

THE POLITICS OF CRIME AND THE DEATH PENALTY: NOT "SOFT ON CRIME," BUT HARD ON THE BILL OF RIGHTS

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THE administration of the death penalty is not one of the happiest subjects in the law, but it is certainly an important one for people who will be entering the legal profession. How our society deals with crime is a timely topic for us to examine. In the last few years there has been greater resort to demagoguery as part of the crime debate in our country. This should be disturbing to all who care about the Bill of Rights and about the fairness and integrity of the system of justice.

The Senate approved a major crime bill by a close vote in August, 1994.¹ It was actually the Bush Administration's crime bill that had been slightly retooled in the early part of the Clinton administration. The bill provides the death penalty for at least sixty offenses. Many crimes which previously could be punished by death only in the state courts are now punishable by death in the federal courts. The bill provides for a great deal of prison construction. Theoretically, it provides for 100,000 police officers, although many people think in reality that only around 20,000 will actually be put on the streets.² Although nineteen assault weapons are banned, 650 semiautomatic weapons remain available for target practice, hunting, and other purposes.³ Although Congress did not appropriate the thirty billion dollars needed to finance

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1. The Violent Crime Control and Law Enforcement Act of 1994 was passed by the House of Representatives on August 21 and by the Senate on August 25. It was signed into law by President Clinton on September 14, 1994. Pub. L. 103-322, 105 Stat. 1796, 55 BNA Cr. L. Rptr. 2305 (Aug. 31, 1994).

2. See, e.g., David Johnston & Steven A. Holmes, *Experts Doubt Effectiveness of the Newly Enacted Crime Bill*, N.Y. TIMES, Sept. 14, 1994, at A16.

3. Gwen Ifill, *'Victory' Over Crime, at Least Politically*, N.Y. TIMES, Aug. 28, 1994 at 1, 3.

measures called for in the bill, it will be very expensive, and many think it is not the right approach to take with regard to crime.⁴

The passage of the 1994 crime bill marks a major change in the last few years with regard to the use of the death penalty by the federal government. I recall being in the gallery of the United States Senate in 1987 when a crime bill was proposed that had very modest death penalty provisions in it. There was a filibuster. It was not like the filibuster against the 1994 crime bill which was by the Republicans, but a filibuster by senators conscientiously opposed to the death penalty who did not want to see the death penalty in the federal law. The vote on whether to close debate was very dramatic. The proponents of the death penalty could not get the votes to cut off debate, so there was no death penalty passed in 1987.

A year later the Anti-Drug Abuse Act was passed, which provided for the death penalty for "drug kingpins."⁵ Some of those same senators who had opposed the death penalty the year before found their re-election chances in enough jeopardy that they then voted for the death penalty, but it was supposedly limited to murders committed by "kingpins" involved in drug trafficking "enterprises."⁶

This year, the filibuster was led by Republicans in the Senate who argued that the crime bill was not tough enough despite its provisions for the death penalty for sixty crimes, "three strikes and you're out," and massive prison construction. Not a single opponent of the death penalty joined the filibuster or voted against ending debate. As a result, the Senate cut off debate by one vote and passed the crime bill.

4. For example, an earlier version of the crime bill was criticized by the chief justices of the nation's state supreme courts. The chief justices "approved a strongly worded resolution" opposing the crime bill at their annual meeting in February. Bill Rankin, *State Justices Pan Federal Crime Bill*, THE ATLANTA CONST., Feb. 11, 1994, at C2. "This is the worst crime bill we've ever seen," said Minnesota Supreme Court Chief Justice A.M. "Sandy" Keith. "It will have little or no impact, just cause more problems for the state courts." *Id.*

5. 21 U.S.C. § 848(e) (1988).

6. In practice, the use of the federal death penalty has not been so limited and, as will be discussed, it has resulted in the most arbitrary and racially discriminatory use of the death penalty in the nation. Prosecutors are given wide discretion in deciding whether to seek the death penalty. As observed by one Congressional committee, "The drug trafficking 'enterprise' can consist of as few as five individuals, and even a low-ranking 'foot soldier' in the organization can be charged with the death penalty if involved in a killing." STAFF REPORT BY THE HOUSE SUBCOMMITTEE ON CIVIL AND CONST. RIGHTS, RACIAL DISPARITIES IN FEDERAL DEATH PENALTY PROSECUTIONS 1984-94, 103d Cong., 2d Sess. 2 (1994) [hereinafter HOUSE SUBCOMMITTEE, RACIAL DISPARITIES IN FEDERAL DEATH PENALTY PROSECUTIONS]. The Subcommittee observed that "[i]n a number of cases, the U.S. Attorneys have sought the death penalty against young inner-city drug gang members and relatively small-time drug traffickers. In other cases, the death penalty was returned against those directly involved in a murder, while the bosses who ordered the killings were given lesser sentences." *Id.* at 5.

There are many reasons to be concerned about the crime bill, and one major concern should be the death penalty provisions. The federal government has the worst record for the inequitable administration of the death penalty. Although three-fourths of those convicted of participating in a drug enterprise under the general provisions of 21 U.S.C. § 848 are white,⁷ the death penalty provisions of the Anti-Drug Abuse Act of 1988 have been used almost exclusively against minorities. Of the first thirty-seven federal death penalty prosecutions, all but four were against members of minority groups.⁸ Since she became Attorney General, Janet Reno has approved ten death penalty prosecutions, all against African-Americans. That is an even greater racial disparity in seeking the death penalty than exists in Alabama, Georgia, Mississippi, Texas, or any other state.

Despite the pronounced racial disparities in the infliction of the death penalty in both state and federal capital cases, Congress refused to include the Racial Justice Act as part of the crime bill.⁹ The Racial Justice Act was a fairly modest proposal that would have at least required courts to have hearings on racial disparities in the infliction of the death penalty and look behind the disparities to determine whether they are related to race or some other factor.¹⁰

I must say in all sadness that I was not surprised that Congress failed to pass the Racial Justice Act. After all, in the 1920's, 30's, 40's and thereafter, Congress refused to pass an anti-lynching law even though African-Americans and other minorities were being lynched.¹¹ In the period when so many people were being lynched, the federal government was putting its law enforcement efforts into chasing down moonshiners. Congress never passed an anti-lynching law. So it is not surprising that it did not pass the Racial Justice Act.

The death penalty is the first cousin of lynching. In the 1930s and 40s, when the South—particularly Alabama, Georgia and Mississippi—was getting such bad press for lynching people, the perfunctory death penalty trial

7. HOUSE SUBCOMMITTEE, RACIAL DISPARITIES IN FEDERAL DEATH PENALTY PROSECUTIONS, *supra* note 6, at 2.

8. *Id.* at 3. See also Kenneth J. Cooper, *Racial Disparity Seen in U.S. Death Penalty*, WASH. POST, March 16, 1994, at A5; *Another Biased Death Penalty*, N.Y. TIMES, March 17, 1994 (Editorial), at A22.

9. The Racial Justice Act was adopted in a version of the crime bill that passed the House of Representatives in April 1994. See David Cole, *A Fear of Too Much Justice*, LEGAL TIMES May 9, 1994, at 26. But due to opposition in the Senate, it was not included in the final bill reported out of the conference committee and adopted by both the Senate and the House later in the summer.

10. See Cole, *supra* note 9, at 41.

11. See W. FITZHUGH BRUNDAGE, *LYNCHINGS IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930* (1993); GEORGE WRIGHT, *RACIAL VIOLENCE IN KENTUCKY, 1865-1940: LYNCHINGS, MOB RULE AND "LEGAL LYNCHINGS"* (1990).

replaced lynching as a way of accomplishing the same thing while pretending to provide some due process.¹²

Powell vs. Alabama,¹³ decided by the Supreme Court in 1932, involved nine young African-Americans who were charged in Scottsboro, Alabama with the rape of two white women.¹⁴ This was the classic case for a lynching or the death penalty. The youths were tried in groups in three trials. There were mobs outside the courtroom and chants for the death penalty. All-white, all-male juries sentenced the accused to death. When there was a national outcry about the injustice of such summary trials with only perfunctory legal representation, the people in Scottsboro did not understand the reaction. After all, they did not lynch the accused; they gave them a trial.¹⁵ There was a case in Kentucky in which a man was hung immediately after a trial that lasted less than an hour. The *Louisville Courier-Journal* "tried to put the best light on the execution," saying that although it was a little hasty, at least there was not a lynching.¹⁶ Some progress had been made.

The "Scottsboro boys" were represented by lawyers, but not very well. One of the lawyers was a drunk and the other was senile.¹⁷ Unfortunately, the practice of providing a poor person an incompetent lawyer and having a perfunctory trial is still used to condemn poor people to their deaths.

Race also continues to play a prominent role in deciding who is sentenced to death. The two trials involving the beating of Los Angeles motorist Rodney King has shown what a difference diversity on juries makes. The Simi Valley jury that acquitted the officers who beat King apparently had no understanding of what Rodney King meant when he said, "I was just trying to stay alive." The more diverse federal jury that convicted the officers reached a very different conclusion about whether the behavior of the officers violated the law. Racial diversity on juries also makes a difference in capital trials. Different outcomes are reached when a capital case is tried before an all-white

12. As historian Dan T. Carter observed, after Southerners "discovered that lynchings were untidy and created a bad press . . . lynchings were increasingly replaced by situations in which the Southern legal system prostituted itself to the mob's demand." DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* (rev. ed. 1979) at 115; see also BRUNDAGE, *supra* note 11, at 255-57; WRIGHT, *supra* note 11, at 251-305.

13. 287 U.S. 45 (1932).

14. For excellent accounts of the case of the "Scottsboro boys" see JAMES GOODMAN, *STORIES OF SCOTTSBORO* (1994); CARTER, *supra* note 12.

15. CARTER, *supra* note 12, at 104-16; GOODMAN, *supra* note 14, at 47-50, 297-98.

16. Wright quoted the editorial as follows: "The fact, however, that Kentucky was saved the mortification of a lynching by an indignant multitude, bent upon avenging the innocent victim of the crime, is a matter for special congratulation." Although "explaining that for the dignity of the law it would have been better if the trial had been less hasty, the paper frankly admitted that since a Negro had raped a white woman, 'no other result could have been reached, however prolonged the trial.'" WRIGHT, *supra* note 11, at 253.

17. CARTER, *supra* note 12, at 18-19, 22.

jury in a white-flight suburban community and when one is tried before a more racially diverse jury.

Unfortunately, there is a very small constituency in our country today for fairness and the integrity of our system. The crime debate in our country today is putting many provisions of the Bill of Rights in jeopardy. The legal profession and the judiciary and those who should be most concerned about safeguarding the integrity and fairness of the system are too often silent. It is those who are the least among us—the poor, the members of minorities and the despised—that most need the protection of the Bill of Rights. They are the people who cannot afford to purchase the attention of a Congressman or a Senator with a huge campaign contribution.

Even in the area of civil rights, Congress occasionally enacts laws to restore precedents or statutes overturned by the Rehnquist Court. But as Robert Kennedy said when he was the Attorney General of the United States: “The poor man charged with crime has no lobby.”¹⁸

A few years ago, politicians could not afford to be soft on Communism. This was particularly true in the death belt states, and the death belt certainly includes Missouri. Now that Communism has fallen, crime is one of the safest issues for politicians to rail about. They accuse each other of being soft on crime, and they demonstrate toughness by support of the death penalty, other excessive punishments, and measures to make prison life even harsher than it is already.¹⁹

The modern exploitation of the crime problem can be traced to 1968 when Richard Nixon accepted the nomination of the Republican party for President of the United States and promised a new Attorney General. He attacked Ramsey Clark, who was then Attorney General, a man who believed in civil liberties and fairness.

In 1988, Lee Atwater urged Republicans to concentrate on crime because “almost every Democrat out there running is opposed to the death penalty.”²⁰ President Bush was elected that year with the help of his Willie Horton advertisements—a base, racist appeal to fear.

Not nearly as noticed, but just as significant and perhaps saddest of all, was when then-Governor Clinton went back to Arkansas to preside over the execution of a brain-damaged man, Ricky Ray Rector, an African-American who was sentenced to death by an all-white jury for the murder of a white

18. See ANTHONY LEWIS, *GIDEON'S TRUMPET* 211 (1964).

19. See Adam Nossiter, *Making Hard Time Harder, States Cut Jail TV and Sports*, N.Y. TIMES, Sept. 17, 1994, at 1 (describing efforts to take away television and exercise for prisoners in many states and the Mississippi legislature's decision to require prisoners to wear striped uniforms with the word “convict” emblazoned on the back); David J. Rothman, *The Crime of Punishment*, THE N.Y. REVIEW OF BOOKS, Feb. 17, 1994, at 34.

20. John Harwood, *Approving Atwater: GOP Comm. Backs Its Chairman*, ST. PETERSBURG TIMES, June 17, 1989, at 1A.

policeman.²¹ After shooting the policeman, Rector, who always had mental problems, put the gun to his own head and shot himself, destroying the front part of his brain. Clinton scheduled the execution for a short time before the New Hampshire Primary.

Clinton went back to Arkansas to make a spectacle out of Ricky Rector's execution and get as much political mileage out of it as possible. The logs at the prison show that in Ricky Rector's last days, he was howling and barking like a dog, dancing, singing and laughing inappropriately, and saying that he was going to vote for Clinton. Rector had a habit every night of putting his dessert aside until bedtime. After Ricky Rector was executed, they found in his cell that he had put his pie aside that night. Not having enough appreciation for what death meant, he did not realize he was not going to come back to eat his pie that evening.

Even the Arkansas Supreme Court said that Rector's was a case that should be considered for executive clemency,²² but there was a more important agenda. The Democrats were taking back the crime issue. Bill Clinton, in the midst of the controversy regarding Gennifer Flowers, was showing that he was tough and that not only did he believe in the death penalty, but he actually carried it out.

Clinton's use of Rector is only one of many examples of how political ambition seems to fuel a certain enthusiasm for the death penalty. In contrast, retirement of public officials seems to contribute to a different perspective. Justice Harry Blackmun, who was appointed to the Supreme Court by President Nixon, voted to uphold the death penalty in *Furman v. Georgia*²³ in 1972. He voted to uphold the death penalty again in 1976 in the cases which allowed the reinstatement of the death penalty in this country.²⁴ But last January, Justice Blackmun announced that he would no longer "tinker with the machinery of death."²⁵ He reviewed the history of the death penalty. He had dealt with it on the Eighth Circuit in *Maxwell vs. Bishop*,²⁶ a case from Arkansas that raised the enormous racial disparities in the imposition of the death penalty for rape. And he had dealt with it for over twenty years as a Supreme Court Justice. Justice Blackmun reviewed this history and concluded that the experiment had failed. The death penalty is not fairly applied; it is not equally applied; those facing it do not have adequate

21. For a sobering account of the Rector execution and Clinton's role in it, see Marshall Frady, *Death in Arkansas*, THE NEW YORKER, Feb. 22, 1993, at 105.

22. *Rector v. State*, 659 S.W.2d 168, 175 (Ark. 1983).

23. 408 U.S. 238 (1972).

24. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

25. *Callins vs. Collins*, 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting from denial of certiorari).

26. 398 F.2d 138 (8th Cir. 1968), *rev'd on other grounds*, 398 U.S. 262 (1970).

counsel; and race is a major factor that determines who receives the death penalty. The infliction of the death penalty does not square up with the promise of equal justice for all.

Justice Lewis Powell wrote the Supreme Court's opinion in *McCleskey vs. Kemp*,²⁷ which, by a 5-4 vote, allowed Georgia to carry out its death penalty law despite racial disparities in its infliction. In *McCleskey*, the Supreme Court upheld racial disparities in the infliction of the death penalty that would not be allowed in any other area of American life—in housing, employment, education or any other area. A recent biography of Justice Powell written by one of his law clerks said that the vote that Justice Powell regretted the most was his vote in *McCleskey*.²⁸ Had Justice Powell voted the other way in *McCleskey*, the penalty would not have been carried out on Warren McCleskey and many others because of the racial discrimination.

Chief Justice James Exum of the North Carolina Supreme Court, who is stepping down after a distinguished career on that court, said this summer that the death penalty is “about the worst thing a criminal justice system truly interested in enforcing the law and attacking crime can inflict on itself.”²⁹

These men are not running for office. They speak about this issue with a truth and clarity that is completely absent in the political debate. But many others who share the views of Justice Blackmun, Justice Powell and Chief Justice Exum remain silent instead of speaking out.

There are many moral issues involved in the death penalty. The death penalty itself is an important moral issue, but I leave that discussion to one side. I want to address the process by which the death penalty is inflicted. One of the most troubling deficiencies in the process is the quality of legal representation that the poor person accused of a capital crime receives in our country today.³⁰ Is it morally, legally and constitutionally right to assign a poor person facing the death penalty a court-appointed lawyer who lacks the experience, the knowledge, the commitment, and the resources to provide an adequate defense, and then penalize that poor person for the failure of the lawyer to make an adequate defense?

Many capital cases in this country today are tried about as honestly as the wrestling matches on television. They are fixed. The criminal justice systems in many parts of this country are without integrity. There is no adversary system in many places. On one side there is the prosecution with all the investigative agencies of the state—the state crime laboratory, the state police and investigative agencies, the local sheriff's office, the local police

27. 481 U.S. 279 (1987).

28. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 451 (1994).

29. *N.C.'s Top Judge Blasts Death Penalty*, THE ATLANTA CONST., June 15, 1994, at A3.

30. Deficiencies in the quality of legal representation for poor people facing the death penalty are discussed at greater length in 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).

department, any expert witness that the prosecutor wants to hire to do whatever analysis is needed, and, in many cases, federal law enforcement and investigative agencies. Many prosecutors spend their entire careers prosecuting cases. They are specialists. I tried a case two years ago against two prosecutors who have been trying death penalty cases as long as the present law has been on the books in Georgia—since 1973. Between them they had probably tried almost 100 death penalty cases.

On the other side, a poor person facing the death penalty may be represented by a court-appointed lawyer who may be trying his or her first capital case and perhaps even his first criminal case. Shirley Tyler, a woman who was sentenced to death in Georgia, was represented at her capital trial by a lawyer within six months after he passed the bar.³¹ Recently I handled the appeal of a capital case from Columbus, Georgia, in which two seasoned prosecutors tried a case against two lawyers who had never tried a death penalty case before. The court-appointed defense lawyers were not given one penny for an investigator to conduct the kind of investigation that is needed to prepare for the trial of a capital case. They were not given one penny for an expert witness. They did not even have an expert to consult so they could ask the state's experts intelligent questions.

People with serious mental problems who face the death penalty are sent to the state mental hospitals where prosecutors can count on their mental health experts to conduct a cursory examination and turn out a report saying that the defendant is competent for trial, is not insane, has nothing wrong with him and is probably malingering. These brief "drive-by" evaluations often fail to detect brain damage, mental retardation or other mental deficits. But often the defense lawyer is not provided with a psychiatrist, psychologist, neurologist or other expert to conduct a proper examination and make a more reliable determination of whether there is some impairment that may be relevant to mental state or mitigation of punishment.

On far too many occasions, the poor person facing the death penalty not only has no expert, he or she has almost no legal assistance from the lawyer assigned by the court. There have been several death penalty cases in which the defense lawyer did not even know that a capital case is bifurcated into two trials—one on guilt and one on sentencing.³² In an Alabama case, after the verdict came in at the guilt stage, the lawyer asked the judge if he could have a few minutes to read the death penalty statute because he had never read it.³³

31. *Tyler v. Kemp*, 755 F.2d 741, 743 (11th Cir.), *cert. denied*, 474 U.S. 1026 (1985).

32. *Douglas v. Wainwright*, 714 F.2d 1532, 1556 (11th Cir. 1983), *vacated and remanded*, 468 U.S. 1206 (1984), *on remand*, 739 F.2d 531 (1984), *cert. denied*, 469 U.S. 1208 (1985); *Young v. Zant*, 677 F.2d 792, 797 (11th Cir. 1982).

33. *State v. Smith*, Ala. Ct. Crim. App. No. 5 Div. 458, Trial Record at 1,875-1,876.

The perfunctory capital trial—the legal lynching—is not a thing of the past. David Peek, an African-American, was tried in Green County, Georgia, and represented by a court-appointed lawyer. His case started at 9:00 in the morning. By late that evening the jury had finished the guilt phase and was sent out to deliberate. At 12:43 a.m. the jury came back and said it was hopelessly deadlocked, but the foreman asked if one juror could be removed from the jury. The court-appointed lawyer *agreed* to it. The judge was happy to remove the one holdout for not guilty and replaced him with an alternate. *Three minutes later*, the jury returned a guilty verdict. At that point the judge started the penalty phase of the trial. By 2:00 a.m., David Peek had been sentenced to death.³⁴

David Peek had an I.Q. of 55. The jury never knew that because the court-appointed lawyer had never obtained his mental health records. Even the state hospital had diagnosed him as mentally retarded, but that evidence was never presented to the jury because the lawyer never got the records. In seventeen hours, from 9:00 in the morning until two hours past midnight, David Peek went from the presumption of innocence to condemnation.

The poor person facing the death penalty may receive less than zealous advocacy from the lawyer assigned to him by the local elected trial judge. For example, there have been at least four different cases in Georgia in which a court-appointed lawyer referred to his own client at some point on the record during the proceedings with a racial slur. The only reference the court-appointed lawyer made to George Dungee during the closing argument at the penalty phase was when he called him “a little 138-pound nigger man.”³⁵ That was the man who was supposed to be George Dungee’s lawyer. If the lawyer had done any investigation, he would have found that George Dungee was a profoundly mentally retarded man. He could not make change or drive a car because he was too limited. He had been rejected from the military because of his mental retardation. But the lawyer had never investigated so the jury never knew anything about the person whose life was in its hands.

The State of Georgia wants to kill a man named Wilburn Dobbs who was referred to at his trial as “colored” and “colored boy” by the judge and defense lawyer, and called by his first name by the prosecutor.³⁶ Dobbs was

34. Peek’s conviction was originally reversed due to the juror substitution by a panel of the Court of Appeals for the Eleventh Circuit. *Peek v. Kemp*, 746 F.2d 672 (11th Cir. 1984). However, the panel opinion was vacated and the Court, sitting *en banc*, upheld Peek’s conviction and sentence. *Peek v. Zant*, 784 F.2d 1479 (11th Cir. 1986) (*en banc*), *cert. denied*, 479 U.S. 939 (1986).

35. *Dungee v. Kemp*, U.S. Ct. of App. for the 11th Cir. No. 85-8202, *Record Excerpts* at 102 (transcript of Opening and Closing Arguments in *State v. Dungee* at 39), *decided sub nom. Isaacs v. Kemp*, 778 F.2d 1482 (11th Cir. 1985), *cert. denied*, 476 U.S. 1164 (1986).

36. *Dobbs v. Zant*, 720 F. Supp. 1566, 1578 (N.D. Ga. 1989), *aff’d*, 963 F.2d 1519 (11th Cir. 1991), *remanded*, 113 S. Ct. 835 (1993).

represented at his trial by a lawyer who said he did not even know for sure until the day of trial that he was going to represent Dobbs. He also did not know up until the day of trial whether the state was going to seek the death penalty. When he was asked to describe his attitudes towards African-Americans, the lawyer appointed to represent Dobbs was quite candid. As described by the district court:

Dobbs' trial attorney was outspoken about his views. He said that many blacks are uneducated and would not make good teachers, but do make good basketball players. He opined that blacks are less educated and less intelligent than whites either because of their nature or because "my granddaddy had slaves." He said that integration has led to deteriorating neighborhoods and schools and referred to the black community in Chattanooga as "black boy jungle." He strongly implied that blacks have inferior morals by relating a story about sex in a classroom. He also said that when he was young, a maid was hired with the understanding that she would steal some items. He said that blacks in Chattanooga are more troublesome than blacks in Walker County [Georgia]. . . . The attorney stated that he uses the word "nigger" jokingly.³⁷

He made a number of other equally revealing and equally sad comments.³⁸ During the penalty phase of Dobbs' trial when the jury could have heard anything about Dobbs' life and background and any reasons why Wiley Dobbs should not have been sentenced to death, the lawyer presented no evidence. For a closing argument, he stood up and read part of a concurring opinion from *Furman vs. Georgia*.³⁹ This was the worst thing he could have done because the concurring opinion that he read expressed the view that the death penalty was unconstitutional and could not be carried out. So rather than emphasizing to the jury the enormous decision that it had to make about whether a fellow child of God was going to live or die, the lawyer suggested that its decision was not that important at all.⁴⁰

A federal district court in Georgia recently said that Wilburn Dobbs did not receive incompetent representation despite the lawyer's racism.⁴¹ However, in order to investigate the life and background of the client, the lawyer must be comfortable working with the client and the client's family and friends. As the Native-Americans would say, the lawyer must walk a

37. *Dobbs*, 720 F. Supp. at 1577.

38. *Id.* at 1577-78.

39. 408 U.S. 238 (1972).

40. A prosecutor is not allowed to make an argument which would diminish the jury's sense of responsibility for its life and death decision. See *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

41. *Dobbs v. Zant*, No. 4:80-cv-247-HLM (N.D. Ga., Order of July 29, 1994). The court had previously found that the lawyer's racism did not affect the sentencing deliberations because "[t]he personal views of the defense attorney . . . were not expressed at trial, and the attorney himself did not decide Dobbs' penalty." *Dobbs*, 720 F. Supp. at 1578.

mile or more in the client's moccasins in order to understand the client and to present his life and background to the jury. The lawyer must know who that person is, and if the lawyer regards the client, his family or his friends in a demeaning way, if the lawyer does not see the client and members of his race as human beings, then the lawyer cannot possibly fulfill the role as an advocate for life.⁴²

The district court found there was nothing wrong with the lawyer's "tactical decision" to read the concurring opinion from *Furman*. This decision is an embarrassment to the legal profession. One does not even need a law degree to equal the performance of Dobbs' lawyer. Anyone with a fifth grade education can sit there and listen to the prosecution's case and then stand up and read a concurring opinion. But according to a United States District Court that is good enough under the Sixth Amendment, and barring the unforeseen, Wilburn Dobbs will be strapped down and electrocuted in Georgia's electric chair.

When people are represented by such lawyers, juries often do not get critical information that is essential for a reliable and just sentencing decision. Horace Dunkins was executed in Alabama. Upon reading in the newspaper that Dunkins was mentally retarded, one of the jurors wrote a letter to the Governor of Alabama saying that if she had known he was mentally retarded, she would have never voted for the death penalty. Immediately before Warren McCleskey was executed in Georgia, several members of his jury went before the Board of Pardons and Paroles and said they did not know important facts and if they had known, they would not have voted for the death penalty.

The adversary system cannot work when juries do not have the information necessary to make their sentencing decisions. Whether a person is mentally retarded or brain damaged is a critical matter for a jury to know before it makes a decision whether someone should live or die. The O.J. Simpson case demonstrates the importance of access by defense counsel to experts on forensic evidence. O.J. Simpson's preliminary hearing lasted longer than most death penalty trials. Many juries that decide guilt and penalty in capital cases hear only the opinions of the prosecution's experts without any adversarial testing.

Gary Nelson spent eleven years on Georgia's death row. He was convicted of murder and sentenced to death based upon testimony by an expert from the state crime laboratory. The case involved the murder of a little girl. The expert witness testified that a hair found on her body had come from Gary Nelson. It turned out that the prosecution had an FBI report in its file

42. For a discussion of the perceptions, attitudes, preparation, training and skills needed to be an effective advocate for life at the penalty phase of a capital trial, see Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323; Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299 (1983).

indicating that the hair did not have sufficient characteristics to be microscopically compared because it was a chest hair. The FBI had concluded it was of no value whatsoever, but some hack expert presented by the prosecution testified that it came from Gary Nelson.

Unlike O.J. Simpson, Gary Nelson did not have his own expert to analyze the evidence and give the jury a different opinion of its value. He was represented by a lawyer who was paid twenty dollars per hour and tried the case all by himself with no investigator and no expert assistance. His closing argument was only 250 words long. By sheer luck, Gary Nelson was later represented by a law firm in Atlanta who took his case *pro bono*. The firm got its own expert and found the FBI report. Gary Nelson was released from death row.⁴³

It has been suggested that this is an example of the system working. However, a man spending eleven years on death row for a crime he did not commit is not much of an advertisement for the system. The court system makes decisions every day about guilt and innocence; liberty and imprisonment; life and death; but most poor defendants receive no expert assistance and have no investigator to marshal the facts so that both sides of the question may be fully explored as is contemplated by the concept of an adversary system.

Another important role a lawyer should play in any trial is ensuring that the provisions of the Bill of Rights are actually followed during the trial. I am confident that no one who graduates from Saint Louis University Law School is ever going to call the provisions of the Bill of Rights a collection of technicalities. The suggestion that the most precious rights that we have—the right to be free from search and seizures of our persons and our homes, the right to remain silent, the right to a fair trial by an impartial jury, and the other provisions of the Bill of Rights—are just technicalities is another sad aspect of the crime debate today. The newspaper in Mobile, Alabama, once ran an editorial condemning a decision by the Alabama Supreme Court—hardly a bastion of liberal activists judges—in which it said the defendants had been let off on technicalities. If the Mobile newspaper was not allowed to print its newspaper, I doubt seriously if it would say that the First Amendment was a technicality.

Process is important. Fairness is important. The way in which society selects those who will live and those who will die is important. It is important whether we are defense lawyers, prosecutors or politicians. We should not talk about the provisions of the Bill of Rights as technicalities because they are not technicalities.

Poor persons facing the death penalty—those most in need of the protections of the Bill of Rights—are often denied these fundamental guarantees of

43. Nelson v. Zant, 405 S.E.2d 250, 252 (Ga. 1991).

fairness because of the ineptness of the lawyers assigned to defend them. Billy Birt was tried in Georgia represented by a lawyer who was later asked to name all the criminal decisions from any court—the U.S. Supreme Court, the Georgia Supreme Court, the federal courts—with which he was familiar. He thought about it for a while and he said, “Well there is the *Miranda* decision. Everybody knows the *Miranda* decision.”⁴⁴ Then he thought a minute longer and he said, “And then there is the *Dred Scott* decision.”⁴⁵ Those were the only two criminal cases that the lawyer could name, and of course, *Dred Scott* was not a criminal case.

That lawyer’s ignorance of the law was significant to Billy Birt because he was tried in Jefferson County, Georgia, a county where 54.5% of the population is African-American, but at that time only 21.6% of the jury pool was African-American because the jury commissioners there had long under-represented African-Americans. Since all the criminal law the lawyer knew was *Miranda* and *Dred Scott*, he did not realize that this practice by the jury commissioners constituted a fundamental violation of the Bill of Rights. So Billy Birt’s lawyer did not raise the issue. When the conviction was reviewed on habeas corpus by the federal court, it refused to examine the issue because the lawyer had not preserved it.⁴⁶

Some people might call that a technicality. However, if there was an election and African-Americans or women were not allowed to vote, no one would say that the decision reached in that election was legitimate. Yet here, the jury commission purposely excluded people from participating in the process on the basis of their race. Because the lawyer did not realize the importance of raising this issue and proving the facts, it was of no avail to his client.

The first person executed by Georgia under the present death penalty law was John Eldon Smith. He was one of three people involved in a crime. As often happens, one person turned state’s evidence and testified against the other two. He got a plea bargain and a very good deal and did not have to worry about the death penalty. The other two went to trial in Bibb County—that is Macon, Georgia—where the jury commissioners did not include women in the jury pools. The lawyers for Smith’s co-defendant raised a challenge under *Taylor vs. Louisiana*,⁴⁷ a Supreme Court case which held that discrimination against women in choosing juries violates the Constitution. The elected state judge there was not particularly bothered by this fact. They had always done it that way, so he denied the motion.

44. *Miranda v. Arizona*, 384 U.S. 436 (1966).

45. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

46. *Birt v. Montgomery*, 725 F.2d 587, 601 (11th Cir. 1984), *cert. denied*, 469 U.S. 874 (1984).

47. 419 U.S. 522 (1975).

But Smith's lawyers were not aware of that case and did not raise the issue. Both Smith and his co-defendant were sentenced to death. But when their cases were reviewed on habeas corpus in the federal court, the co-defendant was granted a new trial because of the discrimination against women.⁴⁸ A life sentence was later imposed by a jury that fairly represented the community, both women and men. The court, however, refused to grant John Eldon Smith a new trial because his lawyers had not challenged the jury before the state courts.⁴⁹ John Eldon Smith was later executed.

If the lawyers who represented the co-defendant had represented Smith and vice versa, Smith would be alive today and the co-defendant would be dead. That is the difference a lawyer and the Bill of Rights can make in a death penalty case.

Remarkably, in the case of the second person executed in Georgia, exactly the same thing occurred. Two co-defendants were tried for the same crime in two separate cases. In one case, the lawyer preserved an issue regarding a jury instruction, and in the other it was not raised. Ivan Stanley—who was by far the least culpable of the two—was executed because the issue was not preserved in his trial.⁵⁰ His co-defendant is still alive today after receiving habeas corpus relief.⁵¹

John Young was sentenced to death in Georgia. Not long after his trial, he met his lawyer at the prison—not because the lawyer was there to visit him, but because the lawyer had been jailed on drug charges. The lawyer later said that during the trial he was breaking up with his wife and with someone else that he had a relationship with, that he was addicted to drugs, that he had a lot of family problems and that he really did not concentrate very much on the trial.⁵² In the end it did not matter—John Young was executed.

Judy Haney was represented by two lawyers at her trial in Alabama. One of the lawyers showed up so intoxicated one morning at trial that the judge had no choice except to send the jury away and lock the lawyer up for a day to dry out.⁵³ The next morning he brought the jury back and produced both Ms. Haney and her lawyer from jail. A few days later, the death penalty was

48. *Machetti v. Linahan*, 679 F.2d 236, 242 (11th Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983).

49. *Smith v. Kemp*, 715 F.2d 1459, 1469-72 (11th Cir. 1983), *application for stay denied*, 463 U.S. 1344, 1345, (1983), *and cert. denied*, 464 U.S. 1003 (1983).

50. *Stanley v. Kemp*, 737 F.2d 921, 922 (11th Cir. 1984), *application for stay denied*, 468 U.S. 1220 (1984).

51. *Thomas v. Kemp*, 800 F.2d 1024 (11th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

52. Affidavit of the attorney, Charles Marchman, Jr., *Young v. Kemp*, (M.D. Ga. 1985)(Civ. No. 85-98-2-MAC).

53. *State v. Haney*, Ala. Crim. App. No. 7 Div. 148, Record at 846-49 (Ala. Crim. App. 1989).

imposed.⁵⁴ Her other court-appointed lawyer was later disciplined by the Alabama Bar for missing the statute of limitations in two workmen's compensation cases.⁵⁵ That is the legal talent that Judy Haney had to represent her in a death penalty case.

Ms. Haney's case also illustrated the difference it makes when the jury is deprived of critical information because of the incompetence of counsel. Ms. Haney had been abused for over fifteen years by the man whose death she was convicted of causing. The abuse of Ms. Haney and her children was a reason the jury might have decided to sentence her to life imprisonment without parole as opposed to the death penalty, but the lawyers did not get the medical records which showed that both Ms. Haney and the daughter had sustained broken bones and other injuries as a result of this abuse.

Why do courts allow this? How can any system that is supposed to be a system of justice and that is making such important decisions such as whether a human being is going to live or die, allow this sort of disgraceful thing to go on?

One reason is that courts and the bar have little commitment to the Sixth Amendment's guarantee of the right to counsel and the Fourteenth Amendment's guarantee of equal justice for both rich and poor. In many states where death is more frequently imposed by the courts, there is no indigent defense system. In many states—Alabama, Arkansas, Georgia, Mississippi, Texas—there is no public defender system. Those accused of crimes are assigned lawyers from private practice by the locally elected judge who may have little commitment to ensuring an adequate defense. The lawyer appointed may have little knowledge of criminal defense and may receive little or no compensation. For example in Milledgeville or Rome, Georgia, the courts appoint lawyers who have not been members of the bar for five years to represent indigent defendants. A tax lawyer who moves to one of these communities but has no interest in criminal law is still going to get criminal appointments for the first five years he is a member of the bar. Many lawyers do not like it when they first move to these communities, but after the five years are up, they begin to like this approach more. But the poor person accused of a crime often pays with his life or freedom for the lawyer's lack of expertise in criminal matters.

Another approach to indigent defense which often provides even worse representation is the "contract system," in which the court contracts with an attorney to provide all of the indigent defense at a set fee. In McDuffie County, Georgia, the county commission did not want to pay too much for indigent defense so it announced it would give the defense of indigents to the

54. The Alabama Court of Criminal Appeals, *Haney v. State*, 603 So.2d 368 (Ala. Crim. App. 1991), and the Alabama Supreme Court, *Ex parte Haney*, 603 So.2d 412 (Ala. 1992), upheld the conviction and death sentence.

55. *Disciplinary Report*, ALA. LAW., Nov. 1993, at 401.

lowest bidder. The low bid was \$25,000. For that amount, a lawyer agreed that he would defend all the cases involving poor people. He is to take out any expenses for experts or investigation from the \$25,000. The best part is that he can do whatever else he wants. He can keep right on with his wills and divorces and title searches and all the other practice that he had there in that small town. It will not surprise you to hear that where such systems are employed, lawyers often do not spend a penny on investigation or expert witnesses. If they did, they would be taking that money from themselves. They operate under a built-in conflict of interest.

The contract system is popular with government officials in many places because they know exactly how much indigent defense will cost. Unfortunately, it is the defendants who suffer from this bargain basement justice. There is the old adage: you get what you pay for. But here it is the poor person who gets the deficient legal services because the government is unwilling to pay what it costs to provide adequate representation.

There is no money in defending a capital case. I was appointed to try a death penalty case in Jackson, Mississippi a few years ago. I spent around 1000 hours and documented 450 hours, and another lawyer in my office spent around 500 hours. Additionally, we had a number of law students and other people helping us as usual. At the end of that case I got a check for \$1000. I thought that check spoke volumes about how much the people in Mississippi valued indigent defense, and the defense of that client. I could have flipped hamburgers at a fast food restaurant and made more money than I made defending a man in a death penalty case. Mississippi still has that \$1000 limit.⁵⁶

Alabama has a statutory limit for an attorney's out-of-court time, of twenty dollars per hour, up to a limit of \$2,000 in a capital case.⁵⁷ A lawyer who spends 500 hours getting ready for a case is paid four dollars per hour. The next time you need a lawyer for anything, try to hire one for four dollars per hour. Call the law firms here in St. Louis and tell them you are willing to pay four dollars per hour and see what you can get. It does not take an economist to figure out why the kind of representation I described takes place in these cases.

The typical death penalty case is not tried like the O.J. Simpson case. Instead, there is case after case in which there is no expert witness at either the guilt phase or the penalty phase of the trial. There is no investigation. A lawyer in Alabama who tried a death penalty case all by himself and was

56. *Pruett v. State*, 574 So. 2d 1342, 1348 n. 7 (Miss. 1990) (Anderson, J., dissenting).

57. ALA. CODE § 15-12-21(d) (Supp. 1994). Although the statute limits payment for time spent out of court to \$1,000, an opinion of the Alabama Attorney General has concluded that the sentencing phase of a capital case is to be considered a separate case, allowing a maximum payment of \$2,000 for out-of-court time at a rate of \$20 per hour. *Op. Ala. Att'y Gen. No. 91-00206* (Mar. 21, 1991).

denied funds for an investigator once asked me, "What was I supposed to do? Shut down my law practice?" He said, "I was not making any money on this case. I could not go out and beat the streets investigating the case."

Another reason for the lack of justice in the courts—that lawyers do not like to talk about because it is painful—is that judges are elected in many states. Unfortunately, politics may come before the Constitution with judges who must stand for election. And politics may influence the appointment of counsel. One of two things is going on with elected judges. Either elected judges are intentionally appointing bad lawyers to defend capital cases or they are woefully incompetent at appointing lawyers.

Judy Haney's case, the one involving the drunk lawyer, was tried before Judge Jerry Fielding in Talladega, Alabama. Even after Judge Fielding had locked the lawyer up during the trial because he was drunk, he appointed that lawyer to do Judy Haney's appeal. The lawyer never got around to filing a brief with the Alabama Court of Criminal Appeals, at least not on time. Our office took the case over at that point. We heard Ms. Haney needed a lawyer and we ultimately filed a brief for her at no charge to her or anyone else. But we found out later that the appellate court actually paid the drunk lawyer even though he did not represent her on the appeal.

One might wonder why a judge would appoint a lawyer who had been intoxicated and had done such a terrible job at trial to do the appeal. Part of the reason is the judge stands for election in that community and the death penalty is much more a part of the political process than it is part of the legal process. A lot of state court judges are former prosecutors who made their careers trying high profile death penalty cases.

Greater media coverage of the crime issue and cameras in the courts have been great developments for politicians who have been elected as judges and prosecutors. After a well publicized crime, the prosecutor calls a press conference and announces that he has met with the victim's family, that the family wants the death penalty and, therefore, he will seek the death penalty. The prosecutor will be on the evening news, the prosecutor will be on the front page of the paper. Brief but dramatic excerpts of the courtroom action will be on television. The prosecutor will be shown standing in front of the jury demanding the death penalty, expressing his outrage and the community's outrage. The judge will be shown presiding and dramatically imposing the sentence of death. It is marvelous publicity and it can help a career along.

Three of the four judges in Columbus, Georgia, are former prosecutors. Two went to the bench shortly after trying high profile death penalty cases and getting a lot of publicity. They preside now as their proteges—the people they hired in the prosecutor's office—try death penalty cases in front of them and try to advance their political careers so they can be judges too.

As I mentioned earlier, judges have appointed lawyers to defend capital cases who have never tried a case before. Where those sentenced to die have won new trials on appeal or in post-conviction proceedings, Georgia judges

have repeatedly refused to appoint to the retrial the lawyers who won new trials.

Another lawyer, William Warner, and I represented a young man whose case went to the United States Supreme Court, which set aside the death penalty in a 9-0 opinion because of racial discrimination by the prosecutor in rigging the juries.⁵⁸ When we came back to the community where the crime occurred, the local judge appointed two local lawyers, neither of whom had ever tried a death penalty case. Our client, Tony Amadeo, told the new lawyers he had nothing against them, but would like to continue the representation he had. The lawyers filed a motion to withdraw. At the first hearing before the local judge, we asked to be appointed and they asked to withdraw. Tony Amadeo gave a very eloquent statement asking that we be appointed. The local judge denied our motion to be appointed and denied the motion of the appointed lawyers to withdraw. Finally, the Georgia Supreme Court reversed and ordered that we be appointed.⁵⁹

Why was the Georgia Supreme Court required to order the local judge to do what he should have done in the first place? The local judge's plan had been to arraign Tony Amadeo on January 6 and try him on January 30 and get him back on death row within a month. As it turned out, after we took over the case and filed the appropriate motions and properly litigated the case, a plea bargain was reached. Mr. Amadeo is now serving a life sentence. He will get his college degree while in prison this year.

Another reason for the poor quality of justice in capital cases is lack of leadership in the bar and in the country. If you have not read Anthony Lewis' wonderful masterpiece *Gideon's Trumpet*, I recommend it. It is the story of Clarence Earl Gideon who was convicted in Florida and then filed his own handwritten petition with the United States Supreme Court saying it just was not fair that he did not have a lawyer at his trial. This ultimately led to the case of *Gideon vs. Wainwright*,⁶⁰ which held that the poor person accused of a felony is entitled to a lawyer. When *Gideon* was pending, the state of Florida asked other state attorneys general to file briefs in support of Florida's position that defendants were not entitled to a lawyer at a trial. Walter F. Mondale, the Attorney General of Minnesota, and Thomas F. Eagleton, the Attorney General of Missouri, and Edward J. McCormick, Jr., the Attorney General of Massachusetts, decided that was not right. A poor person accused of a crime, *should* have a lawyer. As a result of their leadership, twenty-two state attorneys general filed amicus briefs *in support* of Clarence Earl Gideon and the right to counsel. The only states that joined Florida were Alabama and North Carolina.

58. *Amadeo v. Zant*, 486 U.S. 214 (1988).

59. *Amadeo v. State*, 384 S.E.2d 181 (Ga. 1989).

60. 372 U.S. 335 (1963).

We do not have that kind of leadership today. Today, even the most minimal efforts to improve the quality of counsel and to do something about the disgraceful representation that poor people receive is opposed by the prosecuting attorneys' association, by the state attorneys general's association, and, I am sorry to say, by the United States Department of Justice. When Robert Kennedy was the Attorney General of the United States, he proposed the Criminal Justice Act. Although he said that the poor person accused of a crime has no lobby, it was really not true at that time. When Robert Kennedy was the Attorney General, the poor person accused of a crime had a very powerful ally, the Attorney General of the United States, who believed in the fairness and the integrity of the system.

Today, in contrast, every time it is proposed that poor people be provided with decent legal representation, we are told that it costs too much; that communities cannot afford it; that there are no qualified lawyers to do capital cases so the local courts must get along with whoever has a license and will take the case for little or nothing. This is much like saying that since some communities do not have brain surgeons that we should let chiropractors do brain surgery there. No one would seriously suggest this in the medical area, but this is exactly what we do in the law. In medicine, the patient is taken to the city and gets the brain surgery there. If we are going to have the death penalty, lawyers who know how to defend capital cases must be brought to the communities that do not have them.

Another aspect of the lack of leadership is silence on the part of those who know better. I hear judges and prosecutors acknowledge off the record, out of court, that the death penalty is racist, that the quality of the representation is a disgrace, and that the death penalty is not accomplishing anything. But as soon as we get in court, it is as if someone said: "Act One, Scene One." They start posturing. They talk about how we must kill this person to show the community what we think. Only those who are retiring seem willing to stand up and say that the emperor wears no clothes. The people responsible for the system, the judges and the prosecutors, should be standing up for the integrity of the system, trying to improve it.

Another reason for the poor quality of justice is that the Supreme Court has held that the Sixth Amendment requires no more than the perfunctory representation many poor people receive. Under the Court's decision in *Strickland vs. Washington*,⁶¹ the standard of representation in death penalty cases has been brought down to meet the kind of representation that poor people receive. This is manifestly unjust. Poor people accused of crimes are not like wealthy people who hire lawyers and suffer the consequences when their lawyers make mistakes. Poor people do not hire their lawyers. They are stuck with their lawyers. Judges assign lawyers to them. Yet the poor person

61. 466 U.S. 668 (1984).

who is assigned a lawyer who knows only *Miranda* and *Dred Scott*, or the poor person who is assigned a lawyer who never conducts an investigation is left virtually defenseless at the bar. Yet it is that poor person who suffers the consequences of the lawyer's incompetence. That is terribly wrong. It demeans the Sixth Amendment's right to counsel to tolerate that kind of legal representation in our courts today.

What can be done about it? The United States Supreme Court is not going to do anything about it. The Supreme Court shares a major responsibility for the shameful quality of counsel that is tolerated in the nation's courts. Chief Justice Warren Burger was going around the country talking about how trial lawyers were incompetent at the very same time that the Court he presided over was adopting a standard that amounts to nothing more than "close enough for government work" in *Strickland vs. Washington*.⁶²

But *you* can do something about it. You can make a tremendous difference once you get out of this law school by providing the highest quality of representation to even the poorest and most despised among us. One of the important decisions that you will make as a lawyer is whether you will sell your services to the highest bidder, or whether you are going to follow the admonition of Elie Wiesel when he accepted the Nobel Peace Prize a few years ago and said, "[o]ur lives no longer belong to us alone; they belong to all those who need us desperately."⁶³

I have not had enough time here today to tell you just how desperately poor people accused of crimes need your help, how desperately they need somebody who cares about them—a lawyer who will talk to them and listen to them, who will treat them with respect, who will spend time on their cases, and who will work their cases just as hard as if they were one of the wealthy members of society or one of the big corporations.

There are opportunities to serve those who need you. Unlike some of the states I have discussed, there is a public defender's office in Missouri. It has some very dedicated, very talented attorneys, and it needs more. It needs good, dedicated people, who will devote a lifetime to providing poor people with the same quality legal representation that wealthy people receive. Legal services programs need equally committed attorneys to serve poor people with civil legal problems.

There is not a lot of money in it. I make \$23,000 a year; everyone in my office does. I have been practicing law for almost twenty years. Some people might say that by now I should be doing better. But it comes down to this: It is better to be doing something and get nothing for it than to be doing nothing and getting something for it.

There is so much injustice in this world. Why are so many members of the legal profession wasting their time on silly things that only make them a

62. *Id.*

63. Elie Wiesel, *This Honor Belongs to all the Survivors*, N.Y. TIMES, Dec. 11, 1986, at A2.

lot of money when there are people being wrongfully convicted, wrongfully sentenced to death, wrongfully evicted from their homes, discriminated against because of their race, gender or sexual preference, or mistreated because they are HIV positive? How can lawyers stand by when there is so much injustice?

Some law schools now have loan forgiveness programs and other programs to make it possible for students to pay their debts and go out and do important work at modest salaries. But it is also important for lawyers to remember that like everybody else, we must live modestly within our means. When I graduated from law school, I started working with a legal services program and kept up the same lifestyle I had as a student. Instead of paying money for tuition and books, I was making money. I was still riding my old fifteen dollar bicycle and living in the same very low rent apartment. It is not necessary to have a Rolex watch or a Mercedes or expensive clothes. You can go to the factory outlet and get a suit like this one I am wearing for just \$65. It will hold up for a long time.

Some people make tremendous sacrifices. Look at someone like Nelson Mandela, who spent all those years in prison. We are not called upon to make any kind of sacrifice like that. But we are called upon to help people. It is really sad that the legal and medical professions, which should be helping, caring professions, have so completely lost their way. If you talk about lawyers as a helping profession today, people laugh at you, just as they do when you talk about doctors being in medicine to help people. You must decide whether you are just in the legal profession for the money.

There are many desperate needs out there and many people who need your help. They do not have the money to pay for it, but they need you. But even if you decide not to help them, one thing you can do is refrain from demagoguery on issues like crime and immigration. Resist the temptation to beat up on the poorest and most powerless people; those who have no constituency. Refuse to be a part of or support the politics of hate and fear that are becoming increasingly prevalent in the country.

All of you are going to be leaders in one way or another. Refrain from demagoguery about the Bill of Rights. Do not call such sacred rights "technicalities." Remember that life and freedom and truth and adherence to principle are the most precious things we have, far more precious than material things. You should not sacrifice someone like Ricky Ray Rector to advance your career no matter how much good you think you can do later.

Lawyers must acknowledge the limits on the legal system and recognize that its power should also be limited. Regardless of whether or not you believe in the death penalty in the abstract, it is important to realize that the legal system is a blunt instrument that often does not work very well. In many jurisdictions, important positions in the system, such as prosecutor and judge, have been entrusted to people who are not committed to the high functions of those offices. Often the legal system does not have the information, it does not have the advocacy, and it does not have the resources for

it to work well. Like other institutions of government, it is often subject to the passions and prejudices of the moment.

That does not mean we give up on it. Deciding disputes in court is better than fighting duels. But anyone who has practiced law knows that the outcome of cases often depends on the vagaries of the system and the life experiences, outlook and prejudices of the judges, lawyers and the people on the jury. One kind of jury will be selected in a white flight suburban community, and a completely different kind of jury will be selected in the inner city. Those juries will have very different perspectives. They may not reach the same results in similar cases. In addition, how different juries in those communities decide cases may turn on the skills of the lawyers, on how presentable or articulate the witnesses happen to be, and many other factors that have nothing to do with the merits of the case. Because these factors play such a great role, we should be reluctant to have the system decree that someone should be tied down and electrocuted. There should be some limits on the power of the criminal justice system because of its many imperfections.

We urgently need a more thoughtful discussion of crime and punishment than we are having in this country at this time. Some day the people of America must get past this unseemly obsession with the death penalty and join the rest of the industrialized world in putting it behind us. If for no other reasons than our own sense of decency and morality, a recognition of the limits of our system of justice and our lack of commitment to equal justice, we should make permanent, absolute and unequivocal the injunction, *Thou Shalt Not Kill*.

QUESTIONS & ANSWERS

QUESTION:

What types of crimes do the new federal death penalties cover?

BRIGHT:

It is quite a range. Some of them are just silly political posturing. For example, there is the death penalty for killing a poultry inspector. There are not a lot of federal poultry inspectors who are in jeopardy. I do not know if any have ever been killed. There is another provision for killing somebody who works in the national parks. The last time someone was killed in the national parks involved a domestic dispute. Those are not going to have much impact at all.

But then there are a number of other provisions that federalize a lot of state crimes, for example murders occurring during drive-by shootings, rape, child molestation. Those are now punishable by death in many states, but they will now be punishable by death in federal court as well. This involves a tremendous number of cases. Federal prosecutors will now be able to seek the death penalty in places like Minnesota, Wisconsin, and the District of Columbia that do not have the death penalty.

The federal death penalty is going to be the most arbitrary because there are so many crimes that are covered and yet so few will actually be prosecuted capitally. Based on use of the death provisions of the Anti-Drug Abuse Act of 1988, we can expect that some federal prosecutors will use it a great deal and some that will not use it at all. The federal death penalty provisions in the Anti-Drug Abuse Act are supposedly for "drug kingpins." The first person sentenced to death was a man in Birmingham, Alabama, who was supposedly a marijuana kingpin.⁶⁴ But there was no reason why he would get the death penalty when it was not even sought in many cases against people involved in more serious drugs and more heinous murders. We can expect the same kind of arbitrariness with the new federal death penalty.

QUESTION:

Don't the new federal death penalties raise double jeopardy concerns?

BRIGHT:

No, because there are different sovereigns. I learned that lesson in a very painful way. I represented Larry Heath, who was charged with murder in both Alabama and Georgia for a kidnapping that started in Alabama and resulted in death in Georgia. He pleaded guilty in Georgia in exchange for a sentence of life imprisonment, thinking that would end the case. The guilty plea received a great deal of publicity in the communities on both sides of the Chattahoochee River, which divides Alabama and Georgia. After being sentenced to life imprisonment in Georgia, he was taken right across the river to Alabama, charged with capital murder and sentenced to death. In *Heath vs. Alabama*,⁶⁵ the Supreme Court held that it was not double jeopardy. He was executed. So some people will be probably be prosecuted in both the federal and state courts and some defendants, like Larry Heath, will not be warned that they could be sentenced to death in both jurisdictions until it is too late.

QUESTION:

Isn't it true that a death qualified jury is more likely to convict because in order to be considered eligible to sit on the jury the jurors must be willing to impose the death penalty? Have there been any challenges to this system or proposals to have a two-step process in which one jury would determine guilt and another would decide the punishment?

BRIGHT:

There is no question that a death qualified jury is more likely to convict. All the studies say that. One of the things that a lot of people miss is the racial bias involved in excluding potential jurors who are opposed to the death penalty. During jury selection, the judge or the prosecutor will ask potential jurors if they are conscientiously opposed to the death penalty. If they are and cannot put their views aside, the state is entitled to have those people stricken

64. The case has been affirmed on appeal. *United States v. Chandler*, 996 F.2d 1073 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 2724 (1994).

65. 474 U.S. 82 (1985).

for cause.⁶⁶ In the last case I tried, we lost fifteen people under this procedure because they had scruples against the death penalty. Eleven of the fifteen were African-Americans. Of course the reason they were opposed to the death penalty was because it is used in a racially discriminatory manner. Yet their views keep them from participating in the process. So history keep catching up with us. Those African-American jurors who do not like the death penalty, but can put the personal views aside and consider it may survive the death qualification process only to be struck by the prosecutor with a peremptory challenge because of their hesitancy to impose the death penalty.⁶⁷

Two federal district courts found that the death qualification process denies the accused a fair and impartial jury on the issue of guilt.⁶⁸ However, the United States Supreme Court, in reviewing one of those cases, held that states can try the guilt and the penalty phases together and that the death qualification process does not violate the Constitution. The Court found there is a government interest in using the same jury because it saves money. It also held that people who are against the death penalty are not a cognizable group entitled to protection under the fair cross-section provision or the impartial jury provision of the Sixth Amendment.⁶⁹

This process does result in much more conviction-prone juries. Studies⁷⁰ and practical experience⁷¹ have shown that those excluded because of their views on the death penalty tend to be the jurors who might be more likely to acquit or find the accused guilty of a lesser crime. And the very process of death qualification, which focuses the jury's attention on punishment before the trial has even started, creates the impression with jurors that the defendant is guilty, that the guilt phase of the trial is just a formality. A tactic that is

66. See *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Wainwright v. Witt*, 469 U.S. 412 (1985).

67. See, e.g., *Lingo v. State*, 437 S.E.2d 463 (Ga. 1993), in which the prosecutor used all 11 jury strikes against African-Americans in a capital case. On a challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986) to the prosecutor's use of the strikes against African-Americans, the Georgia Supreme Court—over the dissent of its two African American justices—upheld the strikes based on the “race neutral” reasons articulated by the prosecutor, many of which had to do with the jurors' answers regarding the death qualification questions.

68. *Grigsby v. Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983), *aff'd*, 758 F.2d 226 (8th Cir. 1985), *rev'd sub. nom. Lockhart v. McCree*, 476 U.S. 162 (1986); *Keeton v. Garrison*, 578 F. Supp. 1164, *rev'd* 742 F.2d 129 (4th Cir. 1984), *cert. denied*, 476 U.S. 1145 (1986).

69. *Lockhart v. McCree*, 476 U.S. 162 (1986).

70. The studies are cited and discussed in *Lockhart*, 476 U.S. at 167-73.

71. Trial lawyers, both prosecutors and defense lawyers, have learned through experience that death qualified juries are much more prosecution prone than juries that are not death qualified. Justice Thurgood Marshall, who, unlike his colleagues on the Supreme Court, had practical experience as a lawyer in capital cases, observed that “[t]he true impact of death qualification on the fairness of a trial is more devastating than the studies show.” *Lockhart*, 476 U.S. at 190.

suggested in some prosecution manuals is for the prosecution to announce that it will seek the death penalty in order to death qualify, but withdraw the notice of intention to seek the death penalty once the jury is selected. By selecting a jury in this manner, the prosecution will increase the chances of getting a conviction.

