

**THE ELECTRIC CHAIR AND THE CHAIN GANG:  
CHOICES AND CHALLENGES FOR AMERICA'S FUTURE**

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The use of capital punishment in America today presents a number of fundamental moral issues about our society and our system of justice. It is fitting that we address those issues here at Notre Dame Law School, which has a well-deserved reputation for raising moral issues, for a deep commitment to justice, and for responding to human needs with compassion.

Our society and the legal professional are failing to meet the need for legal services of many of those most desperately in need of such services in cases involving the highest stake, life itself. There are, of course, urgent needs in other areas besides capital punishment. Those accused of crimes which do not carry the death penalty, the poor, people of color, homeless people, people with mental impairments, people who are HIV positive, people in prisons and jails and many others are without lawyers to represent them in cases which involve their freedom, their shelter, their survival.

Those needs will be greater when you graduate from law school than they are today. But there could be fewer jobs and less resources for those who respond. And, as you know, you will be saddled with enormous debts. This presents a challenge, but it should not deter you from responding. Indeed, my message to you is that you have no choice except to respond — the needs and the times demand it.

Let's examine the needs and how individuals and institutions may respond to them.

Children and the poor are going to have a tremendous need for your services. The states are increasingly passing so-called welfare reform measures and Congress and the President are about to follow suit with a measure that will "end welfare as we know it." The result of these "reforms" will be to put thousands of children on heating grates to live.

This message to "get a job or starve" comes even as America's most prosperous companies are "down-sizing" — laying off thousands of workers who dedicated their lives to their companies. You will be practicing law in a world in which your fellow human beings are increasingly looked upon by the corporate structure and the government as disposable, as Charles Reich eloquently describes in his book, *Opposing the System*.<sup>1</sup> A person can work

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1. Charles Reich, *Opposing the System* (1995).

hard all her life and suddenly, one day, lose her job, her health insurance, her home and everything – not because she did anything wrong, but because the company does not need her any more. Many of those who lose their jobs in this manner have little prospect of finding employment elsewhere.

Many of those growing up in our country today have little chance of obtaining a job because we have not met the promise of providing a quality education for all of our children. Of course, a quality education is essential for a job in today's world. Silicon Valley did not appear by coincidence in California. The opportunities offered there are the sweet fruit harvested as a result of the country's best system of higher education.

But now that system is being raided to pay for unnecessary prisons. California now spends more money on its prison system than on its university system.

As a result of the denial of education, opportunity and even hope for so many of our children and their parents, the choice for many by age sixteen is not the one you had – which college to attend, what career to pursue. It is a choice between trying to find a minimum wage job at a fast food restaurant or getting in on the material wealth of the American dream through the only business available, the selling of illegal drugs.

As was pointed out recently by Steven Duke and Richard St. John:

Those who would eviscerate welfare contend that welfare recipients need the threat of severe deprivation to motivate them to seek a job. But all the evidence proves that there are no jobs for most of the people now on welfare . . . . A recent study of fast-food workers found 14 applicants for every opening.

There is another glaring gap in the reasoning of those who want to rescind the war on poverty: They assume that the only alternative a welfare recipient has is legitimate work. This overlooks the omnipresent alternative of crime.<sup>2</sup>

But America's children can still count on their government to fulfill one promise. Both the federal and state governments are committed to spend up to \$30,000 a year on every child in the United States. All that child must do to obtain this government support is to try to medicate his depression or despair with illegal drugs or commit some other crime. The state and federal governments are absolutely committed to having a maximum security prison cell for any child who commits a crime – especially if that child is a person of color.

Some of those accused of crimes will be entered in a lottery – a lottery rigged by race and poverty. Out of thousands eligible, about 250 will be condemned to be strapped down and shot, hung, gassed, electrocuted or injected with lethal drugs.

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2. Steven B. Duke & Richard St. John, Less Welfare: More Crime, Pittsburgh Post-Gazette, Jan. 14, 1996, at B1.

Other industrialized nations have abandoned the death penalty. Recently the Constitutional Court of South Africa unanimously found the death penalty to be cruel, unusual and degrading punishment under that country's constitution.<sup>3</sup> But we continue to sentence people to death in the United States.

I was in a Georgia courtroom last fall defending an African American facing the death penalty for a crime committed against a white person. We were trying to persuade the judge to remove the Confederate battle flag from the courtroom — it is a part of the Georgia state flag. The flag was adopted in defiance of the Supreme Court's decision in *Brown v. Board of Education*<sup>4</sup> that schools be integrated.<sup>5</sup> We were also asking the court to bar the state from seeking the death penalty against my client because of racial discrimination in the infliction of the death penalty in Georgia.

As we were litigating those motions, I was struck by several thoughts. The Olympic games are coming to Georgia next year. Georgia, like South Africa, has a long history of apartheid, racial oppression and racial violence. Yet now South Africa has moved ahead, it has joined the rest of the civilized world in abandoning capital punishment. But Georgia is still flying the Confederate battle flag in its courtrooms and burning people up in its electric chair while others celebrate their deaths outside.

But the problems are not limited to Georgia. The sad fact is that, increasingly, our state and federal governments are offering the young not hope, opportunity and equality, but the threat of incarceration and execution. Last summer, President Clinton began running television advertisements proclaiming his support for the death penalty and tough sentencing laws. In 1994, he signed into law a crime bill providing for the death penalty for fifty federal crimes.

The federal death penalty was brought back in 1988. Since that time the Justice Department has approved fifty-four capital prosecutions. All but nine have been against people of color. During the Clinton administration, Attorney General Reno has approved twenty-seven capital prosecutions. Twenty were against

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3. *The State v. Makwanyane*, Constl. Ct. of South Africa, June 6, 1995, reprinted in 16 Hum. Rts. L.J. 154 (1995).

4. 347 U.S. 483 (1954) (holding that racial segregation in the public schools violates the Equal Protection Clause); see also *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955) (requiring that desegregation of the public schools proceed "with all deliberate speed").

5. *Coleman v. Miller*, 885 F. Supp. 1561, 1569 (N.D. Ga. 1995) (finding that the flag was adopted "as a statement of defiance against federal desegregation mandates and an expression of anti-black feelings").

African Americans. Yet despite this sorry record, even more capital crimes were adopted last year.

In addition to providing for more death, state and federal governments pass new measures each year to provide for more incarceration. Longer prison sentences, mandatory minimum sentences, unreasonable and inflexible sentencing guidelines and other legislation such as "three strikes and you're out" result in more people serving longer periods of time behind bars at enormous cost. The United States now imprisons more people than ever before – over 1.5 million in both prisons and jails – and has the highest incarceration rate of any country in the world.<sup>6</sup>

To keep up with the growth in prison population will require the construction of 1,725 new prison beds each week.

And legislatures are moving to make life even more unbearable for those crowded into prisons and jails. Alabama has brought back the chain gang.<sup>7</sup> Its only purpose is degradation and humiliation of human beings for political points. A person cannot get much work done chained to another person. Alabama has also returned to the practice of having prisoners stand in the hot Alabama sun for ten hours a day breaking rocks with ten-pound sledge hammers.<sup>8</sup> This activity serves no practical purpose – there is no need for the crushed rock – but apparently it serves political purposes.

Not long ago such barbarism would be seen as just another aberrational act by Alabama. Today, it starts a national trend.

Arizona and Florida have already reinstated the chain gang and other states are contemplating it as well. And the Alabama legislature, continuing its role as the trend setter, is now considering a bill to return to caning as punishment for crime. Children even as young as thirteen are being prosecuted as adults. Not just in Alabama, where fourteen and fifteen year old children are serving sentences of life imprisonment without any possibility of parole, but all across the land.

As prisons and jails become even more overcrowded, conditions deteriorate. Yet legislation proposed in the United States Congress would restrict the ability of federal courts to provide

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6. 1,725 New Prisons Beds a Week; Biggest 1-Year Spurt in Inmate Population, Atlanta Const., Dec. 4, 1995, at 1A (reporting a Department of Justice announcement that there are 1.1 million inmates in prison and another 484,000 in jails, giving the United States an incarceration rate of 565 per 100,000, higher than even Russia, which had been the world leader).

7. Rick Bragg, Chain Gangs to Return to Roads of Alabama, N.Y. Times, Mar. 26, 1995, at 16; Brent Staples, The Chain Gang Show, N.Y. Times Mag., Sept. 17, 1995, at 62.

8. Alabama to Make Prisoners Break Rocks, N.Y. Times, July 29, 1995, at 5.

relief for unconstitutional conditions in prisons.<sup>9</sup> This legislation is based on irresponsible assertions by the National Association of Attorneys General and members of Congress that prisoner lawsuits are about nothing more important than soggy sandwiches or being deprived of watching football games on television or the use of electronic games.

Nothing is said about the unconscionable degradation and violence in America's prisons that was corrected only by order of federal courts in response to suits brought by prisoners. Judge Frank Johnson ordered the correction of barbaric conditions in Alabama's prisons twenty years ago. Judge Johnson found "horrendous" overcrowding with inmates sleeping on mattresses in the hallways and next to urinals; prisons were "overrun with roaches, flies, mosquitoes, and other vermin"; mentally disturbed inmates were "dispersed throughout the prison population without receiving treatment"; and robbery, rape, extortion, theft and assault were "everyday occurrences" among the general inmate population.<sup>10</sup>

Prisons in thirty-nine states and the District of Columbia have been put under some form of court supervision because of the failure of state officials to operate constitutional facilities.

For example, a federal judge found that residents of the California State Prison at San Quentin were "regarded and treated as caged animals, not human beings."<sup>11</sup> At a prison in Pendleton, Indiana, the federal court found that inmates were shackled spread-eagle to metal bed frames for up to two and a half days at a time and "frequently denied the right to use the toilet and had to lie in their own filth."<sup>12</sup> At the Southern Center for

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9. Stop Turning Out Prisoners Act, H.R. 667, 104 Cong., 1st Sess. (1995). After some modification, the restrictions were adopted as the Prison Litigation Reform Act by the Congress as a rider to the Omnibus Rescission and Appropriations Act of 1996, Pub. L. 104-134, and signed into law by President Clinton on April 26, 1996.

10. *Pugh v. Locke*, 406 F. Supp. 318, 322-27 (M.D. Ala. 1976), aff'd as modified, 559 F.2d 283 (5th Cir. 1977), rev'd in part on other grounds, 438 U.S. 781 (1978) (per curiam).

11. *Toussaint v. McCarthy*, 597 F. Supp. 1388, 1400 (N.D. Cal. 1984), aff'd in relevant part, 801 F.2d 1080 (9th Cir. 1986), cert. denied, 481 U.S. 1069 (1987).

12. *French v. Owens*, 777 F.2d 1250, 1253 (7th Cir. 1985), cert. denied, 479 U.S. 817 (1986). These are, of course, only a few of the many examples of unconscionable constitutional violations that could be found in America's prisons before they were corrected by federal lawsuits brought on behalf of prisoners. For an excellent and sobering account of conditions in the Mississippi State Penitentiary over the decades before federal court intervention, see David M. Oshinski, "Worse than Slavery":

Parchman Farm and the Ordeal of Jim Crow Justice (1996); see also Nils Christie, *Crime Control as Industry: Toward GULAGS*, Page 5

Human Rights, our docket of suits on behalf of prisoners is not about melting ice cream, but about the most fundamental human rights of people, such as the right to safety and security, to basic medical and mental health care.

It is the threat of punishment and degradation, not the promise of hope and opportunity, that we hold out to children who have the misfortune to be born into poverty, the victims of brutal racism, those who have the misfortune to be born into dysfunctional families, those who are the victims of physical, sexual and psychological abuse, and those who have the misfortune to be born with a deficit in intellectual functioning or some other mental impairment.

One would think that if all we hold out to these children is a prison cell, the chain gang and the electric chair, at least we could provide a little process – fair procedure with a good lawyer – before we take away their lives or freedom and subject them to such suffering and degradation for the suffering and degradation they caused others. And one would think that, at the very least, we would make sure that racial prejudice, which already puts so many at such a disadvantage, would not influence the severity of their punishment. But both fair procedures and the access to courts through competent and experienced counsel are being taken away even from those with the most desperate needs of all, those facing the executioner. And the courts are completely indifferent to the prominent role that race plays in the criminal justice system.

Since 1977, Chief Justice Rehnquist has waged a relentless war on the once great Writ of Habeas Corpus, which the Supreme Court described over thirty years ago as "the common law world's 'freedom writ.'"<sup>13</sup> It gives a person the right to go into federal court and assert that he or she has been imprisoned in violation of the Constitution. It gives a life-tenure federal judge the power, where there has been a constitutional violation, not to let the defendant go free, but to require the state to provide a new and fair trial. The Supreme Court once said "there is no higher duty than to maintain it unimpaired."<sup>14</sup>

But the Supreme Court under the leadership of Justice Rehnquist – later Chief Justice Rehnquist – has placed all manner of technicalities in the way of vindication of violations of the

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Western Style? (1993) (a description of failures of the American prison system by an eminent Norwegian criminologist); Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. Pa. L. Rev. 639 (1993) (describing reforms accomplished through corrections litigation).

13. *Smith v. Bennett*, 365 U.S. 708, 712 (1961).

14. *Id.* at 713 (quoting *Bowen v. Johnson*, 306 U.S. 19, 26 (1939)).

Bill of Rights.<sup>15</sup> And now Congress and the President are poised to finish off the Writ. The Anti-Terrorism Bill that has passed the Senate includes provisions which would limit even further the ability of federal judges to set aside an illegally obtained death sentence.<sup>16</sup> It will impose time limits that would treat capital cases like small claims cases.

This legislation would leave enforcement of the Bill of Rights primarily to state court judges. This sounds reasonable, but it overlooks that state court judges in all but a handful of states must stand for election.<sup>17</sup> Those judges are not indepen-

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15. The Court has limited the availability of the Writ to vindicate constitutional rights by adopting strict rules of procedural default, see, e.g., *Smith v. Murray*, 477 U.S. 527, 533-36 (1986); *Engle v. Isaacs*, 456 U.S. 107, 130-34 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 88-91 (1977); Timothy J. Foley, *The New Arbitrariness: Procedural Default of Federal Habeas Claims in Capital Cases*, 23 *Loy. L.A. L. Rev.* 193 (1989); by excluding most Fourth Amendment claims from habeas corpus review, *Stone v. Powell*, 428 U.S. 465 (1976); by requiring deference to fact finding by state court judges, see, e.g., *Patton v. Yount*, 467 U.S. 1025 (1984); *Sumner v. Mata*, 439 U.S. 539 (1981), after remand, 455 U.S. 591 (1982), after second remand, 464 U.S. 957 (1983); by making it more difficult for a petitioner to obtain an evidentiary hearing to prove a constitutional violation, *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992); by adopting an extremely restrictive doctrine regarding the retroactivity of constitutional law, *Teague v. Lane*, 489 U.S. 288 (1989); James S. Liebman, *More than "Slightly Retro:" The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in Teague v. Lane*, 18 *N.Y.U. Rev. L. & Soc. Change* 537 (1991); by reducing the harmless error standard for constitutional violations recognized in federal habeas review, *Brecht v. Abrahamson*, 507 U.S. 619 (1993); and by restricting when a constitutional violation may be raised in a second habeas petition, *McCleskey v. Zant*, 499 U.S. 467 (1991).

16. The Antiterrorism and Effective Death Penalty Act of 1996, signed into law by President Clinton on April 24, 1996, Pub. L. 104-132, requires deference by federal courts to decisions of state courts unless the decision is "contrary to, or involved an unreasonable application of, clearly established Federal law," *id.* s 104(3); establishes a statute of limitation for the filing of habeas corpus petitions, *id.* s 101; further restricts when a federal court may conduct an evidentiary hearing, *id.* 104(4); and adds new barriers to hearing a successive habeas corpus petition, *id.* s 105; see David Cole, *Destruction of the Habeas Safety Net*, *Legal Times*, June 19, 1995, at 30.

17. Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 *B.U. L. Rev.* 759, 779 n.89 (1995) (in 32 of the 38 states that have the death penalty, state court judges must stand for periodic election or retention).

dent. In high publicity, high profile cases, enforcing the law may cost them their jobs. In the present political climate, an elected judge who grants relief in a capital case signs his or her own political death warrant. It has happened in California.

Three justices of the state supreme court were swept from office because of their votes in capital cases.<sup>18</sup> It happened in Mississippi.<sup>19</sup> It has happened in other places, but often it does not happen because judges pay more attention to the next election than to the law in making their rulings.

There was an election last year for the Texas Court of Criminal Appeals. Stephen W. Mansfield ran for a seat on the court on a three-plank platform: greater use of the death penalty, greater use of the harmless error doctrine, and fines for lawyers who file "frivolous appeals" in death penalty cases.<sup>20</sup> Mansfield challenged an incumbent, a former prosecutor, who had served for twelve years on the court. Before the election, it was revealed that Mansfield had been a member of the Texas bar only a couple of years, that he had been fined for practicing law without a license in Florida, that he had almost no criminal law experience.<sup>21</sup> Nevertheless, Mansfield won the election. The

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18. Governor George Deukmejian announced his opposition to Chief Justice Rose Bird because of her votes in capital cases and warned two other justices he would oppose them unless the death penalty was upheld. Leo C. Wolinsky, *Support for Two Justices Tied to Death Penalty Votes, Governor Says*, L.A. Times, Mar. 14, 1986, at 3; Steve Wiegand, *Governor's Warning to 2 Justices*, S.F. Chron., Mar. 14, 1986, at 1. He eventually campaigned for the removal of all three justices and the voters responded by voting all three from their positions. Frank Clifford, *Voters Repudiate 3 of Court's Liberal Justices*, L.A. Times, Nov. 5, 1986, pt. 1, at 1 (describing results of election and commercials in the last month of the campaign which insisted "that all three justices needed to lose if the death penalty is to be enforced").

19. David W. Case, *In Search of an Independent Judiciary: Alternatives to Judicial Elections in Mississippi*, 13 Miss. C. L. Rev. 1, 15-20 (1992) (describing how Justice James Robertson was defeated by a "law and order candidate" who had the support of the Mississippi Prosecutor's Association). Robertson was the second justice to be voted off the Mississippi Supreme Court in two years for being "soft on crime." Andy Kanengler, *McRae Overwhelms Justice Joel Blass*, Clarion-Ledger (Jackson, Miss.), June 6, 1990, at 4A; Tammie Cessna Langford, *McRae Unseats Blass*, Sun Herald (Biloxi, Miss.), June 3, 1990, at A1.

20. Janet Elliott & Richard Connelly, *Mansfield: The Stealth Candidate; His Past Isn't What it Seems*, Tex. Law., Oct. 3, 1994, at 1, 32.

21. *Id.*; John Williams, *Election '94: GOP Gains Majority in State Supreme Court*, Houston Chron., Nov. 10, 1994, at A29.

Texas Lawyer aptly described him after his election as an "unqualified success."<sup>22</sup>

Of course the most fundamental element of a fair process is the right to counsel. Because without a lawyer, a person untrained in the law has no idea what his rights are or how to assert them. I am sure that many of you were inspired to go to law school, as I was, by Anthony Lewis' marvelous book, *Gideon's Trumpet*. 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 v. Wainwright*,<sup>23</sup> which held that the poor person accused of a felony is entitled to a lawyer. Anthony Lewis observed after the decision:

It will be an enormous task to bring to life the dream of *Gideon v. Wainwright* — the dream of a vast, diverse country in which every person charged with a crime will be capably defended, no matter what his economic circumstances, and in which the lawyer representing him will do so proudly, without resentment at an unfair burden, sure of the support needed to make an adequate defense.<sup>24</sup>

Over thirty years after *Gideon* was decided, this dream has not been realized. There is no public defender office in many jurisdictions; in some jurisdictions, the indigent defense work is assigned to the lowest bidder.<sup>25</sup> It was recently discovered that in Putnam County, Georgia, the local sheriff appointed lawyers to the cases of poor defendants and refused to appoint lawyers who would not agree to the plea dispositions proposed by the sheriff.<sup>26</sup>

Congress cut off all funding in the fall of 1995 for a very modest program to provide some measure of justice to those facing the death penalty — the post-conviction defender organizations or resource centers that had existed in twenty states. The resource centers, created in 1987, were a relatively small program for the

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22. Jane Elliott, *Unqualified Success: Mansfield's Mandate; Vote Makes Case for Merit Selection*, *Tex. Law.*, Nov. 14, 1994, at 1.

23. 372 U.S. 335 (1963).

24. Anthony Lewis, *Gideon's Trumpet* 205 (1964).

25. For a description of the lack of indigent defense systems and the state of indigent defense, see 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, 1849-55 (1994).

26. Judy Bailey, *Does Sheriff Run Putnam's Indigent Defense?*, *Fulton County Daily Rep.*, Nov. 10, 1995, at 1.

size of the problem. All together they had about 200 lawyers to deal with the post-conviction representation of over 3,000 people condemned to death. But the young lawyers who were at the resource centers during their eight years of existence proved what a difference you can make if you tackle a problem, work hard at it, build an expertise and are committed to justice.

Some of the resource center attorneys were right out of law school. They were not paid very much by the prevailing standards of the legal profession. But after two or three years, those young lawyers had mastered the complex areas of criminal law, the sub-specialty of capital punishment law, and the procedural maze of state and federal post-conviction law. Besides building their own expertise and applying it, they recruited lawyers from firms to provide pro bono representation. Many lawyers responded to the call. And they, working with the resource center lawyers, provided the highest quality of representation.

And they made a difference. Walter McMillian, who spent six years on Alabama's death row, is a free man today because the Alabama Resource Center proved that he was innocent of the murder for which he was condemned to die.<sup>27</sup> Lloyd Schlup is alive today because the resource center in Missouri established his innocence.<sup>28</sup> Curtis Lee Kyles is alive today because the resource center in Louisiana marshalled evidence of his innocence.<sup>29</sup>

In addition, these young lawyers, and the pro bono attorneys with whom they worked, exposed constitutional violations in other cases - violations such as failure to disclose exculpatory evidence, racial discrimination, and prosecutorial misconduct. These are not technicalities. These are constitutional violations that go to the very integrity and reliability of the system.

And because these lawyers and these programs made a difference, they came under attack by the National Association of Attorneys General, led by the new Attorney General of South Carolina who ran on a promise to replace the state's electric chair with an electric sofa so that more people could be executed at one time.<sup>30</sup> Apparently the attorneys general consider it a bad

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27. Peter Applebome, *Black Man Freed After Years on Death Row in Alabama*, N.Y. Times, Mar. 3, 1993, at A1.

28. See *Schlup v. Delo*, 115 S. Ct. 851 (1995).

29. *Kyles v. Whitley*, 115 S. Ct. 1555 (1995) (finding a violation of due process by the prosecution due to failure to turn over exculpatory evidence).

30. Marcia Coyle, *Republicans Take Aim at Death Row Lawyers*, Nat'l L.J., Sept. 11, 1995, at A1, A25 (describing the effort of South Carolina's Attorney General and other members of the National Association of Attorneys General to eliminate funding for the post-conviction defender organizations even though the organizations had established the innocence of at least four

reflection on our criminal justice system that innocent people are being sentenced to death. The House and the Senate responded by cutting off all funding last fall.

Those who depend upon government funding must recognize that a reality of our times is that if they are effective in helping the poor or people of color, there is a very substantial risk that the government will take away or reduce the funding or, as with the federal Legal Services Corporation, which makes legal assistance available to the poor in civil cases, interfere with their ability to help their clients by placing restrictions on their practices. Of course, that has always been the case in many states; the only programs that received funding were the ones that were completely ineffective. But at least the federal government could be counted on for some programs and the federal courts for some measure of justice that could not be obtained in the state courts. But now there is no commitment to access to the courts or to fairness on the part of our national leadership in either party.

The result is that many who most need legal assistance are without it. Many of the 3,000 men, women and children on death rows throughout the country are without counsel. Many of the lawyers from the capital resource centers who would have provided representation have gone to other jobs in other states. This leaves two choices. One is the states can execute the condemned without providing counsel for the post-conviction stages of review. The Supreme Court has held there is no right to counsel in state post-conviction proceedings.<sup>31</sup> The other choice is to assign a lawyer who knows nothing about post-conviction practice and pay the lawyer a token amount for providing the appearance of some process. Alabama compensates lawyers \$600 for handling post-conviction representation. An attorney who devotes the necessary time will be earning less than ten cents an hour. But the fees in Alabama are better than in Georgia, Mississippi and some other states. They pay nothing.

If the states do provide counsel, we can expect to see the same quality of representation during post-conviction that we see at trial. And the quality of representation at trial in capital cases has been a disgrace to the legal profession.<sup>32</sup> For example, judges in Houston, Texas have often appointed to defend capital

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men condemned to die); David Cole, *Too Expensive or Too Effective? The Real Reason the GOP Wants to Cut Capital-Representation Centers*, *Fulton County Daily Rep.*, Sept. 8, 1995, at 6 (pointing out that eliminating funding for the capital representation centers would increase the cost of providing representation, but decrease the quality).

31. *Murray v. Giarratano*, 492 U.S. 1 (1989).

32. For a more comprehensive discussion of the problems of deficient representation in capital cases and the reasons for it, see Bright, *supra* note 25.

and other criminal cases a lawyer who occasionally falls asleep during trial.<sup>33</sup> When a defendant in a capital case there once complained about his lawyer sleeping, the judge responded that the Constitution guarantees the accused a lawyer, but it does not guarantee that the lawyer must be awake.<sup>34</sup> The trial of a woman facing the death penalty in Alabama had to be suspended for a day because the lawyer appointed to defend her was too drunk to go forward.<sup>35</sup> The judge sent him to jail for a day to dry out and then produced both the client and lawyer from jail and resumed the trial. She was sentenced to death.

Last month, I handled a post-conviction proceeding in a capital case in Georgia in which the court-appointed lawyers did not make one objection during the entire trial, which lasted only one and a half days.<sup>36</sup> Only one motion was filed prior to trial.

One of the attorneys appointed to defend the accused had never heard of two important Supreme Court decisions in Georgia capital cases, *Furman v. Georgia*<sup>37</sup> and *Gregg v. Georgia*,<sup>38</sup> which provide the structure for much of the Eighth Amendment law governing capital trials. Another lawyer who has handled a number of criminal and capital cases in Georgia was asked to name all of the criminal law decisions of which he was aware. He could answer only *Miranda* and *Dred Scott*.<sup>39</sup>

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33. Paul M. Barrett, *Lawyer's Fast Work on Death Cases Raises Doubts About System*, *Wall St. J.*, Sept. 7, 1994, at 1 (describing Houston lawyer Joe Frank Canon, who is known for hurrying through capital trials like "greased lightning," occasionally falls asleep, and has had 10 clients sentenced to death); *Ex Parte Burdine*, 901 S.W.2d 456, 457 (Tex. Crim. App. 1995) (Maloney, J., dissenting) (noting testimony of jurors and court clerk that defense attorney slept during trial).

34. John Makeig, *Asleep on the Job; Slaying Trial Boring, Lawyer Said*, *Houston Chron.*, Aug. 14, 1992, at A35.

35. Record at 846-49, *Haney v. State*, 603 So. 2d 368 (Ala. Crim. App. 1991), *aff'd*, 603 So. 2d 412 (Ala. 1992), cert. denied, 113 S. Ct. 1297 (1993).

36. Judy Bailey, *A Poor Example of Indigent Defense*, *Fulton County Daily Rep.*, Jan. 16, 1996, at 1 (describing hearing in *Fugate v. Thomas*, Super. Ct. of Butts Co., Ga., No. 94-V-195 (Jan. 10-11, 1996)).

37. *Furman v. Georgia*, 408 U.S. 238 (1972) (striking down Georgia's death penalty statute).

38. *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding the death penalty statute enacted by the Georgia legislature in 1973 in response to the Court's decision in *Furman*).

39. Transcript of Hearing of Apr. 25-27, 1988, at 231, *State v. Birt*, Super. Ct. of Jefferson Co., Ga. No. 2360 (1988)

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The Alabama Supreme Court affirmed a conviction and death sentence in a case after receiving a brief from the lawyer that was only one page long.<sup>40</sup> The lawyer did not show up for oral argument. One might have expected the Alabama Supreme Court – or the courts in the other cases I have described – to call a halt to proceedings where the lawyering was so bad and appoint new counsel, not only to protect the rights of the accused, but also so that the court could do its job. Do these courts care at all about justice? How can a court decide a capital case based on a one-page brief and without oral argument? But the Alabama Supreme Court affirmed without ever having adequate briefing or any argument. The client was eventually executed.

Poor people do not choose their lawyers. They are assigned lawyers by state court judges, many of whom are elected and are more concerned about the next election than the Bill of Rights. We must ask, is it morally right to assign a poor person a lawyer who does not know the law, who does not care enough to investigate, who is incapable of properly handling such a serious case, and then penalize the poor person for errors made by the lawyer?

Another great moral and legal issue that courts continue to ignore is the role that racial prejudice plays in deciding who dies. Edward Horsley was executed in Alabama's electric chair on February 16, 1996. He was the eleventh African American put to death by Alabama of the fourteen that have been executed since the Supreme Court allowed resumption of capital punishment in 1976. He and his codefendant were sentenced to death by all-white juries selected in Monroeville, Alabama.

Two African American men sentenced to death by an all-white jury in Utah were executed even though jurors discovered during a lunch recess a note which contained the words "Hang the Nigger's" [sic] and a drawing of a figure hanging on a gallows.<sup>41</sup> No court, state or federal, even had a hearing on such questions as who wrote the note, what influence it had on the jurors, and how widely it was discussed by the jurors. William Henry Hance was executed in Georgia without any court holding a hearing on the use of racial slurs by jurors who decided his fate.<sup>42</sup> The racial

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(on file with author). The lawyer was referring to *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). *Dred Scott* was not a criminal case.

40. Brief for Appellant, *Ex parte Heath*, 455 So. 2d 905 (Ala. 1984). The brief is set out in full in *Bright*, supra note 25, at 1860-61 n.154.

41. See *Andrews v. Shulsen*, 485 U.S. 919 (1988) (Marshall, J., dissenting from denial of certiorari).

42. See *Hance v. Zant*, 114 S. Ct. 1392 (1994) (Blackmun, J., dissenting from denial of certiorari); Bob Herbert, Mr. Hance's 'Perfect Punishment,' *N.Y. Times*, Mar. 27, 1994, at D17; Bob Herbert, *Jury Room Injustice*, *N.Y. Times*, Mar. 30, 1994, at Page 13

disparities in the infliction of the death penalty are undeniable,<sup>43</sup> yet courts refuse even to hold hearings on such ugly racial incidents as I have described here.

But even if our system could provide the person facing the death penalty with a fair and impartial judge, a responsible prosecutor who was beyond political influences, a capable defense lawyer, and a jury which represented a fair cross-section of the community, it would not eliminate the discrimination and unfairness in the infliction of the death penalty. No procedure employed by the court during jury selection or trial can eliminate the centuries of racial prejudice and discrimination in our history. Beyond that, the task of deciding who should live and who should die is simply too enormous for our court system. And our courts do not function best when caught up in the politics and passions of the moment, which is almost always the case when a capital trial is taking place.

I am reasonably confident that this sad situation is only going to get worse because no one in a leadership position speaks out against it. That was not always the case. Over thirty years ago, the Attorney General of the United States, Robert F. Kennedy, observed, "the poor person accused of a crime has no lobby."

And he did something about it. He, the Attorney General of the United States, became a lobby for the poor person. He found responsible leaders on Capitol Hill who responded to his call. Together they brought about passage of the Criminal Justice Act to give lawyers to poor people accused of crimes in the federal courts. One opportunity that will be open to you upon graduation is to work at one of the federal defender offices all across the country now in existence thanks to the leadership of Attorney General Kennedy. Attorney General Kennedy supported the Criminal Justice Act not because he was soft on crime — Robert Kennedy was a tough prosecutor — but because he believed in fairness. It was as simple as that.

But after the election of 1994, as the state attorneys general and politicians in both parties moved to take away funding for the resource centers — to remove the small fig leaf of fairness that did not begin to cover the injustices and inequities in the use of the death penalty — not a word of protest was heard from the White House or the Department of Justice.

Those of us who remember Robert Kennedy hoped that someone might at least say: "Wait, if we are going to have the death penalty, if we are going to kill our own people — even our chil-

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43. For further discussion of the influence of race on the imposition of the death penalty and the failure of legislatures and courts to deal with the problem, see Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in the Infliction of the Death Penalty*, 35 Santa Clara L. Rev. 433 (1995).

dren – at least we must give lawyers to those accused of crimes."

And not just a stable of plug horses that would not be accepted by a decent glue factory, but real lawyers who know what they are doing. It is a matter of fairness. We hoped that someone might say: "Wait, we cannot gut the great Writ of Habeas Corpus. Life and liberty are too precious. Even in this material world, life and liberty should have the protection of the federal courts." Our country could have benefitted from a lesson in fairness and due process from the President or the Attorney General or some of the leaders in Congress.

Those are some of the challenges. What can we do about them?

It can be difficult to find a public interest job – not as hard as some think, but it is certainly more difficult than finding a job with a law firm. As I said earlier, there are no public defender offices in many jurisdictions where those accused of crimes have the greatest need for competent legal counsel. And it is getting harder. Many of the capital resource centers have closed. The civil legal services programs are also under attack for providing too much justice. They are being cut back and restrictions placed on their work. And of course you have those law school debts.

Law schools and human rights organizations must come to the rescue. The legal profession must respond to the challenge. And you as individuals must respond to the problems I have described.

A number of law schools have responded. The University of Texas Law School now has a capital punishment clinic which provides an outstanding experience for students and desperately needed help for lawyers defending capital cases in that state. The Capital Clearinghouse at the Washington and Lee College of Law has helped improve the quality of representation in Virginia.

Loan forgiveness programs are making it possible for law school graduates to take jobs which pay very little but allow them to respond to desperate needs. Yale and New York University are among the leaders in providing full loan forgiveness for students who go into public interest careers. Law students at many institutions have created public interest foundations, through which those who have well paying jobs make contributions to enable other graduates to accept public interest jobs and pay their loans.

Our program, the Southern Center for Human Rights, has benefitted tremendously in the last six years because each year we have had a Skadden Fellow, a new law graduate whose salary and benefits were paid for by the fellowship foundation of the law firm of Skadden, Arps, Slate, Meagher & Flom. Now in its seventh year, the Skadden program provides two-year fellowships for twenty-five law graduates. Thanks to that program, we have had three outstanding lawyers who would not have been with us otherwise. There are clients who are alive today who would be dead were it not for our Skadden Fellows. It is time for other firms to follow Skadden's lead.

Some people concerned about the death penalty created last

year the Harry A. Blackmun Fellowship at our office. That fellowship is making it possible for us to put another recent law graduate in the field to respond to these desperate needs.

Judy Clarke, the federal public defender in Spokane, Washington, recently donated her fees for representing Susan Smith in South Carolina, \$83,000, to the South Carolina Post-Conviction Defender Organization so it could establish a fellowship to provide representation for condemned inmates.<sup>44</sup> This contribution was made by a public defender who is providing representation in the courts to poor people every day. Where is the rest of the legal profession? Lawyers have a monopoly on access to justice; they have a duty to see that it is not only available to those who can pay.

But what is also needed is the response of individuals who are willing to go where the needs are. The legal services offices that survive, the public defender offices that exist, and the various public interest law projects, like my office, are not going to offer you jobs a year before you graduate like the law firms do. The reason is we do not know if we will be cut back thirty percent or eliminated completely.

But those offices will need you at some point. Last year, two of my third-year students at Yale Law School were discouraged in January because they could not find public defender jobs. But by May they were calling for help in deciding between the three public defender offices that had made offers. Another recent graduate worked for a criminal defense lawyer in Atlanta while he waited for his bar results and an opening at a public defender office. He passed the bar and will start practicing with the public defender office in Atlanta next month.

I also urge you to explore creating your own programs, your own non-profit public interest law projects – not offices where lawyers get rich, but places where people get justice. But to do that, you must settle for less in material rewards than what other lawyers are receiving for their work.

It is easy to lose perspective. Remember that it is no sacrifice to receive the same income as that received by teachers, farmers, workers on the assembly line and other good, decent working men and women who raise families and contribute to their communities. To the contrary, it is a great privilege to devote one's life to things that are important and about which you care passionately.

You who will someday graduate from law school have the opportunity to become what Martin Luther King, Jr., in one of his many great sermons, called "drum majors for justice." Dr. King described the drum major for justice as one who speaks the truth – no matter how unwelcome it may be and no matter how uncomfortable it may make the listener – and as one who gives his or her

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44. Clif LeBlanc, *Smith Lawyer Donates \$83,000 in Fees*, The State (Columbia, S.C.), Feb. 2, 1996, at B3; Andrew Blum, *Defender Proffers Fees*, Nat'l L.J., Apr. 15, 1996, at A7.

life to serving others: to feeding the hungry, clothing the naked, and – particularly important for lawyers – to visiting those who are in prison, and to loving and serving humanity.<sup>45</sup> He described his goal as a drum major for justice: "I just want to be there in love and justice and in truth and in commitment to others, so that we can make of this old world a new world."<sup>46</sup>

Follow the example of a young lawyer who graduated from Howard Law School, opened a practice in Baltimore and handled civil rights cases and became a great drum major for justice – Thurgood Marshall. Follow the example of a nun who ministered to the poor in the projects of New Orleans and on death row at Angola – Sister Helen Prejean.<sup>47</sup>

I offer my office as an example of what you can do only because it is the one I know something about and we have had some experience in surviving in hard times without much money. We have never received any government money. We must spread very thinly what little money we have to provide justice for those most in need of it. And that requires living a simple life, not letting a lot of material things clutter our existence.

We pay everyone the same, whether secretary, senior lawyer, or junior lawyer. Our annual salaries have been as low as \$8,500. Now, everyone makes \$23,000. You can live on this amount. I have lived on such a salary for the last thirteen years. But, of course, so have many other people in our society who work at jobs that are not nearly so interesting and fulfilling as what we do.

A law firm may pay one partner \$600,000 or even more. At the Southern Center for Human Rights, that is the entire operating budget for a year for nine lawyers, three investigators, one paralegal, three administrative people and a number of law students. With that we provide representation in fifty capital cases and twenty-four cases challenging prison and jail conditions.

There are other possibilities. The new technology of today enables us to practice law from our homes with a computer, a modem, a printer, a telephone and a fax machine. It is possible to maintain very low overhead so you can charge reasonable fees for services or even barter, as William Kunstler often did with his neighbors.

Consider practicing law not in Washington, New York or the Bay Area, but in communities where there has never been a lawyer who would question the status quo, who would give African Ameri-

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45. Testament of Hope: The Essential Writings of Martin Luther King, Jr. 259- 67 (James M. Washington ed., 1986).

46. Id. at 267.

47. See Helen Prejean, C.S.J., Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States (1993) (describing her work with death row inmates).

cans the same representation as white people, who would give the poor the same representation as the rich. You can change that. Those communities are not hard to find. Get a map of any state in the Union. It will be full of them.

We live in a society where it is possible to isolate ourselves from the poverty, the racism, the injustices that affect the lives of so many people. The culture of becoming a lawyer is one in which there is almost overwhelming temptation to take the job that pays the most money to pay those debts; but then it is so easy to fall into a costly culture of BMWs, big houses, and summer homes. There is so much money available and so many good uses we can think of for it, that it is easy to give in to the twin evils of complacency and complicity.

I urge you to commit yourselves today not to do that. As Elie Wiesel said in accepting the Nobel Peace Prize, "Our lives no longer belong to us alone; they belong to all those who need us desperately."<sup>48</sup> I have not had enough time to describe all the desperate needs, only some of what needs to be done to work toward finally realizing the promise of Clarence Earl Gideon's case.

Your time, your talents and your commitment are urgently needed. Let me give you an example of how much you are needed. Cornelius Singleton, a mentally retarded African American youth on death row in Alabama, went eight years without seeing the lawyer assigned to represent him in post-conviction proceedings.

Can you imagine what it must be like to be on death row for eight years and not see a lawyer? Not to know whether you are going to be executed the next day, the next week, the next year?

To have no idea what is even happening on your case? Do you see what a difference you could make if you had been Cornelius Singleton's lawyer? Just by going to see him, by counseling him, you would have provided a valuable service.

We cannot solve all the problems, but we can lend a helping hand and our professional skills to those who most need us. Like those who helped slaves escape to freedom as part of the underground railroad before the Civil War, we can help people reach safe passage, one at a time, from the injustices which threaten to destroy them.

And what a difference you can make to those individuals whom you help. Last summer, one of my clients, Tony Amadeo, who had been condemned to die by Georgia when he was only eighteen years old, but whose death sentence was set aside due to racial discrimination,<sup>49</sup> graduated summa cum laude from Mercer University. Do not let anyone tell you that you cannot make a difference as a lawyer.

And we can bear witness to the injustices we see until we shake our fellow citizens out of the indifference which we see

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48. Wiesel's Speech: This Honor Belongs to All the Survivors, N.Y. Times, Dec. 11, 1986, at A2.

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

about us.

I leave you with the challenge issued by Justice Thurgood Marshall, six months before he died, in accepting the Liberty Bell Award in Philadelphia. Justice Marshall was frail. He was in a wheelchair. But by the end of his remarks, it was observed that "his voice was as booming as [it had been] in those magnificent times when he argued before the Supreme Court."<sup>50</sup> Justice Marshall said:

I wish I could say that racism and prejudice are only distant memories . . . and that liberty and equality were just around the bend. I wish I could say that America has come to appreciate diversity and to see and accept similarity. But as I look around, I see not a nation of unity but of division - Afro and white, indigenous and immigrant, rich and poor, educated and illiterate. . . .

Look around. Can't you see the tensions in Watts? Can't you feel the fear in Scarsdale? Can't you sense the alienation in Simi Valley? The despair in the South Bronx? The rage in Brooklyn?

We cannot play ostrich. Democracy cannot flourish among fear. Liberty cannot bloom among hate. Justice cannot take root amid rage. We must go against the prevailing wind. We must dissent from the indifference. We must dissent from the apathy. . . . We must dissent from a government that has left its young without jobs, education or hope. We must dissent from the poverty of vision and an absence of leadership. We must dissent because America can do better, because America has no choice but to do better. Take a chance, won't you? Knock down the fences that divide. Tear apart the walls that imprison. Reach out; freedom lies just on the other side.<sup>51</sup>

That's the challenge. To continue the work which Justice Marshall so nobly advanced in his great career at the bar. Now it's your turn.

I hope to see you in the courts.

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50. A. Leon Higginbotham, Jr., Justice Clarence Thomas in Retrospect, 45 Hastings L.J. 1405, 1430 (1994).

51. Carl T. Rowan, Dream Makers, Dream Breakers: The World of Justice Thurgood Marshall 453-54 (1993).