ART TO Come

Death Penalty Roundtable

Power Over Life and Death

Each execution carried out in the United States represents a blow to human dignity. Everyone agrees that human life is sacred. And yet, in the name of justice and protecting victims, 1,106 people have been put to death since the Supreme Court allowed the death penalty to resume in 1976.

The Champion *asked four death penalty experts to share their thoughts on the past and future of capital punishment. We appreciate their willingness to participate in our discussion and provide insights into the challenges facing attorneys who represent clients in capital cases. Our panelists are* ***Stephen B. Bright,*** *the president and senior counsel for the Southern Center for Human Rights in Atlanta, Georgia;* ***Kathryn M. Kase****, the managing attorney in the Houston office of the Texas Defender Service;* ***Gregory J. Kuykendall****, a Life Member of NACDL and the director of the Mexican Capital Legal Assistance Program in Tucson, Arizona; and* ***Christina Swarns,*** *the director of the Criminal Justice Project of the NAACP Legal Defense and Education Fund, Inc., in New York City.*

As DNA testing has shown, erroneous convictions have resulted in innocent people being sentenced to die when, in fact, they should have been set free. If the possibility of condemning the innocent to die were not reason enough to end state-sponsored killing, then surely unfettered prosecutorial discretion, the unreliability of eyewitness testimony, and the untruthfulness of informants tip the scales in favor of abolishing the death penalty.

The machinery of death has never worked properly. Instead of revisiting it every few years in an effort to fix, limit, or refine it, let's just get rid of it. It is the only way to protect the dignity of human life.

Quintin Chatman, Editor, The Champion

What has the effect been of poorly funded and inadequately trained lawyers on the capital punishment system?

Stephen B. Bright: People have been sentenced to death who would not have been if they had been properly represented. Some would not have been *convicted* if they had been competently represented. In some jurisdictions people are given the death penalty not because they commit the worst crime, but because they have the misfortune to be assigned the worst lawyer.

Kathryn M. Kase: It's been catastrophic. Although the ABA Guidelines now recognize that capital litigation is as cost-intensive and complicated as any white collar case, we have plenty of men and women on death row who were represented by under-funded and poorly trained counsel.

While there is no shortage of training courses today, the challenge is getting capital counsel to these programs. Because the pay for capital defense counsel remains low in the state courts, it can be difficult to convince lawyers who have to pay their overhead that they should take significant time out from their practices for training.

And the problem of poor defense funding encompasses more than low lawyer pay. Too frequently, courts refuse to pay the market rates demanded by qualified experts, trained mitigators and competent investigators. As a result, the prosecution has Cadillac resources while the defense has the equivalent of a Yugo. And yet the public wonders how it is that people are wrongly convicted and sentenced to death.

Gregory J. Kuykendall: Perhaps the best way to summarize these effects is to look at the opposite scenario. Appropriate funding and good training directly lead to three positive results: local and federal prosecutors learn from defense teams compelling reasons not to seek the death penalty in the first place, prosecutors offer plea bargains in lieu of proceeding to capital trials (and defendants and their families are more prepared to accept those offers) and, in worst-case scenarios, defense teams successfully convince death-qualified juries to impose life sentences. The government of Mexico, through the Mexican Capital Legal Assistance Program (MCLAP), vigorously pursues all of these objectives simultaneously by deploying well-trained and experienced capital defense counsel to assist the defense teams appointed to represent Mexican defendants. In all pretrial and post-conviction capital cases involving Mexican citizens, MCLAP provides training and legal support to defense teams along with assistance in obtaining the court funding necessary for effective representation. The result has been a radical reduction in the death sentencing rates for Mexican nationals facing capital charges in comparison with their U.S. citizen counterparts.

Christina Swarns: Poorly funded and inadequately trained lawyers artificially inflate the size of the nation's death rows by facilitating wrongful convictions, wrongful death sentences and wrongful executions. Lawyers that lack expertise in the Byzantine intricacies of death penalty law are simply not equipped to defend against the presentation of the incorrect, irrelevant, and inflammatory evidence, argument and instruction that encourages juries to impose death sentences and allows judges to affirm them. Lawyers that are denied the resources required to retain appropriate investigators, mitigation specialists and experts are unable to marshal the often readily available evidence that may raise a reasonable doubt as to guilt or sentence or, may indeed, establish actual innocence. Thus, the inadequate training and under-funding of capital defense lawyers is lethal.

Because Americans of color are disproportionately likely to live in poverty, they are disproportionately reliant on the appointed counsel systems that are plagued by inadequate training and insufficient resources. This has undoubtedly contributed to the overrepresentation of minorities on the nation's death rows (African Americans represent 12 percent of the U.S. population but over 40 percent of death sentenced prisoners) and among death row exonerations (almost half of all death row exonerees are African American).[1] It has also improperly contributed to the widely held public perception of a link between race and violence/criminality.

What impact has DNA technology had on the public's perception of the fallibility of juries?

Stephen B. Bright: The public has realized what criminal defense lawyers have known all along — that juries, like any human institution, make mistakes. And the number of mistakes they make are not insignificant. Before DNA, people could argue forever about whether someone was actually guilty of the crime. DNA has made it possible to prove beyond doubt that some are innocent. This has been very sobering for many people.

Kathryn M. Kase: The exonerations wrought by post-conviction DNA testing have probably done more to undermine confidence in jury verdicts than perhaps any other forensic technology. The exonerations also have served to underline what we already know from the academic research — that eyewitness identification evidence, confessions derived from police interrogations, and jailhouse informant testimony are especially fallible and most likely to lead jurors astray.

What troubles me is that, despite the lessons from these exonerations (which confirm decades of academic research), judges and prosecutors have been slow to accept that capital cases should not rest on eyewitness identification alone or on a confession or jailhouse informant testimony alone. As long as the justice system is unwilling to jettison evidence that has been shown to be the cause of unjust convictions or to at least allow expert testimony that explains the fallibility of this evidence, we fail to learn from history and we condemn our clients to repeat it.

Gregory J. Kuykendall: The routine exoneration of prisoners as a result of DNA testing seems to have resulted in a higher percentage of the population understanding that juries are fallible. Meanwhile, however, high profile naysayers like Justice Scalia continue to claim that no one has been executed who was demonstrably innocent, pointing to those DNA exonerations as evidence that the appellate system is working as intended. The fact that more than 100 people have left death row as a result of DNA testing makes Scalia's claim statistically very unlikely. For most capital cases, advances in DNA technology don't enhance either the likelihood of exonerations or the accuracy of convictions. Capital cases often do not involve DNA evidence at all, as most murders do not create a crime scene that is amenable to DNA testing. Consequently, many capital convictions are still based on notoriously fallible forms of evidence such as eyewitness testimony, exceptions to prohibited character evidence, snitch testimony or confessions. It would be a tragic mistake for the public to assume that DNA technology is an adequate failsafe mechanism to prevent wrongful death sentencing and executions.

Christina Swarns: The DNA revolution has significantly undermined public confidence in the reliability of the American criminal justice and capital punishment systems. In a poll commissioned by the Death Penalty Information Center, a majority of respondents indicated that the frequency of exonerations has caused them to lose confidence in the justice system's ability to convict only the guilty.[2] Eighty-seven percent of respondents stated that the exonerations have led them to believe that an innocent person has been executed.[3] The fact that DNA exonerations undermine the reliability of evidence that has been traditionally viewed to be inviolate — defendant confessions and eyewitness identifications — only increases the breadth of public skepticism about the accuracy of jury verdicts.

New Jersey recently abolished the death penalty. Should opponents focus on a state-by-state approach to ban the death penalty?

Stephen B. Bright: That is certainly one approach that should be taken. Any state, if it conducted the same study that New Jersey did, would reach the same conclusion: that the death penalty is not worth keeping because it costs too much; it's not fairly and consistently imposed; race and poverty influence who is sentenced to death; it's impossible to eliminate the risk of executing an innocent person; the delays in carrying it out because of appellate review, reversals, and new trials amount to revictimization of the families of victims; and the interests of retribution and protection of the community are served by sentences of life imprisonment without the possibility of parole.

Justice John Paul Stevens reached a similar conclusion in *Baze v. Rees* — that the death penalty involves "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes."

Just five states — Texas, Virginia, Oklahoma, Missouri, and Florida — have carried out 65 percent of the executions (719 of 1099) since 1976. The death penalty is increasingly being limited to a few states, just as it is limited to a few nations (China, Iran, Saudi Arabia and the United States).

Gregory J. Kuykendall: The composition of the U.S. Supreme Court and Congress makes me believe that focusing on a state-by-state approach makes the most sense for now. Once a minority of states allows the death penalty, or a significant change in the Court and Congress occurs, refocusing abolition efforts via Eighth Amendment challenges through the federal court system would then seem to make sense.

Christina Swarns: New Jersey's successful effort at legislative abolition should be replicated in any jurisdiction amenable to such a change. The greater the number of states that abolish the death penalty — whether legislatively or otherwise — the greater the chances of the U.S. Supreme Court declaring capital punishment to be cruel and unusual punishment.

At the same time, efforts to limit the application of the death penalty must also continue. It is possible to erode the applicability of the death penalty to such a small universe of eligible offenders that it is functionally abolished.

What type of training is needed for an attorney to adequately represent a defendant facing capital punishment?

Stephen B. Bright: Far more than can be concisely described in answering this question. For starters, lawyers need comprehensive training in investigating for, recognizing and presenting mitigating circumstances, and in selecting "death qualified" juries.

Kathryn M. Kase: It's my hope that attorneys come to capital defense at the trial level with significant experience in representing non-capital defendants and in a manner consistent with client-centered representation. Even with that experience, a true understanding of mitigation is one of the most important skills that capital defense lawyers can acquire. Successful capital defenders must learn how to find mitigation, how to develop it, and how to present it to decision-makers at all phases of the litigation in order to secure a life sentence.

Gregory J. Kuykendall: Justice Ruth Bader Ginsburg said in 2001, "I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well-represented at trial." Adequately trained defense teams are the most crucial aspect of successful capital defense work as the vast majority of people on death row were represented by counsel who never received such training. The American Bar Association has provided a base minimum for training: Guideline 8.1(C) of the ABA's 2003 Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases requires all capital defense attorneys to receive specialized capital defense training that includes, among other things, investigation techniques, use of mental health experts, developments in mental health fields and other scientific areas, capital jury selection, and appropriate record preservation for capital post-conviction review. Guideline 10.6, Additional Obligations of Counsel Representing a Foreign National, mandates counsel to contact the foreign national's consular office, which, in the case of a Mexican national, will lead directly to the involvement of MCLAP and its array of training services and resources.

"Making the record" is never as important or as difficult in any area of the law as it is in capital defense, and adequate preservation of claims requires painstaking attention to state and federal developments in multiple areas of the law. Staying abreast of the rapid developments in post-conviction, evidence and sentencing law requires regular attendance at continuing legal education seminars. Effective capital litigation also requires researching and filing well in advance of going to trial a myriad of motions — and demanding trial judges issue rulings on each motion — which reference state and federal constitutions along with the complex and constantly evolving body of decisions interpreting those constitutions in the death penalty context.

Christina Swarns: Any attorney handling a capital trial or appeal must meet the experience and training qualifications set forth by the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.

What role does broad prosecutorial discretion play in the lack of fairness and accuracy in the administration of the death penalty?

Stephen B. Bright: The two most important decisions made in any capital case are made by prosecutors — whether to seek the death penalty and whether to agree to a non-death sentence as part of a plea bargain. Prosecutorial discretion is the reason for the inconsistency in the

imposition of the death penalty — the same crime will be prosecuted as a capital case in Houston but not Dallas, in Philadelphia but not Pittsburgh and so forth throughout the country. And the prosecutorial discretion is the primary source of the racial disparities in the infliction of the death penalty.

Kathryn M. Kase: Broad prosecutorial discretion substantially diminishes proportionality in the imposition of the death penalty. What makes it worse is the refusal of state courts to review death sentences for proportionality.

In Texas, the victim's race and the location of the crime are highly determinative. A death sentence is much more likely to be sought when the victim was white and the murder occurred in a wealthy urban or suburban county.

And the public notices this. Houston residents have long joked that if you're going to commit capital murder, be sure to deposit the body in neighboring Waller County because that rural jurisdiction has never had the money to take a death case to trial.

Gregory J. Kuykendall: Prosecutorial discretion is not simply the starting point of the litany of unfair practices that infiltrate death penalty litigation, but is also the most challenging problem to do anything about. Political animals like prosecutors cannot help but be impacted when the public makes legally inappropriate demands for the use of the death penalty which, by their populist nature, are primarily informed by classism, xenophobia, and racism. When a well-to-do white child is murdered by an impoverished, undocumented immigrant, the probability of the prosecutor initially seeking the death penalty is significantly higher than when the identical crime is committed by a middle class white woman. While the courts declare that prosecutorial discretion is not "unfettered," as a practical matter it is almost always impossible to prove prosecutors are improperly exercising their discretion, especially in light of judicial travesties like *McCleskey v. Kemp*, 481 U.S. 279 (1987) (the 1987 Supreme Court decision condoning racial disparities in death sentencing as "an inevitable part of our criminal justice system").

Christina Swarns: Prosecutors unilaterally decide which offenders will face capital prosecution and which victim's life warrants the maximum penalty. Although numerous studies document the often dispositive role that race-of-defendant and/or race-of-victim play in the administration of the death penalty, the law offers no meaningful opportunity to expose or change the prosecutorial processes that lead to these fatally flawed results. Opportunities to discover the considerations underlying capital charging decisions are all but foreclosed by *United States v. Armstrong* and statistical evidence demonstrating racially biased capital outcomes are rendered constitutionally irrelevant by *McCleskey v. Kemp*. As a result, prosecutors wield largely unfettered discretion over the administration of capital punishment and, absent public, judicial or legislative scrutiny, have no incentive to ameliorate the consistently documented evidence of racial bias and disproportionality in their charging decisions.

Given the recent willingness of the Supreme Court to hear a challenge to Kentucky's lethal injection protocols, and given the decision in *Atkins v. Virginia*, can it be said that the tide is turning away from the death penalty?

Stephen B. Bright: The tide is turning at the community and state levels. Prosecutors are seeking the death penalty less and juries are imposing it less because of concerns of executing the innocent, the availability of life imprisonment without parole as an alternative, and other reasons. Ten years ago, around 280-300 people were being sentenced to death a year. In the last five years, it's been around 125 to 150 a year.

Kathryn M. Kase: Last year in Texas, juries delivered only 15 death sentences, a record low. Defense lawyers also proved to be remarkably successful in using mitigation, victim outreach, and motions practice to persuade prosecutors to waive death in cases initially charged as capital.

At the same time, only two of 17 death penalty trials in Texas last year resulted in sentences of life without parole. We also have yet to have a single Texas jury return a finding of mental retardation since *Atkins*. Consequently, Texas juries remain highly lethal for capital defendants in Texas. Where we're seeing progress is with prosecutors.

Gregory J. Kuykendall: No. The most that can be said is that a fragile coalition on the Court came to the realization that merely tinkering with peripheral aspects of the machinery of death had become a farce and that certain wholesale modifications were necessary. For executions to retain any vestige of legal validity, some obvious changes were needed: raise the age for state killing to 18, stop killing the mentally retarded, and require a very modest amount of social history investigation by the defense before imposing death sentences.

This newfound willingness to limit the categories of defendants who can be killed or to prescribe how that killing is performed does not mean the Court is any closer to rejecting the validity of the death penalty itself. Ironically, these attempts to fix the patently unfixable could actually prolong the life of the death penalty by making it more credible and palatable to the American public.

Christina Swarns: Cases like *Atkins v. Virginia* and *Roper v. Simmons* — and, perhaps more importantly, the state statutes prohibiting the execution of juve-

Stephen B. Bright

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nile offenders and mentally retarded offenders that underlie those decisions — offer some indication that society has become increasingly uncomfortable with a wide application of the death penalty. The recent enactment and promotion of death penalty statutes for such non-homicide offenses as child rape, however, suggests that it is much too early to conclude that the tide has irreversibly turned away from a broad construction of death eligibility.

Similarly, while the Supreme Court has become increasing involved in method-of-execution challenges, it has yet to announce a decision on the ultimate question of the constitutionality of lethal injection, so it is impossible to determine whether or not the Court's involvement with this issue is a broad signal of its discomfort with the death penalty overall.

What is it about the culture of the United States that makes us view the death penalty as acceptable rather than barbaric?

Stephen B. Bright: One could write a book in answering this question. But, in short, a major part of it is a culture of using violence as a solution to problems, a culture that prefers vengeance to reconciliation, and a culture that does not recognize the dignity of every person and refrain from doing certain things — like killing and torture — because it's as degrading to the society as it is to the person being tortured or executed.

Gregory J. Kuykendall: I believe this cultural phenomenon is a direct result of people mindlessly watching TV instead of responsibly making their brains work by reading or talking with each other, solitarily watching TV instead of establishing and acknowledging community, and obediently watching TV instead of actively questioning authority. TV's short attention span format is designed to promote black and white views of the world rather than encourage us to explore the complexity of society. Influence peddlers take advantage of this phenomenon and use it to promote simplistic views that we can easily regurgitate in sound bites.

The only way for large scale public support for the death penalty to exist in the face of the myriad compelling arguments against it is for a high percentage of the American public to revel in isolationism. I also don't believe the promotion of isolationism is an accidental byproduct; it's part and parcel of watching TV instead of thinking, instead of interacting with each other and instead of refusing to be spoon-fed the information large corporations and our government wants us to accept.

Christina Swarns: I do not believe that most Americans appreciate the truly barbaric nature of the death penalty. American capital punishment has always been disproportionately applied to "outsiders" — members of politically unpopular, socially marginalized, and politically disfranchised groups. Because it so rarely touches the lives of mainstream Americans, it is easy for most to remain ignorant of the barbarism inherent in the administration of the death penalty and believe, instead, that it is an effective and legitimate form of punishment. Cases and situations that expose the barbarity of the death penalty — e.g., the problems with lethal injection — do give the American public pause.

Kathryn M. Kase

"Too frequently, courts refuse to pay the market rates demanded by qualified experts, trained mitigators, and competent investigators. As a result, the prosecution has Cadillac resources while the defense has the equivalent of a Yugo."

What information should death penalty opponents disseminate to the masses to cultivate public support for abolishing the death penalty?

Stephen B. Bright: The realities of the death penalty as recognized by the New Jersey commission.

Gregory J. Kuykendall: Opponents should continue to pound home the probability that innocent people have already been executed and will continue to be in the future, no matter how much the system is reformed. That issue, along with all of the problems inherent in people — with all of their foibles and weaknesses — deciding who lives or dies, seem to me to be the most promising avenues of information dissemination.

Christina Swarns: Most Americans continue to believe that the American death penalty system is administered fairly and properly: that those who are sentenced to death represent "the worst of the worst" offenders; that their crimes are the most heinous; that the condemned received fair trials; and that the State actors behaved with integrity. In order to cultivate public support for abolition, therefore, advocates must make every effort to expose the depth of the public's misunderstanding of the true nature of the American death penalty.

Since the public is deeply troubled by the phenomenon of death row exonerations, advocates should emphasize the fact that the circumstances that produce wrongful convictions — e.g., false confessions, mistaken identifications, police and prosecutorial misconduct, inadequate counsel — are not aberrational and are, instead, commonly occurring events in the administration of the death penalty. Thus, advocates can and should make links between exoneration cases and pending cases to demonstrate the truly systemic depth of the flaws in the capital punishment system.

Studies indicate that there is inequity in our capital punishment system. Why isn't the lack of equal justice under law enough to convince courts to ban capital punishment?

Stephen B. Bright: Our society has largely abandoned the pursuit of equal justice under law. If it doesn't resume it

soon, it will be necessary to sandblast that phrase off the Supreme Court building.

Kathryn M. Kase: A quarter century of political war on judicial activism and the analytic framework established by *McCleskey v. Kemp* have diminished the judiciary's will to address the inequities in capital punishment, especially where race is concerned. Our challenge is to continue publicizing and litigating these inequities until, finally, the system takes notice and there is change.

Gregory J. Kuykendall: Typically social studies do not make much of a difference to the U.S. Supreme Court when those studies deal with data that might affect a broad cross-section of those impacted by the death penalty. *McCleskey v. Kemp* is a notorious example, but others exist: *see Gregg v. Georgia*, 428 U.S. 153 (1976) (rejecting studies showing the death penalty has no deterrent effect); *Estelle v. Smith*, 451 U.S. 454 (1981) and *Barefoot v. Estelle*, 463 U.S. 880 (1983) (rejecting clinical research demonstrating that psychiatric findings of future dangerousness are inherently unreliable); *Lockhart v. McCree*, 476 U.S. 162 (1986) (upholding the constitutionality of death qualification of jurors, even assuming the validity of social science studies concluding that death-qualified juries were more prone to convict). Since the Court is so resistant to social science findings, perhaps the more effective way to use that material is in legislative lobbying and public education.

Christina Swarns: Capital punishment is disproportionately applied to members of marginalized and disfranchised communities — people who are poor, people who suffer from mental problems, people who are members of minority groups, and people who are uneducated and/or undereducated. Thus, those most likely to be affected by the flaws in the administration of the death penalty lack political power. They do not have (or do not exercise) the capacity to influence the elections of the prosecutors that decide which offenders will face death (and which victim's life warrants death), of the judges that decide if and when an error warrants reversal, or of the lawmakers that decide whether to expand or contract the death penalty. At the same time, however, individuals that lack a vested interest in or appreciation of the unfairness of the administration of the death penalty (e.g., members of law enforcement, victims, and others) are politically active and influential. These circumstances combine to create a situation wherein the actors with the capacity to address the problems of unequal application of the death penalty are often forced to choose between re-election and equal justice. Sadly, equal justice often loses.

What attracted you to death penalty work?

Stephen B. Bright: I believe it is wrong and I was shocked by the poor quality of counsel and the racial discrimination in many capital cases.

Kathryn M. Kase: What attracted me is what today keeps me working full time as a capital defense lawyer in Texas: the abiding belief that murder is wrong and that it is no less wrong when carried out by the government in the guise of "justice."

Gregory J. Kuykendall: Initially, I had no real attraction to it. It wasn't until I had begun to represent my first capital client that I recognized capital defense not only dealt with a mentally very stimulating and challenging area of the law, it also opened my mind and heart significantly more than any intellectual pursuit I had experienced before. The process of conducting capital mitigation investigations and learning the incredibly wrenching backgrounds of my clients completely changed my understanding of humanity and the compassion we all owe each other. My experience with Mexican nationals and, among other things, their immigration experiences has changed my perception of where I fit in this world.

In addition, fighting for a client's life has all of the best features of criminal defense work, only on steroids. Because the stakes are higher and your client is so reviled, the cops and prosecutors lie even more than usual, the judges are even more absurd in their efforts to avoid the proper and fair application of the law, and the heat produced by the entire process is infinitely higher than normal. If you *really* love criminal defense work and have an open heart and mind, becoming a capital defense lawyer might well be the best thing that ever happened to you.

Christina Swarns: I have always been opposed to the death penalty. What attracted me to death penalty defense work, however, was the diversity of issues presented by each death penalty case. Capital cases can and do require an understanding of not only *habeas corpus* and federal constitutional law, but also a familiarity with a range of such other issues as mental health law and science, forensic examination and analysis, First Amendment law, and statistics. Similarly, the litigation of a capital case calls upon a broad range of skills including strong interpersonal communication abilities and outstanding written and in-court advocacy. The issues presented by one capital case are always different from those arising in the next.

Can slowing down the death penalty appeals process and making it more costly to taxpayers make life without parole more acceptable to lawmakers?

Stephen B. Bright: It is already very costly and capital cases cannot be rushed through the courts like small claims

Gregory J. Kuykendall

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cases. States just need to examine the costs and the benefits. For example, California has the largest death row, with 669 people condemned to die, but it has carried out only 13 executions since 1976. Given the financial shape that California is in, if it were to do the same kind of study that New Jersey did, it would conclude that it is spending a lot of money on the death penalty, but not accomplishing much, if anything, with it.

Gregory J. Kuykendall: Many people who don't appear to have any moral qualms about killing inmates are shocked and appalled at the cost of doing it. My experience with MCLAP has been that when defenders in relatively poor jurisdictions let the funding authorities know the enormous cost of properly investigating, preparing and defending a death penalty case, often death is removed as a sentencing option. My hope is that the obvious economic argument against the death penalty will increasingly appeal to "social conservatives." The problem with this line of thinking is that it encourages those same "conservatives" to try to knock the legs out from that argument by changing the law to make executions quick and cheap.

In fact, the overall tendency in recent years has been for lawmakers — and lawgivers — to make the death penalty appeals process more rapid and less costly. The so-called Streamlined Procedures Act, for example, slashes the amount of time a petitioner has to properly investigate and present claims of federal constitutional violations in habeas corpus proceedings. When combined with the existing procedural restrictions of AEDPA, the cumulative effect is grossly unfair and deliberately lethal. On top of that, many state and federal judges consistently deny funding for adequate post-conviction investigation and then routinely discount the legal bills presented to them, thereby creating a chilling effect on competent counsel taking on post-conviction cases. So, making the death penalty slower and more costly to tax payers is not a viable strategy in many jurisdictions for making life without parole more acceptable to lawmakers, at least not until some of the current laws are changed.

Christina Swarns: Victims, prosecutors, police officers and other death penalty proponents frequently lament the purportedly lengthy capital appeal process, asserting that the pain and suffering experienced by the victims is exacerbated by a protracted capital appeal. Such concerns have served as the basis for many a call for aggressive death penalty "reform" and have, indeed, animated the passage of legislation imposing significant time limits on the filing of death penalty appeals (e.g., the Anti-Terrorism and Effective Death Penalty Act of 1996 and various state statutes of limitation). It is therefore doubtful that a campaign focused on the length of a capital appeal would encourage abolition. Instead, history dictates that a slow-down of the capital appeals process will provoke lawmakers to pursue *less* review, *greater* restriction on the appeal process, and, ultimately, a *rush* to execution.

Cost has recently become an effective motivator of criminal justice reform. The reality of federal, state and local budget crises have combined with the often exorbitant medical (and other) costs associated with the graying of an over-inflated prison population to force many jurisdictions to reconsider the fiscal practicality of laws and policies mandating lengthy and/or lifetime sentences for non-violent offenders. While in most cases monetary considerations have not demonstrated the same capacity to influence positive change for violent offenders, the significant cost of a constitutionally adequate death penalty defense has caused at least one jurisdiction (Georgia) to re-examine the economic viability of capital prosecution. Were more jurisdictions to provide capitally charged and death sentenced prisoners the defense to which they are entitled under federal constitutional law and the ABA Guidelines, it is possible that lawmakers would begin to view the death penalty as a fiscally irresponsible choice.

What is the best strategy to bring about the end of capital punishment in the United States?

Stephen B. Bright: Follow New Jersey's example — examine the realities and decide whether it is worth it. The New Jersey commission included prosecutors, law enforcement and victims' rights groups. It recommended repeal with only a single dissenting vote (the one dissenter was a state legislator). We need the kind of leadership that Gov. Martin O'Malley has provided in Maryland.

Kathryn M. Kase: Taoist philosopher Lao Tzu said that there are many paths to enlightenment, and it is important to choose one with a heart. I suspect that ending capital punishment will require strategies that involve not merely the head, but also the heart.

Gregory J. Kuykendall: A comprehensive approach on many simultaneous fronts is required. The public must be educated to the gross inequities and economic stupidities of the system. Constituents need to be provided with easy and effective ways to contact their lawmakers in support of positive legislative changes. On the judicial front, funding authorities must be compelled to pay what is constitutionally required to properly defend each phase of capital cases, just as defenders must be given the training and support necessary to thoroughly investigate, prepare and present the defense of these cases.

I am convinced from our experi-

Christina Swarns

"The actors with the capacity to address the problems of unequal application of the death penalty are often forced to choose between re-election and equal justice. Sadly, equal justice often loses."

ences in the Mexican Capital Legal Assistance Program that producing a fully trained and adequately resourced capital defense community would contribute greatly to the withering away of the death penalty in America. While MCLAP has certainly not brought about an end to the death penalty in any jurisdiction, we have had enormous success in reducing the death sentencing and execution of Mexican nationals. We attribute that success to accurately identifying the cases that need assistance, determining what help defenders need and then finding ways to deliver that support. The scope and variety of assistance that MCLAP is called upon to provide demonstrates the pressing need for comprehensive training and better resourcing of capital defense teams in general. In a nutshell, our simple philosophy is that the most certain way to eliminate executions is to prevent courts from imposing death sentences in the first place.

Christina Swarns: If it was easy to develop an effective strategy for ending capital punishment in the United States, it would have been abolished a long time ago! Ultimately, however, I believe that there needs to be series of state-focused, integrated campaigns involving media, legislation, the courts, and community organizing.

Notes

1. http://www.deathpenaltyinfo. org/article.php?did=412&scid=6#race.

2. *A Crisis of Confidence: Americans' Doubts About the Death Penalty*, June 9, 2007.

3. *Id.*