</sup> in which the Supreme Court upheld a death sentence even though defense counsel was appointed just three days before a trial at which Avery was convicted and sentenced to death. One might have thought *Avery* was a relic from another era—that a few days to prepare for a capital trial might have been acceptable in 1940, not because it is, but because courts in 1940 might have allowed such things.

But the Supreme Court revived *Avery* in upholding the conviction of Harrison Cronin, whose court-appointed real estate lawyer was given just thirty days to defend complicated check kiting charges put together by the government over four and a half years.<sup>51</sup> The use of *Avery* to uphold convictions and death sentences shows a 1940s-era indifference to the impossibility of lawyers providing an adequate defense.

Once a person has been convicted and the conviction has been upheld on appeal, he or she has no constitutional right to a lawyer to seek post-conviction review of his or her conviction and sentence.<sup>52</sup> Post-conviction review—state and federal habeas corpus actions—is the part of the process during which many people have proven their innocence, established violations of their constitutional rights, or

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<sup>47</sup> John Stamper, *101 Get Pardons, Commutations GOP Governor's Final Acts*, LEXINGTON HERALD-LEADER, Dec. 11, 2007, at A1.

<sup>48</sup> *Conklin v. Schofield*, 366 F.3d 1191 (11th Cir. 2004).

<sup>49</sup> *Roberts v. Moore*, 134 F.3d 364 (4th Cir. 1998).

<sup>50</sup> 308 U.S. 444 (1940).

<sup>51</sup> *United States v. Cronin*, 466 U.S. 648 (1984).

<sup>52</sup> *Murray v. Giarratano*, 492 U.S. 1 (1989).

shown that other grievous errors entitled them to new trials or other relief. People who can afford lawyers to represent them in these proceedings may be successful in showing violations of their constitutional rights and thus be entitled to new trials. But those who cannot afford lawyers may not be able to seek post-conviction review and, as a result, regardless of innocence or constitutional violations at their trials, must serve their sentences or even be executed.

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

In the states that provide lawyers in post-conviction review, the lawyers provided may be as bad or worse than those assigned to defend the accused at trial. For example, a lawyer assigned to represent an inmate sentenced to death in Texas filed the identical brief for him that he had filed for another inmate in another case, which, of course, had different facts and different legal issues.<sup>53</sup>

The brief filed on behalf of another man condemned to die in Texas, Justin Fuller, was incoherent, repetitious, and rambling; it made arguments that did not make any sense.<sup>54</sup> The lawyer copied some of Fuller's letters into the brief. As a result, the brief contained unintelligible and irrelevant statements such as, "I'm just about out of carbon paper so before I run out I want to try and list everything that was added to and took from me to convict me on the next page . . . ."<sup>55</sup> Nevertheless, Fuller's appeal was denied and he was executed.

There is no justification for courts accepting such briefs in any criminal case. Without adequate briefing, a court cannot do its job in reviewing a case on appeal. A court concerned about justice would have removed the lawyers from these cases and appointed competent lawyers so that it could decide the cases based upon briefs on the is-

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<sup>53</sup> Chuck Lindell, *Lawyer Makes 1 Case for 2 Killers*, AUSTIN AM.-STATESMAN, Feb. 26, 2006, at A01.

<sup>54</sup> See Maro Robbins, *Convict's Odds Today May Rest on Gibberish*, SAN ANTONIO EXPRESS-NEWS, Aug. 24, 2006, at 01A.

<sup>55</sup> *Id.* (internal quotation marks omitted).

sues presented by the cases. But the Texas Court of Criminal Appeals did not slow down in these or other cases in order to get decent briefing before denying relief and allowing executions.<sup>56</sup>

Today, it is better to be rich and guilty than poor and innocent. And people are being sentenced to death not because they committed the worst crimes, but because they had the misfortune to be assigned the worst lawyers. This is not equal justice. It is not fairness. And the verdicts being rendered are not reliable.

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

### III. CONCLUSION

The Chief Justice of Georgia, Harold Clarke, once observed in a speech to the legislature, “[W]e set our sights on the embarrassing target of mediocrity. I guess that means about halfway. And that raises a question. Are we willing to put up with halfway justice? To my way of thinking, one-half justice must mean one-half injustice, and one-half injustice is no justice at all.”<sup>57</sup>

“One-half justice” should be unacceptable to the legal profession and the judiciary. As Attorney General Robert Kennedy said in 1963, the poor person accused of a crime has no lobby. For that reason, the legal profession and the judiciary must stand up for fairness in the criminal justice system. Lawyers and judges must remind Americans that we cannot settle for a bare-bones system of criminal justice for any part of our society. And we cannot tolerate the conversations that defense lawyers continue to have with their clients—described so

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<sup>56</sup> See, e.g., *Ex parte Rojas*, No. 39062-01, 2003 WL 1825617, at \*1–5 (Tex. Crim. App. Feb. 12, 2003) (Price, J., dissenting) (denying post-conviction review because the lawyer assigned to the case missed the statute of limitations); *Ex parte Graves*, 70 S.W.3d 103 (Tex. Crim. App. 2002) (holding no right to competent counsel in state post-conviction proceedings where lawyer appointed by the court lacked experience and failed to raise certain claims); see also TEX. DEFENDER SERV., LETHAL INDIFFERENCE: THE FATAL COMBINATION OF INCOMPETENT ATTORNEYS AND UNACCOUNTABLE COURTS IN TEXAS DEATH PENALTY APPEALS (2002), available at <http://www.texasdefender.org/publications.asp> (describing the inadequacy of lawyers assigned to provide post-conviction representation in Texas).

<sup>57</sup> Chief Justice Harold G. Clarke, ANNUAL STATE OF THE JUDICIARY ADDRESS, reprinted in FULTON COUNTY DAILY REP., Jan. 14, 1993, at 5.

eloquently by Justice Brennan in *McCleskey*—about the impact of race on the outcomes of their cases.