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PROTECTING THE INNOCENT: PROPOSALS TO REFORM THE DEATH PENALTY

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

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PROTECTING THE INNOCENT: PROPOSALS TO REFORM THE DEATH PENALTY

TUESDAY, JUNE 18, 2002

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 10:17 a.m., in room SD–226, Dirksen Senate Office Building, Hon Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Feingold, Specter, and Sessions.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Good morning, and I apologize for the delay, but we were having a vote and thought there was going to be a second one on the floor. I hate to be holding up Congressman LaHood and Congressman Delahunt, who are not only two of the best members of the other body, but two close friends.

It has been a year since our full Committee held a hearing to examine the need for reform of the capital punishment system. Since then, like waves piling sand on the shore, more and more evidence has accumulated, exposing a death penalty system that is broken. A year's time has also exposed more of the toll that this broken system is taking on the lives of those wrongfully convicted.

A year ago, I spoke of 96 exonerated capital prisoners. Now, we have reached 101. I was just introduced to Ray Krone, the 100th capital prisoner to be exonerated. He is here today. He served 10 years in prison, 3 of them spent on death row. Then Ray Krone was proven innocent. I don't think any of us can even imagine what one day on death row would be like, knowing we had not committed the crime.

In fact, DNA evidence pointed squarely to the real killer in that case. Because they had locked up the wrong person, police stopped looking for the man who had committed the crime. But while they had the wrong person locked up, the man who committed the crime went out to sexually assault another woman.

On its front page today, USA Today tells Ray Krone's story and reports how shabbily our Federal and State laws often treat exonerees like Ray for the time lost behind bars. After more than a decade in State prison for a crime he did not commit, Ray Krone got an apology from the prosecutor and $50, and he was sent on his way. In case those who are taking notes didn't hear that, after spending 10 years, 3 months and 9 1/2 days in prison, he was given $50 and told to start his life over again.

Governor Ryan of Illinois, who showed great courage two years ago by announcing a moratorium on executions in his State, recently announced the results of the commission he appointed to study problems in the Illinois system of capital punishment. The commission recommended 85 changes and improvements. Incidentally, this was a commission whose members represented many points of view across the political and ideological spectrum.

A significant number of those 85 recommendations have been embraced by even those who steadfastly support the death penalty. Senator Feingold chaired a hearing on the Ryan commission report just last week, and I commend him for the excellent work he has done on that.

In May, the State of Maryland announced a moratorium on executions to investigate concerns about racial and geographic disparities in that State's capital punishment system.

Just two weeks ago, the Supreme Court let stand the Fifth Circuit Court of Appeals decision in the "sleeping lawyer" case. This was the case in which the Texas Court of Criminal Appeals said it didn't violate a defendant's right to counsel when his lawyer slept all the way through the trial. The Texas Court said basically that the Constitution said only that you were entitled to a lawyer; it didn't say you were entitled to have the lawyer stay awake. The Fifth Circuit Court of Appeals said that unconscious counsel equates to no counsel at all, and the U.S. Supreme Court has let that stand.

So all of these are reasons are why we must have legislative action. For more than two years, I have been working to pass a bill called the Innocence Protection Act. I introduced it in February of 2000. Around the same time Congressman Bill Delahunt, of Massachusetts, and Congressman Ray LaHood, of Illinois, introduced the Innocence Protection Act in the House of Representatives.

We have 26 cosponsors in the Senate, and I thought there were 233 in the House, but Congressman LaHood tells me it is 236 now. That is Democrats and Republicans, and I think it is safe to say they go across the spectrum from those who support the death penalty to those who oppose it.

It is hard to get 236 cosponsors for Love Your Puppy Day, let alone on a third-rail issue like death penalty reform. I think the whole country should thank the Congressmen for what they have done. Reflecting the strong and growing interest in these reforms, House Judiciary Chairman Sensenbrenner and Crime Subcommittee Chairman Smith have scheduled a hearing on this bill this afternoon.

It is incredible momentum generated in support of reform, but that doesn't mean that all the reformers speak with the same voice. Among the members of this Committee, four of us—Senators Specter, Feinstein, Feingold, and myself—have drafted legislation proposing different types of changes to the system.

What is most significant is not the differences between these bills, but the fact that each of us knows, and all of our cosponsors agree, that reform is needed before more innocent defendants are wrongfully convicted and sent to death row.

Today, in addition to having Ray Krone here, sitting right beside him is Kirk Bloodsworth. I have gotten to know the Bloodsworths

and they are fine people. Kirk was wrongfully convicted of the rape and murder of a young girl, a heinous crime, one that calls out for punishment of the person who did it. But the problem was they had the wrong person, and the wrong person was convicted and spent nine years trying to prove his innocence. Both of these cases were ultimately solved by DNA evidence, so we need to provide access to testing, where available.

What causes innocent people to be convicted in the first place? In June of 2000, Professor Jim Liebman, who is going to testify today, and his colleagues at the Columbia Law School released the most comprehensive statistical study ever undertaken of modern American capital appeals. They found serious errors in two-thirds of all capital cases, mostly commonly because of grossly incompetent defense lawyers.

We owe it to exonerees like Kirk Bloodsworth and Ray Krone to ensure that more innocent defendants are not convicted and sentenced to death for crimes they did not commit. As a U.S. Senator and as a former prosecutor, I can say we owe it to the American people to find the real killers and keep them off the streets, instead of resting easy and thinking we have solved the problem by locking up the wrong person. The real killer is still on the street, still looking for new victims. We owe it to our democratic system of Government and to the way of life we cherish to prevent the erosion of public confidence in our criminal justice system.

So I thank our first witnesses. I am especially grateful to them for taking the time to come here this morning, especially when they have got to hold a hearing this afternoon.

Gentlemen, the last thing in the world I am going to do is determine who goes first in the other body, so I will leave it to you guys.

[The prepared statement of Senator Leahy appears as a submission for the record.]

STATEMENT OF HON. WILLIAM D. DELAHUNT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Representative DELAHUNT. I will proceed, Mr. Chairman. On behalf of our other colleagues, some 236 in the House who have cosponsored the Innocence Protection Act, let me thank you for convening this hearing today and inviting Ray and myself to testify.

I also want to offer our gratitude for your leadership. It has been truly remarkable, Senator, and it is a wonderful legacy that I know once this proposal is signed into law, you can look back on with profound pride.

I also am aware that you have been working with Senator Specter and Senator Feinstein and other members of the Committee to develop a consensus, and I am pleased to report to you that we are pursuing a similar effort in the House. As you indicated, this afternoon we will be having a hearing before the Crime Subcommittee and I am hopeful that our efforts in the House will result in an end product that we can all embrace.

Let me suggest that this bill is much more than simply preventing wrongful convictions and giving justice to the wrongfully convicted. It is also about restoring confidence in the integrity of our entire justice system, a system that is the backbone of a healthy, vibrant democracy and really separates us from other na-

tions, but whose success depends on its ability to maintain the confidence of the American people.

As you have indicated, that confidence has been profoundly shaken by recent findings about the rate of serious reversible error in death penalty cases, as well as a growing number of cases reported in the national press in which innocent people have been exonerated. You mentioned Kirk Bloodsworth, who spent 9 years in prison in Maryland, including 2 on death row, and Ray Krone, who spent 10 years in prison in Arizona, 3 of them on death row, and Marvin Anderson, who is also with us today.

By the way, Senator, I think we should note that our bill and our House version, which is a mirror image of the bill that you filed, would increase that compensation at the Federal level from $5,000 per year served in cases of those convicted of capital crimes to $100,000 on an annual basis, and I truly wonder if that is sufficient, Mr. Chairman.

DNA really provided us with a great opportunity to examine the frailties of the system. It was DNA that revealed the frailties in the system, and it also provided us with insights in how to address those deficiencies, how to correct them. DNA testing taught us that the best safeguard against wrongful convictions is a qualified lawyer with the resources necessary to present a vigorous defense in capital cases. That is what we have learned because of DNA.

It is cases like Marvin Anderson and Ray Krone and Kirk Bloodsworth that I believe caused respected judges, judges like Sandra Day O'Connor, to express concern publicly that the system, and I am quoting Justice O'Connor, "may well be allowing some innocent defendants to be executed."

Well, as he will shortly testify, Professor Liebman examined over 4,500 capital sentences handed down since 1976 and discovered that the courts had found serious reversible error in 68 percent of those cases. That is an error rate of almost 7 out of 10, and I think we can all concur that is simply unacceptable.

Now, some have suggested that the high rate of reversals demonstrates that the system is working. Well, I would suggest that is nonsense. We cannot know whether the appeals process is catching all the errors or not. We just simply can't determine that. We can't make that assessment. But what we do know is that the errors are not being caught at trial and innocent people are being convicted, while the guilty, as you indicated, remain free to prey on our communities.

The Act before us focuses on the two most effective steps that we can take to ensure greater fairness and accuracy in the administration of justice—access to post-conviction DNA testing and the right to adequate legal services in death penalty cases.

DNA has exonerated 12 of those who have been freed from death row, and another 96 who were wrongfully convicted of serious crimes. In at least 16 of those cases, the same test that exonerated an innocent person has led to the arrest and prosecution of those that actually perpetrated the crime. This is as much about public safety as it is about preventing wrongful convictions.

Yet, DNA testing is often opposed by prosecutors and must be litigated sometimes for years. Evidence that might have established innocence has been misplaced or destroyed. Our bill would

help ensure that biological material is preserved and DNA testing is made available in every appropriate case, but DNA is not a magic bullet that will eliminate the problem of wrongful convictions.

We must take steps to prevent those convictions from happening in the first place, and the single most important step is to ensure that every indigent defendant in a capital case has a competent attorney. The Innocence Protection Act would encourage States to develop minimum standards for capital representation, and most importantly would provide them with the resources to help ensure that lawyers are available to meet those standards.

As you indicated, Senator, you were a prosecutor. I was also an elected prosecutor for more than 20 years, and I am fully cognizant of the fact that the adversarial process can find the truth only when both lawyers are up to the job.

Some have suggested that our society cannot afford to pay for qualified counsel in every capital case. The truth, and I know you share this, is that we cannot afford to do otherwise if our system of justice is to have the confidence of the American people.

So with that, Mr. Chairman, thank you again. I look forward to working with you and Senator Feingold and other members of the Committee and my fellow puppy and good pal, Ray LaHood, in making this a reality.

[The prepared statement of Mr. Delahunt appears as a submission for the record.]

Chairman LEAHY. Thank you very much, and I think of the days when both you and I were prosecutors in adjoining States. I think we both came to the same conclusion that it is a lot easier to prosecute cases if you knew there was competent counsel on the other side. Among other things, you don't have to try the case again ten years down the road.

Congressman Lahood, you have been such a strong and consistent voice in this and I appreciate it because, like Congressman Delahunt, you carry a great deal of respect in your party and among both Republicans and Democrats on both sides of the aisle. So I am delighted to have you here, sir.

STATEMENT OF HON. RAY LAHOOD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Represenative LAHOOD. Thank you, Senator. Thank you, Mr. Chairman. I want to express my thanks to you for the extraordinary leadership you have provided, and also to Senator Feingold.

I know, Senator, you had a hearing recently about this and about the commission that Governor Ryan established in Illinois, and that really highlights some good work that went on in Illinois and we appreciate your leadership on this issue, also.

I will be brief, Mr. Chairman, because I think you and Congressman Delahunt have really captured the essence of the legislation. The one thing that I would say is that Bill and I were on C–SPAN this morning touting your leadership and the hearing today, and I know it is being broadcast on C–SPAN III.

One of the things that I really believe is that we have a flawed system, and I think your legislation here and our legislation in the House will correct a flawed system. These two gentlemen sitting

behind us and sitting in front of you are an example of a flawed system, a system that went wrong, a system that really did not prosecute people who committed a crime, but prosecuted innocent people, and they served the penalty for having to sit on death row for an enormous amount of their own personal life.

That flawed system needs to be fixed. In my opinion, we are about 60 percent to the goal line. When you look at where we were a couple of years ago when the three of us were standing up talking about this bill, and now we have 236 cosponsors in the House, we have come a long way. But we need to cross the goal line, and the goal line is really to pass legislation and have the President sign it.

What will take place in the House today is a hearing by the Crime Subcommittee of Judiciary. Bill will be there to hear testimony, and what will happen here today is an important further step in our goal. I hope that through the leadership of you and Senator Feingold and others, and Governor Ryan and Governor Glendening, the momentum is really moving, and the front-page story, the banner story in USA Today.

So we have made a lot of progress, but we need to finish the other 40 percent and pass this legislation and have it signed into law to fix a flawed system, a system that does not allow currently for people to be wrongfully convicted and have to serve on death row. I think once we do that, we will have achieved an awful lot in really improving the criminal justice system and making sure that the correct people are convicted and put behind bars, and wrongfully people will not have to serve on death row.

Thank you for your leadership, and we will continue to keep on doing what we are doing in the House. Our goal is to really try and get a bill marked up and passed in the House, and I know that is your goal, and I hope we can really finish this important legislation this year and get it signed into law. That is our goal and we are going to keep working on it until we achieve that.

Thank you very much.

[The prepared statement of Mr. LaHood appears as a submission for the record.]

Chairman LEAHY. Well, thank you. It is my goal, also, and again looking at the list of your 236 cosponsors, there is not a common thread ideologically and politically around those 236, except for the fact of wanting to have justice done. I feel that way and a lot of prosecutors I know feel that way, and I appreciate you being here.

Senator they both have to attend to matters back on the other side. Do you have any comments?

Senator FEINGOLD. I just want to compliment both of you on your terrific bipartisan leadership on this issue. It is a pleasure to be working with both of you on this issue.

Thank you, Mr. Chairman.

Represenative LAHOOD. Senator, I assume our statements will be put in the record.

Chairman LEAHY. Yes, the full statements will be put in the record.

Represenative LAHOOD. Thank you.

Chairman LEAHY. I appreciate both of you coming over. It is good to see you both.

Represenative LAHOOD. Thank you very much.

Representative DELAHUNT. Thank you, Senator. Thank you, Senator Feingold.

Chairman LEAHY. When I started, I mentioned Kirk Bloodsworth and Ray Krone in my opening statement, but I have also met Marvin Anderson here today. Mr. Anderson was convicted of robbery and rape and kidnapping, all crimes he did not commit. He spent a lot of years protesting his innocence.

I must say, Mr. Anderson, you also had some extraordinary help from your family. I know you have mentioned your appreciation to them before, and I do so, too.

Mr. Anderson proved his innocence. As in Mr. Krone's case, the DNA evidence pointed to the actual perpetrator. Again this was at a time when everybody thought the books were closed and we had somebody in jail. But the actual perpetrator was out free, while an innocent man was behind bars.

Our next witnesses will be a panel of Barry Scheck, the Co–Founder of the Innocence Project at the Benjamin N. Cardozo School of Law; Professor James Liebman, the Simon Rifkind Professor of Law at Columbia Law School, in New York; Mr. Larry Yackle, Professor of Law at Boston University Law School, in Boston, Massachusetts; State's Attorney Paul Logli, from Winnebago County, Illinois, and Professor William Otis, Adjunct Professor of Law at George Mason University Law School.

We will take a moment to get all your gentlemen lined up here, and I will mention Mr. Scheck is Professor of Law at the Benjamin N. Cardozo School of Law. He is the Co–Founder of the Innocence Project, which has either represented or assisted in the representation of more than half of the 108 men exonerated through post-conviction DNA testing. Some of them had also been sentenced to death.

Mr. Scheck, we will start with you and then I will introduce Professor Liebman. Go ahead, sir.

STATEMENT OF BARRY SCHECK, CO–DIRECTOR, THE INNOCENCE PROJECT, BENJAMIN N. CARDOZO SCHOOL OF LAW, NEW YORK, NEW YORK

Mr. SCHECK. Thank you very much, Mr. Chairman.

Chairman LEAHY. Welcome back.

Mr. SCHECK. It is good to be here.

I think that when you introduced this legislation two years ago, there were 67 individuals who had been exonerated with post-conviction DNA tests, and we are now up to 108. I think that the main reason that the pace of these exonerations has accelerated is the passage of something like 25 statutes now in different States that in some form authorize post-conviction DNA testing, as well as the growth now of innocence projects at 35 different law schools across this country.

This is a small but very important class of people to whom attention must be paid, and I have no doubt that if the legislation before this Committee now is passed that within two or three years we can double the number of people that are exonerated. But we are in a race against time because as we sit here today, 75 percent of the time the biological evidence in these cases is lost or destroyed

or literally being degraded by bacterial contamination and it is disappearing.

As was noted by you in your introduction and by Congressmen Delahunt and LaHood, this is a profound pro-law enforcement piece of legislation, because every time an innocent person is arrested, convicted, sentenced, and executed, God forbid, the real assailant is out there committing more crimes.

If you take a look at Ray Krone's case and think about some of the issues that have been dividing members of the Committee on what the standard should be for getting access to the evidence for purposes of a DNA test, whether it should be the one that is in the Innocence Protection Act dealing with non-cumulative material evidence that could show innocence or a higher standard, think about Ray Krone's case.

Here, after his conviction, there was some blood and some saliva on the tank top of the victim. It would not be immediately apparent, frankly, to prosecutors or anyone else that even if you did DNA testing, which wasn't done in the initial trials, one of which resulted in him being sentenced to death—even if you did it and you excluded him as being the source of the blood or the saliva, that wouldn't necessary prove his actual innocence. But the truth is, when you extract the DNA profile and you put it in a databank, you can get a hit on a convicted offender, which is exactly what happened in his case.

Just speaking on a totally practical level as one who is out there in the trenches trying to get access to the evidence for people in Ray's position, it is sometimes hard, unfortunately, for law enforcement officials to imagine the different things you can do with pieces of evidence and the use of this databank.

So if you set that initial standard too high, frankly, as some are proposing, the Ray Krones of this world frankly are going to rot away and may never see the light of day, nor will the person who really committed the crime be apprehended. That is what is so different about this kind of post-conviction legislation.

What I think divides some of the Senators here in terms of the competing versions of this legislation that is before the body is one issue of time limits. Time limits for those of us who are really working these cases are of critical importance. The idea that there will be a sunset provision in these cases is a serious problem.

The truth of the matter is it is very, very hard when you are looking at these old cases to even find the lawyers who represented these defendants, the lawyers on appeal, the lawyers at trial. Many of them are disbarred. They have disappeared or they have died.

It is impossible very often to get transcripts. In order to make a proper motion to get access to the evidence, you have to have the transcripts of the trial, and many times they are incomplete. Certainly, these inmates, who are indigent, who have no representation in a post-conviction phase, can't access to them.

It, of course, is most difficult to find the evidence. Take the case of Marvin Anderson. Marvin Anderson was a young man in 1982, a model student, a volunteer fireman, who was convicted in Hanover, Virginia, because a woman who was kidnapped and raped remembered the assailant as saying something about he, a black man, had a white girlfriend.

The only person in Hanover that they really knew that fit the age range that had a white girlfriend was Marvin Anderson. Even though he really didn't fit the description, he was brought in and eventually identified. The police literally had in their files some information about a man on a bicycle who was a very good suspect for this crime.

Marvin was convicted wrongly and sentenced to prison. As late as 1988, evidence as to who the real assailant was was brought before Governor Wilder. It failed in an effort to get him a pardon at that stage. Years passed. Marvin went before parole boards. This is true of so many of our clients. They said, well, if you admit to this crime and show remorse, we will let you out early. Marvin said "I didn't commit this crime."

Eventually, he was released on parole, but he and his mother, who is here with us today, did not give us this fight. We at the Innocence Project in New York and our Capital Region Innocence Project in the D.C.–Virginia area couldn't close this case because we knew what kind of a man he was.

Believe it or not, the swabs in this case were stapled to the underlying paper that were found by accident that resulted in a DNA test that proved Marvin innocent and identified the person who really committed the crime. So it is unrealistic to have time limits in these cases.

[The prepared statement of Mr. Scheck appears as a submission for the record.]

Chairman LEAHY. I think it also underscores again what we have been all saying. It is not just the case, as important as that should be, of freeing the innocent, but allowing those in law enforcement to go after the person who is the real perpetrators who are still out there and are still a danger to society.

Professor Liebman is the Simon Rifkind Professor of Law at Columbia Law School. He has taught since 1985 and is the coauthor of *A Broken System: Error Rates in Capital Cases*, and the follow-on *Broken System II: Why Is There So Much Error in Capital Cases and What Can Be Done About It?*

I believe you are also assistant counsel to the NAACP Legal Defense and Education Fund. Am I correct, Professor?

Mr. LIEBMAN. Yes.

Chairman LEAHY. We are always happy to have you here, and please go ahead, sir.

Incidentally, we are hurrying it along because I am not sure when the voting will start again on the floor and we may have to cut out. All statements will be put in the record in full. The importance of this hearing is to make a record, so that when you get back to your statements, if you see things in there and think I wish I had added this point or that point, or answered this question more fully—this isn't a "gotcha" kind of hearing—just add that in and it will be part of the full record.

Professor Liebman, go ahead, sir.

STATEMENT OF JAMES S. LIEBMAN, SIMON H. RIFKIND PROFESSOR OF LAW, COLUMBIA UNIVERSITY SCHOOL OF LAW, NEW YORK, NEW YORK

Mr. LIEBMAN. Thank you, Mr. Chairman. I am going to focus my testimony today on the need to improve the quality of legal representation in State capital trials.

My testimony is based, as you mentioned, Mr. Chairman, on a comprehensive study by a team of Columbia University researchers. We looked at three things: the amount of error in capital cases, the causes of that error, and what can be done to avoid it.

We began this study 11 years ago following a request from Senator Biden, who was then Chair of this Committee. Senator Biden asked us to do some research, and that got us on our way. I am pleased to be back here, 11 years later, to provide some additional findings.

Five findings are particularly pertinent today. First, State death penalty verdicts are fraught with reversible error. Of nearly 5,000 State capital verdicts reviewed for error during our 23-year study period, 68 percent were found to contain reversible error and had to be sent back for re-trial.

Second, reversible error is serious error. We know this for a number of reasons. For one thing, 90 percent of those errors were found by elected State judges, who can be voted out of office if they reverse cases for no good reason.

Where we have data, nearly 80 percent of the reversals were because of four clearly serious errors: egregiously incompetent defense lawyers, prosecutorial suppression of evidence of innocence or mitigation; misinstruction of juries; and biased judges and juries.

These errors are so serious that curing them changes the outcome on retrial 82 percent of the time where we have data, including 9 percent that resulted in acquittals on re-trial.

Third, the review process is so overwhelmed by serious capital mistakes that it cannot catch all of those mistakes. We conducted case studies on four individuals who were convicted and given a death sentence, though they were innocent. In all four of those cases, the State and Federal courts had upheld their verdicts and approved the defendants for execution.

It fell to college students in one case and posthumous DNA testing in another case to prove that these defendants whom the courts had approved for execution were innocent. In each case, the courts actually recognized that the evidence was weak and noted it. The courts also saw that there were errors in the case and noted that. Yet, in each case, the courts upheld the verdicts and sent the innocent defendant on to be executed because of very strict prejudice rules and very strict procedural default rules that the courts have had to adopt in order to enable them to cope with the amount of error they find in these cases. So reviewing courts do not catch all of the error in the cases.

Fourth, the result of so much error is that it causes the system to be unable to achieve its important law enforcement goals. Over the 23-year period, barely 5 percent of the death verdicts that were imposed were carried out.

As a result, the usual, normal outcome of a capital verdict as the system works today is that it will be reversed, and when it goes back for re-trial it will be replaced with a non-capital sentence.

When add up the costs of all those reversals and retrials that end in non-capital verdicts, the cost per execution, on the best available estimate is $23 million. The cost in anguish to frustrated victims in these cases is immeasurable.

Fifth, at the core of all of these errors and costs is a single problem: the absence at many State capital trials of adequately trained and compensated lawyers. The single most common reason for reversals at the State post-conviction and habeas level is egregiously incompetent lawyers. That problem accounts for one-third of all of those reversals. States that spend the least on their capital trials and tend to spend the least on capital defense have the highest error rates.

Most crucially, those States and counties that impose death sentences more often per 1,000 homicides, the ones that reach out and grab the weak and marginal cases as well as the strong cases, have much higher error rates, and they also have much higher innocence rates. Baltimore County, which wrongfully sentenced Kirk Bloodsworth to die despite his innocence, is one of those high death sentencing counties. Phoenix, Arizona, which wrongfully sentenced Ray Krone to die despite his innocence, is another high death sentencing county.

The most important way to keep the system from imposing death verdicts in weak cases—the best way to confine the death penalty to the worst of the worst cases—is to have serious, careful adversarial testing at the trial phase so the weak cases and the innocence cases don't get through.

If states invest in competent, careful screening of cases by well-compensated lawyers at the front end of the system, that will pay for itself many times over in saved reversals, saved delay, and saved anguish to victims at the back end of the process.

These findings support many of the provisions of the bills before the Committee, and I am prepared to talk about those if there is time. But I commend the Committee, Mr. Chairman, for its efforts to address this very crucial cause of the breakdown in the States' death penalty systems.

[The prepared statement of Mr. Liebman appears as a submission for the record.]

Chairman LEAHY. Thank you, and thank you again for taking the time to be here.

Professor Yackle is Professor of Law at Boston University Law School. He teaches courses on constitutional law and the Federal courts. He has written more than two dozen amicus curiae briefs in the U.S. Supreme Court. He is the author of four books and a number of articles on constitutional law and the jurisdiction of the Federal courts.

So, Professor Yackle, I am delighted to have you here and I appreciate you taking the time. I feel like I am going back to law school here today, which is a good feeling, I must admit. I kind of miss those days.

STATEMENT OF LARRY YACKLE, PROFESSOR OF LAW, BOSTON UNIVERSITY SCHOOL OF LAW, BOSTON, MASSACHUSETTS

Mr. YACKLE. You are one of the few.

Chairman LEAHY. Well, you don't miss it in your last year. I find after I had been out, first in private practice, and then I spent a number of years as a prosecutor, I was wishing I could go back for at least one semester so I could say, wait a minute, let me tell you how it really is. That would have been nice, but I feel I get these tutorials every few days here.

Please go ahead, sir.

Mr. YACKLE. Thank you, Senator. I have to say that I am getting a tutorial myself this morning. I had thought until I came today that only members of Congress could change history by revising and extending their remarks, and now I find that the rest of us can do that.

Chairman LEAHY. Well, it varies Committee by Committee, but this is a Committee where we try to get as much information as we can.

Mr. YACKLE. I am pleased to be here to be associated with these hearings. I know the Committee is considering a number of bills, all of them important, and in my view laudatory bills to reform the criminal justice system, particularly in capital cases. I think all of these bills are extraordinarily important and I am just privileged to be here to be associated with your efforts.

My assignment is very narrow. I want to address only one title in one of the bills, the bill authored by Senator Specter. This is Title I of his bill, 2446. It addresses a glaring problem in the capital justice system in the United States.

Under current law, it is possible that men and women can be executed before the courts have decided whether their convictions and sentences are valid. It sounds incredible, but it is quite possible that this can happen. The purpose of Title I in Senator Specter's bill is to prevent that happening.

That goal in itself is sufficient to justify Title I, but there are other purposes as well. The idea in this title is to ensure that there are stays of execution in all death penalty cases while the courts are doing their work, and until the courts are finished with their work, and only at that time, would a stay be lifted such that an execution could be carried out.

Today, of course, courts have power to issue stays of execution, but it requires a good deal of litigation in order to determine whether a stay will issue in a particular case. This litigation often is conducted late at night, in the 11th hour, sometimes requiring telephone conversations. It keeps judges and lawyers, including Supreme Court Justices, up through the night laboring to determine whether a stay should issue. All of this is wasted effort. In all of these cases, a stay should already be in place in order that this kind of frenzied, hectic litigation over stays is eliminated.

In addition, today, under current law, when a stay is issued it tends to be short-lived, so that the adjudication that occurs in the wake of a stay tends to be on a very short fuse. Judges do their work then with their eye on the clock, racing the clock in order to get their work done before a stay expires.

That is not adjudication that is likely to be thorough and careful and effective, and that is the kind of adjudication we need in capital cases. There ought to be a stay in place that relieves courts of that kind of anxiety over time.

Finally, that sort of litigation that is required today over stays of execution generates mistakes. All of us know if we work faster than we really can, we are likely to make mistakes. In these capital cases, when serious mistakes are made, only two things can happen.

One, we need further wasteful litigation later in order to correct those mistakes. Or, two, what is worse, mistakes may never be corrected at all and men and women may be put to death even though they had valid claims, but the courts were unable, for want of time, to determine the validity of those claims.

Over ten years ago, the Judicial Conference of the United States, through a Committee chaired by former Justice Powell, proposed something in the nature of what Senator Specter's Title I would do. What we need is a system in which there are stays of execution early on in every case, stays that carry through all stages of adjudication and are lifted only at the end, when Federal courts have determined whether claims are valid or not.

[The prepared statement of Mr. Yackle appears as a submission for the record.]

Chairman LEAHY. Thank you very much. That is helpful.

We will go to Paul Logli, the State's Attorney in Winnebago County, Illinois. He has been a prosecutor for 18 years, the last 16 as State's Attorney—twice the amount of time I served as State's Attorney in Vermont.

Before that, you were a judge on a local circuit court. Am I correct on that?

Mr. LOGLI. That is correct, Mr. Chairman.

Chairman LEAHY. Well, I am always delighted to have State's Attorneys before us. Your State and my State and Maryland and a couple of others use the term "State's Attorney."

Mr. LOGLI. That is correct.

Chairman LEAHY. I appreciate having you here. Go ahead, sir.

STATEMENT OF PAUL A. LOGLI, STATE'S ATTORNEY, WINNEBAGO COUNTY, ILLINOIS, ON BEHALF OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, FALLS CHURCH, VIRGINIA

Mr. LOGLI. Thank you, Mr. Chairman. Like you, I am a Vice President of the National District Attorneys Association, which, in searching our records, I know that you served as a vice president of our Association.

Chairman LEAHY. You are showing some good history. I was that, and I was about to become President-elect of the National DAs Association. I gave up the glory of that for what turned out to be a number of years of anonymity in the U.S. Senate. I enjoyed both.

Mr. LOGLI. We appreciate you being here.

Like you, Senator, I want to emphasize to this Committee that, as a prosecutor, we represent the only trial attorneys in the coun-

try whose primary ethical obligation is to seek the truth wherever it takes us.

We would ask that a copy of the National District Attorneys Association's policy on DNA be added to this record.

Chairman LEAHY. It will be.

Mr. LOGLI. Thank you.

Our Association has consistently embraced DNA technology as a scientific breakthrough in the search for truth. Since the mid–1980s, when DNA evidence was first introduced, we have fought for its admission in criminal trials and we have been instrumental in providing training to prosecutors on using DNA evidence. We have been using DNA evidence to convict the guilty and free the innocent for over 20 years.

We have always supported the use of DNA testing where such testing will prove the actual innocence of a previously convicted individual and not serve as a diversionary attack on a conviction.

The issue of post-conviction DNA testing such as contemplated by your Act, Senator, involves only cases prosecuted before adequate DNA technology existed. In the future, as we use DNA testing in the investigations and prosecutions currently pending, the need for this post-conviction DNA testing will actually cease, hopefully, as we go through the cases where DNA testing can be used to show actual innocence.

We need to emphasize that post-conviction testing should be employed only in those cases in which a result favorable to the defendant establishes proof of the defendant's actual innocence. We feel that requiring only that the results be material, non-cumulative evidence and not specifically prove innocence could waste valuable resources, unnecessarily burden the courts, and further frustrate victims. The resources for DNA testing are finite and they should be used wisely.

The National District Attorneys Association believes that post-conviction relief remedies must protect against potential abuse and that such remedies must respect the importance of finality in the criminal justice system.

Now, moving on to competency of counsel, no one, especially prosecutors, wants incompetent defense lawyers on the other side of the counsel table, especially in a murder case. We don't want to have to re-try cases again. Victims don't want to have to go through the trauma of a trial again. It benefits no one, especially victims, to have to re-try a major case.

Having said that, we believe that federally-mandated or coerced competency standards for State court defense counsel are difficult, not very workable, and may be unnecessary, as the system is starting to show in the various States.

Our system of criminal law is inherently a State system. Some 95 percent of all criminal trials are at the local level of government, and because of that, the State judiciary is entrusted with serving as the arbitrator for all facets of the court system, including who can practice in the trial courts.

Of the 38 States that currently allow a death sentence to be imposed as a criminal penalty, 22 of those States already have either a statute or a court rule that establishes standards for competency of counsel at the trial, appellate, or post-conviction level.

Now, I recognize that not all States have competency standards and there are some things that Congress can do to motivate that. In many States, the criminal justice system is strapped for cash, both on the defense side and the prosecution side. We are having a difficult time attracting and retaining young lawyers to be prosecutors or defenders. When we can't attract and retain them, then we truly have competency problems.

We have spoken with other members of this Committee and other members of Congress about programs to enhance the ability of young lawyers to stay in the system, such as student loan forgiveness, and we know that the Senators are familiar with that. You are doing it for some of your staff attorneys. The military does a bonus to encourage lawyers to stay on.

We believe that to truly motivate competency, it would be most helpful for the Congress to allow student loan forgiveness and to encourage training, especially ethics training at national centers such as the National Advocacy Center for prosecutors, State and Federal, in Columbia, South Carolina. We want to provide incentives to young people to come into the system and stay in the system, and we believe that that, more than federally-mandated standards, would ensure competency of counsel on both sides, prosecution and defense.

Chairman LEAHY. Why not do both?

Mr. LOGLI. Well, I think that we can do that. I think that if you want to have some type of universal standard, the way to encourage that is to provide that type of loan forgiveness money or training money to the States as an incentive. But to take money away from the States, from already cash-strapped systems, would be self-defeating, in our opinion.

We really want to work together with the Senate in getting a form of this bill through. We think it is workable. We embrace the use of DNA technology, we embrace counsel competency, and I believe that we are not really that far apart on a successful bill.

[The prepared statement of Mr. Logli appears as a submission for the record.]

Chairman LEAHY. Well, thank you. The student loan area I find appealing. We do this in some regards with teachers, and sometimes with doctors in rural underserved areas. For example, I know Senator Durbin has a bill for public defenders.

On a personal level, my oldest son, who is recognized as a very, very good trial lawyer in our State, has been actively recruited by a number of prosecutors, both in Vermont and here in this area. He has had to turn those offers down because he couldn't have paid his student loans had he gone there.

Professor Otis is an Adjunct Professor of Law at George Mason University. In 1992, he was Special White House Counsel to then–President Bush. He spent most of his career in the Department of Justice, in the Office of the U.S. Attorney for the Eastern District of Virginia, where he was chief of the Appellate Division.

We are glad to have you here, Professor Otis. Please go ahead, sir.

STATEMENT OF WILLIAM G. OTIS, ADJUNCT PROFESSOR OF LAW, GEORGE MASON UNIVERSITY, FALLS CHURCH, VIRGINIA

Mr. OTIS. Thank you, Mr. Chairman, Senator Specter, Senator Feingold, Senator Sessions. Innocent citizens are being killed because of deficiencies in our law, but not, I am afraid, deficiencies some of the proposals before you will rectify. Instead, they risk compounding these deficiencies by creating unnecessary costs to carrying out the punishment our most brutal killers have earned.

It is said that the system is broken. It is not broken. To the contrary, the administration of the death penalty is more fair and accurate today than at any time in our country's history, and seldom have its benefits been more evident than they are now: as we have had more executions in the last decade, the murder rate has gone down every single year.

No one doubts that every reasonable precaution should be taken to ensure that only the guilty are executed. To the extent the movement for reform seeks to advance that goal, all will applaud its intent. But in its present form, I respectfully believe that the movement is misdirected. It aims at the occasional problem, while ignoring the epidemic danger to the innocent, namely that thousands of them are murdered every year.

The innocents who most deserve this Committee's attention are not convicts who want what will often turn out to be just another means to string things out and game the system. The real innocents are ordinary citizens gunned down by unrepentant killers we should execute, but because of the multitude of hurdles already built into the system so often we don't.

Almost 1 in 10 of the roughly 3,700 inmates on death row has at least one prior conviction for murder. This teaches a startling lesson: that just in recent years, more than 300 innocent people have been killed, not by legal error, but by criminals we knew had done it before.

This emphatically does not mean that all those repeat killers deserved execution after their first murder, although one must wonder if the death penalty should have been imposed on at least some of them. It does highlight, however, that the most glaring deficiency in our system is neither excessive use of capital punishment, what with only one execution for every 200 murders, nor insufficient scrutiny of death penalty cases, what with post-conviction review already averaging more than ten years.

It is that we don't carry out the death penalty with the assurance needed to fully realize two of its principal benefits: general deterrence and incapacitation of those like Ted Bundy or John Wayne Gacy, for whom killing was a sport. As a result of our hesitation, the real protection of innocence our Government owes its citizens is not nearly what it should be.

What this suggests is that we must consider whether capital punishment is underutilized. Although Professor Liebman's study purports to find an error rate of 68 percent in death penalty cases, that is a misleading number sometimes used to imply that 68 percent of those sentenced to death have been "exonerated." But nothing approaching that is true.

By far the more telling statistic is that over 90 percent of those who faced re-trial after appellate reversal were again convicted.

And the most telling statistic of the Liebman study is this: zero. Zero is the number of factually innocent persons Professor Liebman or any other serious scholar has claimed to be able to demonstrate were executed in at least the last 40 years—zero.

The great majority of our citizens support capital punishment, and it could scarcely be otherwise, what with the memory of Timothy McVeigh still fresh, and Osama awaiting the only justice that will fit him. The minority seeking to abolish the death penalty understands this, and thus that a straightforward attack on it cannot work.

A more subtle strategy has been devised: "stealth abolition", abolition in which capital punishment technically remains on the books, but is never actually imposed because the practical barriers to its imposition will be made prohibitive.

Like any mechanism in the law, no matter how just or how fitting, the death penalty can be effectively repealed simply by putting it in the concrete boots of excessive cost and unending delay. This sort of stealth abolition is the unstated agenda of some of the groups supporting the proposals before you. If they want outright abolition, let them say so directly and win their case with the public.

No just person wants a judiciary where innocent people are being railroaded or just fumbled into the death chamber. That is the picture the stealth abolitionists paint: that, for example, defense lawyers have the resources of a church mouse, the brains of a pumpkin, and the system the overall reliability of an airline schedule.

Having worked in the courts for almost a quarter of a century, I can tell you that it is nothing like that. Of course it is possible to discover some poster boy blunderer among the thousands of cases each year, but the sleeping defense lawyer is essentially an urban myth.

Certainly, we can improve. In my judgment, more targeted reforms for DNA testing and improved performance by counsel would be welcome, and I will be happy to discuss those with you if you are interested. We should protect the innocent people in our country. We just need to remember who they really are.

[The prepared statement of Mr. Otis appears as a submission for the record.]

Chairman LEAHY. Well, Professor Otis, I think that perhaps Congressman LaHood would be surprised to be considered a stealth abolitionist. I think he is as strong an advocate of the death penalty as anybody I know and he is the chief Republican sponsor in the other body on this legislation.

I would think that you would agree, and we all agree on the need to protect society. I wore a shield for eight years to do just that. But I think you would agree that society is not protected when the wrong person is locked up and the person who committed the crime is out free.

I should note that the Columbia University death penalty study came about as a result of a request from this Committee for evidence about capital punishment reversal rates. It has been widely acclaimed. It recently won the 2002 prize of the Law and Society Association. Of course, Professor Liebman can speak for himself.

Senator Specter—like me, a former prosecutor, and he in a much larger venue—has one of the pieces of legislation before us, referred to earlier in reference to the question of when stays of execution are given. Senator Specter, like most members of this Committee, is juggling about three different places he is supposed to be. So before I begin my own questions, I will yield to Senator Specter for any statement he wishes to make.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you very much, Mr. Chairman. I would like to make an opening statement and shall be relatively brief.

I commend you for your leadership on this important subject and the others who have brought forth legislation, and I thank you for convening these hearings and join in urging that we move ahead on a markup and trying to get some legislation enacted.

There is no doubt, with the modern scientific evidence on DNA, that we could exonerate many people who are in custody if they had access to DNA treatment. The risk is always present that the innocent may be executed and those executions might be avoided if individuals have access to DNA material.

I believe that the best remedy is to legislate a constitutional right under the fifth section of the Due Process Clause of the 14th Amendment. One Federal district judge has made that holding. We know that the Congress has been very, very slow to act, really inactive, leaving the issue to the courts.

The whole change in constitutional law in criminal cases has been made by the courts—*Mapp* v. *Ohio* on search and seizure in 1961; Gideon v. Wainwright, right to counsel, in 1963; Miranda in 1966, Escobito in 1964, and so on. It is really a legislative responsibility, and we have the authority under Article 5 of the 14th Amendment and I think we ought to move ahead to make it a constitutional right.

The second aspect that the legislation touches is the issue on adequacy of counsel. There have been many, many examples to show that the requirements for counsel have to be changed very substantially to provide for adequacy of counsel.

The legislation that I have introduced touches one more area on a case that very much surprised me when I found it, called *Alzine Hamilton*, a U.S. Supreme Court decision in 1990 where four Justices had voted for certiorari in a capital case. For some technical reason, certiorari was not granted and the defendant was executed. That is a consequence too horrendous to be characterized.

So this is a subject which requires our immediate attention and we can legislate to stay the execution where four Justices have voted for cert. Why cert was not granted is not discernible from the Supreme Court records.

In making these arguments, I do so in the context of fairness to the accused, and also in the context of fairness to society. I believe that the death penalty is a deterrent, and I think we will not be able to maintain it unless we do it fairly.

When I was district attorney of Philadelphia, there were about 500 homicides a year and I would not permit the death penalty to

be requested without my own personal review and limited it to three, four, five, six cases a year at the most.

But without getting into the rationale of why I do believe it is a deterrent, I do think it is an effective deterrent. But to maintain it, we are going to have to very, very materially change the procedures for the application of the death penalty.

Mr. Chairman, I am going to leave, but I am going to come back for a round of questioning. Thank you.

Chairman LEAHY. Thank you, and I will work with you on that. I have been reviewing, actually, some of your recommendations this weekend and I will look at it.

We will take about a three-minute break and then begin the questions.

[The Committee stood in recess from 11:23 a.m. to 11:28 a.m.]

Chairman LEAHY. Thank you all very much.

Professor Scheck, the Innocence Protection Act, as you know, permits DNA testing if it establishes new, non-cumulative evidence that is material to a claim of innocence. Ironically enough, we know that in some of these cases where DNA evidence is tested, it has conclusively proven the guilt of the person asking for it. So it cuts both ways.

Under the Innocence Protection Act, testing, it would be allowed if it established new, non-cumulative, material evidence. Mr. Logli has suggested that testing should only be permitted if it proved an inmate's actual innocence. Which standard do you think is most appropriate, and why, based on the cases you have handled?

Mr. SCHECK. Well, I think the standard of new, non-cumulative evidence would be the better standard. It is funny that Mr. Logli and I were talking before the hearing started because Illinois and New York were the first two States that had post-conviction DNA statutes and the standard in Illinois is similar to the one in your bill, Mr. Chairman, and in New York as well.

The one thing that I think we can agree upon is that there has not been a vast flood gate of cases of people coming forward and choking the system with requests. The real hard work here, frankly, is vetting the cases and, in accordance with the standards, finding the transcripts, finding the evidence. That is the real issue in these cases.

So I think the lower standard is appropriate. Particularly in our experience, those prosecutors who are willing to look at a case and say, well, this could an instance where somebody was wrongfully convicted, a DNA test could show it, we might find the right person—they will agree.

Those who are looking for whatever reason not to agree will never see a case where they think that—if you raise it to a standard like actual innocence, it is just not going to happen, and the three men that are behind me over here may very well not have seen the light of day.

So I think that standard works, and it has been working in now what I think is many States. As many as I think 18 have a standard that reflects the one enunciated in the Innocence Protection Act.

Chairman LEAHY. Well, if you have 18 States doing it already, why do we have to act?

Mr. SCHECK. Well, we really have to act because the time limit question, I think, is the most important one. For example, in the State of Idaho, on July 1 the time limit is going to run. So the theory is everybody in Idaho that could prove their innocence with a post-conviction DNA test had to do it within one year. In Florida, it is two years. The time limit is running in Delaware; it is running in Louisiana and Michigan.

There is no way in the world that these applications are going to be researched adequately. It takes our office between 3 and 5 years to perfect an adequate claim that Mr. Logli and his colleagues would say, yes, this is a case where we ought to go forward, because it is so hard to find the transcripts and it is so hard to find the evidence. So the time limit, in my judgment, is really terrible.

Take Kentucky. Actually, this is an issue that really goes toward Senator Specter's view, which I thoroughly agree with, of establishing this as a constitutional right. In Kentucky last week, a student from the Innocence Project found blood stain evidence in an old murder case that was found by a window where there had been a sign of forced entry.

The police and the prosecutors at the time of the trial said, well, this comes from the assailant, but it wasn't typed. So they asked the prosecutor to type it. The prosecutor went into court and said, "type it? I want to destroy it," and asked the judge to destroy the evidence. The more frightening development is that the judge granted the motion.

So then we had to go to the Kentucky appellate courts, and just last week they issued an order prohibiting the destruction of the evidence. But because the Kentucky post-conviction DNA statute is only available for people that are on death row, Michael Elliot, who is serving a life sentence—according to the appellate court, they couldn't order the evidence preserved or the DNA testing.

So we had to go to Federal court pursuing the constitutional right theory, seeking through a 1983 action to enjoin the destruction of the evidence and to get access for purposes of DNA testing. Now, I have no idea whether Michael Elliot is guilty or innocent, but I can tell you, and the Wall Street Journal confirms, that when we finally get an appropriate case and we get the evidence to the laboratory, about half the time these people who are insisting on their innocence, the results come out in their favor.

Chairman LEAHY. Come out in their favor?

Mr. SCHECK. Come out in their favor.

Chairman LEAHY. Professor Liebman, your study was done following a request from this Committee, with both Republicans and Democrats requesting it. In the time I have left, and then we will go to Senator Feingold and Senator Sessions, do you want to respond to the criticisms voiced by Mr. Otis?

Of course, at some point here we are also going to make sure, Mr. Otis, you get a chance.

Mr. LIEBMAN. Yes, thank you, Mr. Chairman. I would like to make three points.

First, Mr. Otis talks about stealth abolition. I will tell you what is bringing about stealth abolition in this country. It is high rates of serous error in the capital system. All of those capital verdicts

that don't belong there because they have error in them, because the defendants are innocent, are clogging the system. That allows the worst of the worst offenders to hang back behind all of the undeserving cases that are there because of serious errors.

If you didn't have all of these seriously flawed cases clogging the system, you could move the worst of the worst cases up to the front of the line and get the system working the way it is supposed to and the way Americans expect the capital system to work. Americans do not expect a system that can only execute 1 ½ percent of the people on death row every year, 5 percent over 23 years. That is stealth abolition, and it is because there is so much error in these cases.

The way to solve the problem is get competent counsel at trial so that only the valid cases involving the worst of the worst offenders get through. The weak cases should be screened out at that stage, as our adversarial system is supposed to do. That would go along way towards making the system work appropriately.

Indiana adopted standards a few years ago very much like those in Senator Specter's bill. The result is that they have had fewer of these really weak cases get through, much more reliable verdicts, and the system is saving money.

Mr. Otis's second claim is that zero innocent people have been proved to have been executed. As Mr. Otis knows, that is very difficult to prove. When there is a train wreck, the first thing you do is you go count the people who were killed and then you say, my gosh, what are we going to do about this?

In the capital system, you can't do that. You can't tell the innocent executed from the others, for a reason I will get to in a second. What do you do in a situation like that? You study risk. In fact, even when we can count the dead innocent, we study risk so that we can avoid innocent people dying.

If Ford Motor Company said we're going to wait until somebody dies and then we will try and figure out if our cars are safe, people would say that is crazy. You have got to study and avoid risk, before tragedies occur. That is what our study did. I agree with Justice O'Connor who looked at the evidence of risk, and found a likelihood that innocent people have been executed and will continue to be executed unless things like the Innocence Protection Act are passed. One reason you can't study how many innocent people are executed is the point Professor Scheck mentioned. A lot of the evidence is destroyed that you would need to study it. In a number of cases, prosecutors with DNA samples that could have proved an innocent person was executed have refused to turn over the evidence for testing and instead have destroyed the evidence.

Finally, sleeping lawyers are not a myth. They happen. Many people have been executed in this country, despite the fact that their lawyers slept through their trials.

Chairman LEAHY. *Burdine* v. *Johnson*.

Mr. LIEBMAN. Burdine. He was the lucky one, though. He got relief. But a number of the cases we counted as having no errors in fact involved defendants represented by sleeping lawyers. But the courts let it pass. They approved the case for execution. The same is true of defendants represented by lawyers on drugs, or abusing alcohol during the trial.

The disbarment rate among defense lawyers in capital cases is about 40, 50, 60 percent in some States. Luckily for everybody else, it is about 1 or 2 percent of all lawyers. But when you are a capital defendant, the disbarment rate goes way up in many States. So this is not an urban myth. This is a real problem and there are real solutions for it in these bills.

Chairman LEAHY. Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman. Let me first commend you for all your leadership on this issue and for holding this hearing. I have a full statement I would like to submit for the record, if I could.

Chairman LEAHY. It will be included.

[The prepared statement of Senator Feingold appears as a submission for the record.]

Chairman LEAHY. We will also submit for the record statements from any other Senators, but also a number of items, including the editorial in the Washington Post today and articles from the New York Times, and so forth.

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman.

I would like to first make a brief comment about the competing proposals for reform of the death penalty system. Mr. Chairman, I am very proud to be an original cosponsor of your bill, the Innocence Protection Act. Whether my colleagues support your bill or have their own approach to the problem, like Senators Specter and Feinstein do, I am very pleased that there is obviously a growing consensus on the Committee, and I think in the whole Congress, as was demonstrated by the testimony of the House members, that the current death penalty system is broken.

I was almost amused by the reference to stealth abolition because I am an abolitionist, but I can say for sure, and you can put it on the record, that the people who are working on these issues are not necessarily abolitionists. Some of them clearly are for the death penalty, but they simply can't justify a system that may have innocent people on death row and that may have already executed innocent people.

I can't prove it, Professor Otis, but my instincts tell me there is no question that we have executed innocent people, and that we will do it again unless we do something about this awful system.

I am somewhat comforted by the almost shrill tone that is being adopted by those who don't think we should even be inquiring into these things. This is an embarrassment for our country and we are literally whistling past the graveyard if we think this system isn't broken and doesn't have to be changed. It has to be changed.

Yes, Congress should enact the Innocence Protection Act without delay. But during the last two years since you first introduced your bill, Mr. Chairman, the States and the Federal Government have executed more than 140 people, and during this same time period more than a dozen death row inmates have been found innocent and released from death row.

With each execution, our Nation runs a real risk of executing an innocent person, as I indicated, if we have not already done so.

How many more innocent people must bear the ultimate nightmare of being sentenced to death for a crime they did not commit before Congress acts?

Yes, as we have indicated, Governor George Ryan certainly did the right thing, I think a courageous thing, when he suspended executions over two years ago to allow time for a thorough review of the death penalty system in Illinois and for reform proposals to be considered.

I also think we should here in Congress heed the wise example also set by Maryland Governor Paris Glendening, who is a governor who recently put into effect a moratorium in the State of Maryland.

I have introduced a bill that would apply the Illinois model to the rest of the Nation. The National Death Penalty Moratorium Act would place a moratorium on Federal executions and urge the States to do the same while a national commission on the death penalty examines the fairness of the administration of the death penalty at the Federal and State levels.

Professor Liebman, it is good to see you again. The study conducted by you and released in June 2000 concluded that there was a disturbingly high rate of reversible error in capital cases, and that rate is 68 percent. The study found that the two primary reasons for this high error rate were inadequate counsel and police or prosecutorial misconduct.

The Innocence Protection Act, as well as the Specter and Feinstein proposals, of course, address access to DNA testing and competent counsel, but these bills are silent on the issue of police or prosecutorial conduct. We also know that troubling racial and geographic disparities plague the Federal system, as well the State systems. In fact, concerns about racial and geographic disparities resulted in Governor Glendening's decision last month to put the moratorium on in Maryland.

Let me ask you two questions. What percentage of the cases reversed for serious error involved access to DNA testing or competent counsel?

And, second, if you could make only two or three additional reforms, what are the two or three reforms to address police or prosecutorial misconduct you would like to see?

Mr. LIEBMAN. Senator Feingold, it is good to see you. The last time I saw you was at Columbia when you gave a fine speech.

Let me go to the second question, which is what can be done about this. I do think that the problem of prosecutorial misconduct is a serious one, and we have some recommendations about that in our study. One of those recommendations is that there ought to be open files in these cases.

Many prosecutors use open files policies, but many do not. If somebody's life is on the line, it would seem elementary, and I think most citizens in the country assume, that everything that the prosecutor should be available to the jury when it makes its decision. But in many jurisdictions in this country, evidence is not turned over.

What happens in those places is that it takes 10 or 15 years of court proceedings fighting over that record. Finally, the defendant gets the record, the case to be overturned, and then you have got to what's in it requires back and re-try it 15 years later. Think of

all of the time, money, expense and frustration that would have been avoided by simply turning over the evidence in the first instance right at trial.

The second thing that we would propose is a number of steps on the part of prosecutors to try to limit the capital prosecutions that they bring to reach only the worst of the worst cases, without sweeping in the weaker and more marginal cases that impose so much of the burden of error in these cases.

I think the Illinois proposal to limit the number of aggravating circumstances in that statute is a very good one. Let's get rid of the broad factors that sweep in so many of the weak cases that cause so much error and cost, and instead focus only on the very worst of the worst.

I think those are two very good proposals.

You asked how many DNA cases there are. The most crucial thing about DNA is it provides a kind of window into the system. But most capital cases do not have biological evidence in them. They are not rape murders. They are murders in the course of robbery or burglary.

But there is no reason to think that the miscarriages of justice that lead people to get convicted when they are innocent and that DNA reveals are not also occurring in other cases. It's just that we don't have a window into those cases, and that is why we need the other reforms that we have discussed.

Senator FEINGOLD. Thank you, Professor.

Let me ask Mr. Scheck and then Professor Liebman again, given the number and complexity of problems plaguing the current administration of the death penalty, isn't it unjust and unconscionable for executions to proceed while these problems go unaddressed or proposals for reform are being debated?

In other words, isn't there a need for at least a moratorium, Professor Scheck?

Mr. SCHECK. I certainly think so. When you look at public opinion polling, I think that is where really now a majority of the American people are, even those who in principle as a moral matter would support capital punishment as a morally appropriate response to the most heinous of crimes.

This is a difficult situation for now four years or more the American Bar Association has been in favor of a moratorium on capital punishment, and more and more people that study this system carefully have come up with these conclusions and come up with all these issues, all these recommendations that your hearing covered last week, which are win-win propositions for the criminal justice system.

A thoroughgoing moratorium effort that considers all the problems of mistaken eyewitness identification, junk forensic science, ways to reform the interrogation procedure by videotaping interrogations, which is both an improvement in the form of the evidence for the prosecutors as well as protection for the accused—all these things, I think, are going to be a net plus for the system.

It is an improvement of law enforcement that will benefit everyone in society. So there is a profound good that comes from this moratorium effort for the whole system, including, of course, the capital punishment system.

Senator FEINGOLD. Thank you, Professor.

Professor Liebman, would you just respond to that?

Mr. LIEBMAN. Senator Feingold, the overriding proposal and recommendation that we made after 11 years of study and a number of comprehensive statistical analyses was that more study is needed at the local level, at the county level, at the State level, and at the national level.

The Illinois study is a wonderful example. A lot of people thought they knew the problem with the Illinois statute. But they didn't. It took the study commission's comprehensive analysis to discover that the problem was Illinois's overbroad death penalty statute. But that is not what people were talking about before they conducted that study.

We need to know more than a single study at a university with limited funds can produce. The studies that have been conducted in a few States around the country have revealed that a lot more can be learned. And more needs to be done nationally. I commend the Senator because the definition of the study that needs to be conducted to really figure out what is happening and figure out what needs to be done to fix the death penalty is comprehensively laid out in your bill.

Senator FEINGOLD. Thank you.

My time is up, Mr. Chairman, but just let me say I appreciate the chance to pursue these questions, but I want to be very clear that I think your Innocence Protection Act is an extremely important piece of legislation. If we are able to move it or any other version that the chairman believes would be acceptable in this Congress, it would be an enormous step forward on this issue, and I thank him for his leadership again.

Chairman LEAHY. I thank you for that, and it is my intent to try to get enough consensus so we can move a bill this year. I understand from Congressman Delahunt and Congressman LaHood they want to do that in the House.

Senator Sessions, also a former prosecutor, has waited here patiently. Please go ahead.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman.

All of us want the highest standards in our courts of law. There is no one that has a greater feeling for that than I do. You stand in court as a Federal prosecutor or a State prosecutor and you announce that you represent the United States of America. You are an officer of the court.

I know Mr. Logli and Mr. Otis have done that and feel the honor of that calling, and you want justice. There are plenty of guilty people. Why would anyone want to prosecute or pursue someone who is innocent?

Can there be errors? Yes, there can be errors. We want to make sure our system works effectively to eliminate that, but I do not believe our system is broken. I agree with Mr. Otis that the system has never been better. A death penalty case for a prosecutor is a tremendous mine field to negotiate. There are so many possibilities and so many parts of the system designed to make it provide the

ultimate protection for the defendant that it is very difficult to proceed successfully through a prosecution when you seek the death penalty. The jury has to agree, and a judge in Alabama has to agree, and then you go through the appellate process.

The routine appeals in my State are like those in most States. You get a direct appeal from the trial court verdict of guilty.

Mr. Yackle, I guess you could say you want an automatic stay here, but the stays occur. You get an automatic appeal to the Court of Criminal Appeals in Alabama, then to the Alabama Supreme Court. Then the defendants take their next step, which is a State habeas review. Then they go to the trial court, then the Court of Criminal Appeals, and then the Alabama Supreme Court.

Then if the death penalty is still in place and has not been reversed through those six levels of review, then they file in Federal court seeking Federal habeas corpus review and go from the Federal trial court, to the Federal appellate court, to the U.S. Supreme Court.

Sometimes the U.S. Supreme Court does not hear the case. Well, they shouldn't. They don't hear most of the appeals that come up, and just because they don't hear a case does not mean that the defendant is wrongly accused. Indeed, overwhelmingly most of these cases don't deal with guilt or innocence; they deal with some procedural objection to the system.

My best judgment is that the death penalty is a deterrent, that it does save lives, that it is effectively carried out throughout our country, and if someone can come up with specific ways to make it better, I am willing to listen to that.

The Emory University study says that there are 18 murders deterred by one execution. Whether those numbers are accurate or not I don't know, but I believe there is a deterrent effect. Whether it is 1, 5, 10, 18, or more, I don't know, but my best judgment is it does deter.

So what we want to create is a system that works. We do not need to panic. We do not need to be telling the American people that there is not justice in our courts in America, and I feel very strongly about that.

Mr. Liebman, your study covering the years 1973 to 1995 were the years in which all those retroactive Supreme Court opinions came down. You had *Gregg* v. *Georgia* in 1976, *Strickland* v. *Washington*, *Batson* v. *Kentucky*, *Beck* v. *Alabama*. That is when retroactively the Supreme Court said things you have been doing, States, that have been legal and consistent with the law, we don't agree anymore that they are legal, we reverse those, resulting in hundreds of reversals of cases—virtually all cases reversed around the country that had to be re-tried again, convince another jury, oftentimes unanimous verdicts required.

So I don't think this system is nearly as bad as you would say. Indeed, my attorney general in Alabama, Bill Pryor, notes that in the last 5 years error rates in Alabama would be less than 5 percent. So I think we need to get this thing straight.

Mr. Logli, have you supervised the trial of death penalty cases?

Mr. LOGLI. Yes, Senator. My office has engaged in capital prosecution on at least 6 occasions in the 16 years that I have been the State's Attorney.

Senator SESSIONS. So it is not that often, really.

Mr. LOGLI. No, and I think I represent most local prosecutors. It is a rare prosecution indeed. My jurisdiction has between 20 and 45 murders a year, and to seek it in only 6 cases in 16 years, I think, speaks that we conduct very serious reviews and seek it only when the evidence is overwhelming and when the aggravating factor is apparent.

Senator SESSIONS. Do you have an appellate system there that is similar to what I described for Alabama, multiple appeals?

Mr. LOGLI. Yes, sir.

Senator SESSIONS. And, secondly, does the trial judge, in your opinion and your experience, tend to be more alert to protect the rights of the defendant in a death penalty case than in a non-death penalty case?

Mr. LOGLI. No question about it, Senator.

Senator SESSIONS. They bend over backwards, don't they?

Mr. LOGLI. Absolutely.

Senator SESSIONS. Thank you, Mr. Chairman.

Chairman LEAHY. If you want to take more time, please feel free. You have sat here patiently and I have been trying to be pretty flexible in giving time to members.

Senator SESSIONS. Well, I thank you for that.

Mr. Otis, the appeals of many of these cases that result in reversals deal with the types of evidence that could be introduced at sentencing or maybe the jury selection procedures, maybe the charge the judge gave to the jury.

Isn't it true that overwhelmingly the cases that are reversed are for these kinds of errors and not relating to guilt or innocence of the defendant?

Mr. OTIS. Yes, that is correct, Senator Sessions. As a matter of fact, in my experience as an appellate lawyer factual innocence was very seldom litigated in the court of appeals. Almost always it would be a procedural question.

But beyond that, in the death penalty context, even in the relatively rare case in which there is an error at the trial phase that might be interpreted as affecting the determination of guilt, that itself does not establish exoneration. I talk about that in my written statement in a case that the Committee might know about it.

It was a case in Maryland, the Trevor Horn murder, where a hit man was hired to kill a quadriplegic 8-year-old so that his father could get the kid's trust fund. Now, the arrangement that the father made with the hit man was in part undertaken in a series of telephone conversations that were recorded on a telephone answering machine tape.

In Maryland, it happens that there is a two-party consent rule; that is, a conversation cannot be recorded without the consent of both parties to it. That is relatively unusual. Most States have one-party consent.

Because this series of telephone conversations negotiating a $5,000 fee to kill the child—because they had not been undertaken with two-party consent, the court of appeals in Maryland threw out the conviction, but it didn't have anything to do with the truthfulness or authenticity of the evidence in that case.

Nonetheless, this is exactly the kind of case that would show up in Professor Liebman's study as an "illegal conviction" that the court of appeals had to overturn to "save a wrongly convicted man from death row." In fact, because there was no question about the truthfulness or authenticity of the tape or the identity of the killer, most of us would think that it was not the convict who was deprived of justice. It was Trevor Horn's family and all the rest of us who were deprived of justice.

Senator SESSIONS. Mr. Logli and Mr. Scheck, just on DNA, that can be a very clarifying scientific test. It is not always conclusive. There may be a lot of arguments to be made that it is not absolutely dispositive of whether or not an individual committed a crime, but fundamentally it can put somebody there or suggest somebody was not there.

Mr. Scheck, I have got a letter from the attorney general of Alabama complaining about the Innocence Project in the State, in which he offered a DNA test. The sentencing group didn't agree to take it, didn't follow up on it, and then after the death penalty order was issued, then you rush in at the last minute and demand the DNA test, delaying the execution.

So I guess I will let both of you discuss this. Sometimes, I think those who desperately want to defeat the death penalty sentence, in my experience, use every procedural advantage they can get to and often blame the system. Sometimes, it is their own fault.

Would you comment on that? And, Mr. Scheck, I will give you a chance to respond.

Mr. LOGLI. Well, I believe that if DNA testing can reveal the truth, can reveal actual innocence, then it should be sought, whether it is asked for by the State or by the defense. That is why our belief is that the standard here should be that if the test is ordered and if the results are exculpatory that they prove actual innocence.

It would be inappropriate to allow DNA testing that doesn't go to actual innocence. What is the point? Yet, that standard would not deter any appropriate DNA testing in those cases where there is an assertion of actual innocence.

As Professor Otis has pointed out, in most of our appeals there is no assertion of actual or factual innocence. In very few cases, there is that assertion. It is technical or procedural. But in those cases where there is that assertion and where the tests can show that, then by all means do the test, but not just based on materiality toward a claim of the defendant.

Senator SESSIONS. Mr. Scheck?

Mr. SCHECK. Well, first, before I respond specifically to the Alabama case, very frequently DNA testing now on a blood stain or a saliva stain or even a hair at a crime scene may not in and of itself prove actual innocence right away. What it can do is provide significant and material proof that, in conjunction with additional evidence, can establish that a person did not commit the crime and that another person did.

It is really, I think, self-defeating for law enforcement to use as a threshold for getting the initial DNA test actual innocence as a standard instead of the lower standard, because what is going to happen, as has been demonstrated in case after case out of these 108 exonerations, is you are not only going to lose the opportunity

to get a DNA result that is highly exculpatory that does lead to other evidence that exonerates the individual, but that same evidentiary chain is also going to lead to the apprehension of the real assailant.

Now, Senator Sessions, in that case at issue there, Danny Joe Bradley was a man on death row, still is on death row in the State of Alabama. Students from the Innocence Project years ago asked to do DNA testing on vaginal swabs from the victim, a step-daughter that had been taken from the home where Mr. Bradley was and found in a riverbed.

I don't think anybody contested that the best evidence, the one that Mr. Logli would insist that we test, would be the vaginal swabs from the victim of this rape murder. The problem was and the difficulty is that the only evidence that could be found by the Alabama authorities was semen stains on a bedspread and sheet in the home where the young women slept.

So they offered to do the testing on that, which was not the best evidence, instead of going forward with an evidentiary hearing, which still hasn't taken place incidentally, on tracking down the vaginal swabs.

The biggest problem, Senator Sessions, that we have in all of these cases is going back and finding the evidence in these old cases. And it is not just in these post-conviction exoneration cases, but it is in the cases where I have been working with prosecutors all across the country on old, unsolved murder cases. Where is the evidence? Is it in the police department? Is it in the property room? They are old cases. They have moved them. Is it with the court reporter? Is it at the crime lab? It is in all kinds of different places and you have to find it.

So in that Alabama case, the problem was to this day they have never found the vaginal swabs. Now, we ultimately went back to the trial judge and persuaded him, an Alabama State court judge, and he gave us some testing on the bedspread. It did not come out in Mr. Bradley's favor, but there is still an effort to find those vaginal swabs which would be the determinative test.

Senator SESSIONS. The only point I would just say is they offered that. You could have had it earlier had you asked for it, and the people didn't ask for it until the last minute, thereby delaying the execution and going through a pretty prolonged procedure. That is just the life of a prosecutor in these cases. This is not unusual.

Chairman LEAHY. The life of the prosecutor was never an easy one, as you know and Senator Specter knows and I know and as State's Attorney Logli knows. It is never an easy one, but it is not supposed to be.

Senator SESSIONS. Well, defense lawyers are officers of the court. If they need evidence, they ought to ask for it promptly.

Chairman LEAHY. Senator Specter.

Senator SPECTER. I concur that the life of a prosecutor is not an easy life, but it is a fascinating life.

Senator SESSIONS. Yes, it is.

Chairman LEAHY. The best job I ever had.

Senator SPECTER. Senator Sessions was a U.S. Attorney and Senator Leahy was district attorney in Burlington, Vermont. People ask me if district attorney was the best job I have ever had and

I tell them no. Assistant D.A. was the best job I had. I didn't have to administer an office, just take the files in and try the cases.

I am going to propound a series of questions. The hour is late and the chairman and others have been here for a long time and I have had other commitments. In the course of a five-minute round, there is not much that can be asked and answered, but what I am going to do is propound a number of questions and to the extent they can be answered orally, fine. To the extent they can't be, I would like to have your written answers.

On the issue of the stay, I did not know about the case of *Alzine Hamilton as Natural Mother and Ex–Friend to James Edward Smith* v. *Texas* until I read about it in Professor Derschowitz' book, Supreme Injustice, and had a hard time accepting that there could be a case where four Justices had voted for certiorari, certiorari was not granted, and the man was executed. There is another case, *Herrera* v. *Collins*, where certiorari was granted, with the Court not ordering a stay, but in this case the courts of Texas ordered a stay.

One of the questions which I would like you to respond to is do you see any problem with the Congress of the United States giving direction to stay executions where four Justices have voted for a writ of certiorari?

This Committee has taken on some interesting questions. One of them tangentially related is the television issue, where Senator Biden and I have introduced legislation to televise the Court. We tried to get it televised specially in *Bush* v. *Gore*.

I would be interested in your observations as to whether there is any separation of powers or any reason why Congress shouldn't step into that and make sure that people are not executed where four Justices have ordered a stay.

On the adequacy of counsel issue, you have the traditional problem of States' rights. What standing does the Congress of the United States have to set standards for defense lawyers?

The Supreme Court, as we all know, in *Miranda* has conditioned the death penalty on—*Miranda* was the warnings case. I am thinking of the 1972 case involving Georgia. Help me out.

Mr. LIEBMAN. *Furman* v. *Georgia*.

Senator SPECTER. *Furman* v. *Georgia*. So the Supreme Court of the United States said in *Furman* v. *Georgia* that you can't impose the death penalty unless you have an itemization of aggravating and mitigating circumstances. What is the route to exercise congressional authority to require that States have a standard for counsel in death penalty cases? I think the States have a lot of motivation here to keep the death penalty. It is very popular in the States which disregard the issue of adequacy of counsel.

The third question relates to the issue of DNA and the unwillingness of the legislative branches to act. Of course, the most famous case is *Brown* v. *Board of Education*, where there should have been action by the legislatures, by the Congress, state legislatures, and the executive branch, but it was left to the Court. Obviously, the Court has been a great institution.

It took a long time for the Federal Government to intervene in State criminal proceedings. *Brown* v. *Mississippi* was the first case in 1938, where they took an African American and brought him

over into Alabama and had a mock lynching and then they brought him back. Finally, the Supreme Court of the United States said "too far. We are going to step in on due process grounds."

But how do we motivate legislatures to move on items like DNA, where the evidence is so conclusive that innocent people are being detained, and doubtless some innocent are being executed, where really shouldn't have to wait for the Supreme Court of the United States to take that action? Really, in my opinion, they should have taken it by this time, and this Committee, I think, Chairman Leahy and others, are going to take the lead and try to move ahead.

Well, my red light is on.

Chairman LEAHY. No, no, please go ahead. We have been trying to be very flexible with people's time, and I appreciate the panel being willing to take time. So feel free to continue.

Senator SPECTER. Well, let me start with a basic question, Professor Liebman. What is the best approach to try to get legislatures like the Congress to act on due process constitutional rights when they are as glaring as the DNA right ought to be? That may be a little loaded, but go ahead.

Mr. LIEBMAN. I agree, Senator Specter, that there is a lot that needs to be done and it is not happening on its own, and so there needs to be some, as you put it, motivation to make it happen.

I also believe that the Congress probably has a pretty broad, often unexercised, power to try to do things under Section 5 of the 14th Amendment. But that view is controversial and it treads on territory that the Supreme Court doesn't like to have tread on.

Senator SPECTER. Why is it controversial, Professor Liebman?

Mr. LIEBMAN. Because every institution guards most carefully what is most sacred to it, and the Court's ability to say what the Constitution means is what it considers to be its most important function.

Now, my view is that that is an important function of all members of the Government and they all ought to exercise it. But I would suggest that damages and habeas corpus rights and procedures are statutory matters that everyone agrees are within Congress' power, and that the necessary motivation can be created through those mechanisms. Congress undoubtedly can say that if States want to continue to have the protection of the exhaustion rule that federal habeas review is not available until the case has gone through the State courts, then those States have to provide adequate counsel and other kinds of protections. Congress clearly can say that if states don't provid those protections, then cases do not have to be exhausted in the State courts and can go straight to Federal court.

That would give the States a very strong motivation to say, well, we are going to provide the right to truly adequate counsel, because if we don't, we are going to cede our power to resolve cases in the first instance. You could also do this through mechanisms allowing capital defendants denied statutory rights damages, or as a condition that states need to meet to qualifty for Federal money to obtain.

Senator SPECTER. Professor Scheck, do you have a problem with having the Congress legislate to stay an execute where four Justices have voted to grant cert?

Mr. SCHECK. No, I don't, but I would like to go back to the DNA question for a second, Senator, because I think the provision of your bill with respect to using Section 5 of the 14th Amendment, not just for inmates on death row but for all State inmates, is exactly the right approach.

Indeed, we are not going to have any problems as in the City of Boerne case with the Religious Reformation Act with this kind of legislation for a constitutional right of access to DNA testing that could prove actual innocence. Indeed, I included in my testimony and I commend to your attention the opinion of Judge Luttig from the Fourth Circuit in the Harvey case.

We have been litigating—and I think you averted to it in your opening remarks—Section 1983 actions for injunctive relief to get access to DNA evidence. Judge Charles Wiener, in Philadelphia, a Federal judge, granted access in the Godschalk case because we don't have a State statute yet for post-conviction DNA testing in Pennsylvania.

It was the case of a man with no criminal record who was brought in. He confessed, supposedly, to two rapes in Montgomery County, Pennsylvania. It took years, until Judge Wiener gave us access to the evidence on the constitutional theory that your bill embodies. He spent nine years trying to get the evidence. We got the evidence. The DNA tests were performed. They showed that he didn't commit the two rapes. They were committed by somebody else and he was exonerated.

Now, Judge Luttig's decision in the Fourth Circuit—and Judge Luttig is, I think, a jurist whom everybody regards as very conservative. I think he produces more clerks for Judges Scalia and Thomas than any other Federal judge in the system. He thoroughly supports this constitutional right of access for purposes of DNA testing in his opinion. It is very comprehensive and well-thought-out, and I think speaks directly to the proposal you have made.

Senator SPECTER. Professor Yackle, take up the question of mandating adequacy of counsel. Can the Congress do that, and if so, how, without creating a hue and cry and States' rights.

Mr. YACKLE. I do think there are ways to do that, Senator, without raising any problematic constitutional questions. The Innocence Protection Act includes a scheme that I think is perfectly valid in that respect.

There are ways to do things that raise constitutional questions and ways to do them that invite constitutional objection. I think generally this body ought to do what the Court does. When there is a way to do something without raising a constitutional objection, that is the way to do it. I think in the case of counsel standards, there are perfectly straightforward ways to set about doing it.

Senator SPECTER. Well, I agree with you. If there is a way to do it without raising constitutional objections, we ought to do it that way. But we ought to do something and we do precious little on these subjects.

Mr. YACKLE. You and I are in perfect agreement.

Senator SPECTER. Mr. Logli, what is the best argument for congressional assertion of authority in these areas which have been traditionally reserved to the States?

Mr. LOGLI. I believe there is a role for Congress. I believe that when we look at counsel competency standards—and keep in mind Illinois has adopted counsel competency standards not only for defense counsel, but also for prosecutors, and that has not been challenged by Illinois prosecutors.

Now, those standards don't apply to the elected State's attorneys, but my assistants have to have a certain amount of experience, a certain amount of trials under their belt, a certain amount of training. They have to be certified as capital litigation counsel.

Now, if the Congress wants that to occur in all the States, I think they can do that through legislation that combines with other methods we talked about previously. I am not sure you were at the hearing at that particular time. You may have been called away. But when we talk about longevity of public defenders, longevity of assistant prosecutors, I think we have to look at incentives to keep them there. Student loan forgiveness would help.

So let's say you put together a list of universal standards, recommendations, what people should have under their belt to try a capital case, and tie that into student loan forgiveness for prosecutors and defenders, tie it into training funds for prosecutors and defenders.

We have a tremendous facility for prosecutors, both State and local, at the National Advocacy Center in Columbia, South Carolina. Let's keep the funding there and increase that funding. Let's set up a similar establishment for defense counsel. I would like to use Federal funds in that way as a carrot and not as a stick to encourage States.

Many of them already have those standards. Twenty-two States that have the death penalty have counsel competency standards, out of the 38 States. So I think there is a role for Congress, more than just a bully pulpit, but it should be put together as part of an entire package to encourage good lawyers to come into the system and stay.

You talk about the best job in the world. I do believe I have the best job in the world. I believe I work with some of the finest people, lawyers, in the world, but it is getting increasingly difficult to attract and retain them, and that is a real competency issue on both sides of counsel table.

Senator SPECTER. Professor Otis, I will give you the last word. What is your view on making DNA evidence, both in capital cases and other cases, a constitutional right to have access to it?

Mr. OTIS. Senator Specter, I learned early on in my career as an Assistant U.S. Attorney—the best job in the world—not to give seat-of-the-pants answers to difficult and problematic constitutional questions.

Senator SPECTER. Well, you tried all those cases as an Assistant U.S. Attorney. You got a sufficiently long recess to be able to research all the issues that came up and get consultation and come back with a formulated judgment?

Mr. OTIS. I would be happy to do that. Having said that, I will say that I am not familiar with any case that would provide an

analogy for it; that is, I do not know of any instance in which Congress has required by legislation the States to examine and process, much less to put in evidence, a particular kind of factual material.

I guess the closest analogy would be fingerprints. Now, fingerprints are probably the best we have right now insofar as conclusive scientific evidence. DNA is a powerful tool, but I am not aware of any move in Congress, and there is certainly no statute you have passed to require the submission of fingerprint evidence.

I think the way that these things are best done, and the way that they have been done in the past is, for example, for the Congress to legislate standards to be used in Federal cases, which Congress can plainly do. Then, as we have so often seen, States will model their own statutes after that. Largely, that happened with the Federal Sentencing Guidelines, you may remember.

Senator SPECTER. Do you think Congress should have legislated to bar the introduction of coerced confessions in State criminal proceedings?

Mr. OTIS. I don't think Congress needed to do that because the Fifth Amendment to the United States Constitution forbids compelled testimony against oneself.

Senator SPECTER. Well, they were using coerced confessions all over the country before *Brown* v. *Mississippi*, including in Pennsylvania in the *Treetop Turner* case, all over the country, not just in the South.

Mr. OTIS. I think the Supreme Court is the organ of the Federal Government that has the authority to enforce the United States Constitution.

Senator SPECTER. Well, I agree they have the authority, but doesn't Congress have authority to enforce the Constitution?

Mr. OTIS. It has the authority to enforce the Constitution over those matters that are reserved to its power. Traditionally, the operation of State governments, and certainly something as detailed as the specific kinds of evidence that may be introduced or must be introduced in State proceedings, is beyond anything with which I am familiar that Congress has ever required.

Senator SPECTER. Well, I think you are right. Congress hasn't, but they should have. It is just a first cousin, but shouldn't Congress have barred segregation in schools before *Brown* v. *Board of Education*?

Mr. OTIS. Well, it seems to me the Supreme Court did what needed to be done. The Supreme Court saw that——

Senator SPECTER. What took them so long after *Plessy* v. *Ferguson*?

Mr. OTIS. Well, I don't know. I guess it is the Senate that advises and consents to who sits on the Supreme Court, not law professors.

Senator SPECTER. We have a share in that. We have had some pretty lusty debates on this question, with nominees coming before us and saying the Due Process Clause is meaningless, there is no Due Process Clause, it is only original intent.

Mr. OTIS. Once the Supreme Court had acted, of course, President Eisenhower federalized the National Guard and enforced the Supreme Court's order that took root in the United States Con-

stitution. I think all of us believe that that was exactly the right thing to do.

Senator SPECTER. Well, President Truman took some action in the executive branch without waiting for the Supreme Court to act. I am just giving you one person's opinion and I don't think we ought to wait for the Supreme Court. I think we ought to make a determination as to what is a constitutional right.

When you have people who are incarcerated, and especially with the death penalty, and DNA may establish their innocence, that to my way of thinking rises to the level of a constitutional right.

I had a unique opportunity—and this will be my concluding statement, Mr. Chairman—to be an assistant D.A. at a time of the revolution of *Mapp* v. *Ohio*, and argued the first cases in the State appellate courts as chief of the appeals division and saw what the Court did. And it was the Warren Court; it was the Court after *Brown* v. *Board, and there they went—Mapp* v. *Ohio*—and they changed the law, overruled *Wolf* v. *Colorado*. Then *Gideon* comes up two years later, and then *Escobito* and *Miranda*.

That kind of seeing the Constitution formulated everyday in the criminal courts by order of the Supreme Court made me wonder why somebody else didn't do it first. So I am glad Senator Leahy and some of the rest of us are going to try to do that.

Thank you, Mr. Chairman. Thank you very much, gentlemen.

Chairman LEAHY. I thank the senior Senator from Pennsylvania for coming back. I know you had about 12 other things going on and I appreciate it.

Professor Liebman, when Senator Sessions raised the question whether your study took account of changes in the Supreme Court case law in the late 1970s, did you take account of those? I wasn't quite sure.

Mr. LIEBMAN. Absolutely, Mr. Chairman. I am glad you gave me a chance to respond to that. There were, as Senator Sessions pointed out, cases where hundreds of death sentences were overturned at once. He suggests, and this suggestion has been made repeatedly, that our study counted those reversals. It did not count those reversals. It says clearly that it did not count those reversals. But some people who don't like all the error our study revealed continue to say that we did count those wholesale reversals.

We waited until there was a presumptively constitutional statute in each State and then we started counting error and calculating error rates under the modern system. Senator Sessions referred to a statement by the Alabama Attorney General that there is a 5-percent error rate in Alabama. The way the State's attorney general got that 5 percent error rate for Alabama is to assume that cases that are stuck in the courts and have not been reviewed are cases where the sentence or the verdict or the conviction is valid.

What we did was to wait and only count those cases that have actually been reviewed. When you only count the cases that have actually been reviewed in Alabama, without making assumptions about what you don't yet know because cases have not been reviewed, you get a reversal rate of about 70 percent in Alabama.

So I appreciate the opportunity to point out that we were very careful to avoid those obvious problems when we conducted our analyses.

Chairman LEAHY. Thank you very much, Professor Otis, State's Attorney Logli, Professor Yackle, Professor Scheck, Professor Liebman. Thank you very much.

The record will stay open for both questions and statements not only of the Senators, but any additions any of you wish to make. Thank you.

The Committee stands adjourned.

[Whereupon, at 12:20 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

QUESTION AND ANSWER

SENATOR JEFF SESSIONS'S QUESTION FOR PROFESSOR JAMES LIEBMAN

Professor Liebman, your death penalty study asserted an overall error rate of 68% in capital trials for the period 1973-1995. This statistic has been used by some as demonstrating the need to reform the death penalty system. However, several state attorney generals have challenged the accuracy of your study and uncovered what they claim are numerous errors in it. Upon reviewing your study on the Internet, we found only a small list of reversed cases for each state that was admittedly "incomplete." To enable us to review the accuracy of your entire study, please submit to the Committee a comprehensive list of every capital case reviewed in your study and every case counted as reversed for each State.

July 8, 2002

VIA FEDERAL EXPRESS AND VIA E-MAIL, W/O ENC.

Hon. Patrick Leahy, Chairman
c/o Patrick Wheeler
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Leahy:

Thank you for asking me to testify before the Judiciary Committee on June 18, 2002 in regard to the Innocence Protection Act and other important pieces of legislation.

On July 1, 2002, you faxed me a follow-up request for a comprehensive list of the data underlying the Columbia death penalty study about which I testified, to enable members of the committee to review the entire study. A print out of all the data underlying our two reports that deals with individual cases and whether or not they were reversed is enclosed. Those materials are divided into three segments, corresponding to direct appeal, state post-conviction and federal habeas cases. Each segment begins with a key that defines the short-form variables used in coding materials into our data bases.

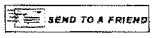
My Columbia colleagues and I have provided all of the data underlying our two reports to the Inter-University Consortium for Public and Social Research (ICPSR) at the University of Michigan. The ICPSR is the standard public depository for social science research data in the United States. Among the important services ICPSR provides is to make data available to the public in a standardized and manageable electronic form. We have been informed by ICPSR staff that our data will be posted on their public web site within the next two-three weeks. Interested individuals will likely find it most convenient to use the data
in the electronic format provided by ICPSR. The ICPSR web site is http://www.icpsr.umich.edu.

Again, thank you for asking me to testify.

Sincerely,

James S. Liebman
Simon H. Rifkind Professor of Law

AIM REPORT



Reed Irvine - Editor

August A, 2000

THE DEATH PENALTY SAVES LIVES

THIS ISSUE:

- Fewer Executions, More Murders
- Agenda Of The Major Media
- Targeting Bush
- Flawed Study
- The Clinton-Gore Record
- Nullification Tactics
- Hollywood's Contribution
- The Murder Capital
- O.J. And "Hurricane"

What You Can Do

- Notes

George W. Bush came out of his national convention with a significant lead over Al Gore. One poll put the margin at 17 points. While this is reassuring to his supporters, it is a lead that could quickly evaporate. In 1988, Democrat Michael Dukakis held a 17 point lead over Republican George Bush and lost the election. One of the wild cards in this particular campaign is the performance of the national media, which has shown the ability to manipulate issues and events for the benefit of the Democrats. It has already tried to turn the death penalty into a big campaign issue against Bush.

While the coverage has not kept the Texas governor from building up a formidable lead in the polls, it has helped reduce the number of Americans who support capital punishment. In 1994, 80 percent supported the death penalty, while today, according to the Gallup organization, the figure has dropped to 66 percent. The relentless anti-death-penalty drumbeat in the media appears to be eroding popular support for the execution of those found guilty of capital murder. The emphasis is on the danger of executing innocent persons, but the foes of the death penalty have yet to cite a case where that has happened in recent history.

Lost in excessive coverage of death penalty cases in Texas, which leads the nation in executions, is the fact that Gov. Bush lacks the power to commute death sentences unilaterally. Unless a majority of the pardons and paroles board recommends it, the Texas governor cannot spare the life of a convicted killer. On June 12, a front-page Washington Post article on how the Gary Graham murder case was testing Bush's "unflinching faith" in the death penalty put that fact far down in the story on the jump page.

If Bush is going to be held accountable for the executions in Texas, it is a record that some believe should be praised, not criticized. This is not a popular view in the major media, but veteran crime reporter William Tucker argues that because Texas has been responsible for one-third of the nation's executions, Governor Bush should take some of the credit for the declining national murder rate. Tucker, the author of several books, including *Vigilantes: The Backlash Against Crime in America*, claims that if the pace of executions were stepped up, more lives could be saved. Tucker's analysis of the trends in murder rates, using Justice Department figures, suggests that increasing the number of executions for murder is associated with a decline in the number of murders per 100,000 of population.

Fewer Executions, More Murders

Tucker says that with executions falling to very low levels in the 1960s and capital punishment being declared unconstitutional by the U.S. Supreme Court in 1971, the murder rate trended upward, reaching a new peak in 1979. The Supreme Court reversed its position on the death

penalty in 1976, and the murder rate dropped significantly through 1985 when there were 25 executions. That was only a quarter of the 1951 total, when the population was 35 percent smaller and there were only a tenth as many homicides.

America's bark was worse than its bite, and the decline in the homicide rate was reversed. It returned to the levels prevailing before the Supreme Court decided that hanging murderers was not what the Founding Fathers had in mind when they barred cruel and unusual punishment. Tucker writes, "What you see is that, as soon as we stop executing people, murders skyrocket. The amazing thing is that it's not just any old kind of murder. It's a very particular kind of murder called felony murder—murder in the course of a crime."

The number of executions was stepped up, reaching over a hundred in 1999, about the same number as in 1951. Tucker points out that the murder rate has again declined to around the 1967 level. "Though historically high," he says, "this is still a lot better than where we've been for the last three decades."

Tucker argues that the evidence is compelling that the death penalty saves lives. "Widely publicized executions proclaim that the justice system 'means business,'" he says. "The message seems to get through loud and clear to would-be murderers." He continues, "George Bush and the state of Texas deserve a large portion of the credit for this trend. One-third of the nation's executions take place in Texas—and the steepest decline in homicides has occurred in Texas, Oklahoma, Louisiana and Arkansas, which together account for nearly half the nation's executions."

Agenda Of The Major Media

Except for the New York Post, which published Tucker's graph and an article explaining it, the major media have shown no interest in the argument that the death penalty saves lives. Such a slant might leave pro-death penalty governors such as Bush looking good.

Michael Kelly, editor in chief of the National Journal, has accused the press of having an ideological obsession with the issue. He did a Nexis computer data search of major media coverage of the issue. It turned up 505 articles, press releases and mentions on television that discussed George W. Bush in the context of the death penalty. This was in one week alone! When he narrowed the search down to the Washington Post, the New York Times, and other major newspapers, he found 12 hits in the Times, four in the Post, and 139 in other major newspapers.

Contrasting the media scrutiny of the death penalty with the public's historical support for it, Kelly said, "All of this illustrates a curious thing that has happened to presidential elections—the rise of the media as a major force, perhaps the major force, in defining what are and what are not issues." The problem, he noted, is that the media's views "are far more liberal" than the general population's. "The invention of the Bush death penalty issue is typical of the media's habit of creating issues that skew coverage to (a) advance liberal causes and/or (b) favor the Democrat and disfavor the Republican," he said. As a group, he observed, "journalists believe in liberalism and in electing Democrats."

Former Washington Post reporter William Powers, in a July 8 posting on the National Journal web site, agreed, saying, "On issue after issue, the people lean one way, and we lean

the other. From school prayer to taxes, from abortion to missile defense, from gay marriage to foreign aid, we have utterly different views from the public we serve."

Targeting Bush

The campaign against the death penalty caused George W. Bush to interrupt his campaign in mid-July to grant a death row inmate, Ricky Nolen McGinn, a stay of execution. McGinn, who claimed he was innocent, had been given a death sentence for the rape and murder of his 13-year-old stepdaughter. Her blood was found in his car, on his clothes, and on an ax found in his car. A semen stain was found on her clothes and a pubic hair in her body. DNA tests had already been performed in the case, although they were said to be inconclusive. McGinn wanted time to perform new tests to supposedly prove his innocence. After Bush issued his stay, officials revealed that the new DNA tests failed to exonerate McGinn.

In the Gary Graham case, which received far more national and international publicity, Bush refused to intervene. Paul Duggan of the Washington Post, one of many reporters who tried to use the case to damage Bush, insisted there was only one witness against Graham, and that some other witnesses might clear him. In a column in the Wall Street Journal, two officials of the Texas-based group Justice for All, Dianne Clements and Dudley Sharpe, said the same ploy had been tried back in 1993, when some so-called new witnesses turned out to be Graham's cousin and a woman who married him in jail. The new witnesses who surfaced this time around had testified at the time of Graham's 1981 murder that they didn't see it and couldn't identify anyone.

Flawed Study

A much-publicized Columbia University report claiming the capital punishment system suffers from high reversal of error rates was ripped apart by Paul G. Cassell in the Wall Street Journal. Cassell noted that the media failed to emphasize that the report found no case of an innocent person being put to death. In some of these cases of so-called errors, the death penalty was actually carried out and the conviction reaffirmed. Some other "errors" were the result of anti-death penalty rulings by liberal judges.

The New York Times coverage of the Columbia report was so bad that the Nashville Tennessean took the Times to task, saying it had misrepresented the actual situation in that state. The Times had claimed that Tennessee had a 100 percent reversal rate. There was only one such case, and it had been reversed by an anti-death penalty judge.

The report found that only five percent of the 5,760 death sentences imposed from 1973-1995 were carried out. This is one of the great weaknesses of the death penalty. It suggests that the jurors are wrong 95 percent of the time. If that were true, it would be a powerful argument for dropping the jury system and leaving decisions of guilt and innocence up to judges.

Tennessee is an excellent example of this. Tennessee reinstated capital punishment in 1977 but 23 years later only one execution has been carried out. There are 96 currently pending death sentences in the state. When auto mechanic Robert Glen Coe was executed on April 19 of this year, 19 years had elapsed since his conviction. He had abducted, raped and brutally killed an 8-year-old girl, Cary Ann Medlin, in 1979. An article in the Tennessean described the crime and his confession:

"After raping and sodomizing the child, Coe said, he 'caught her around the neck and jerked her out of the car.' Coe tried to choke her, wrapping his fingers around her throat so tightly they left bruises. Cary Ann 'turned blue in the face and wouldn't die.' 'I told her to shut her eyes and I took out my pocket knife,' Coe wrote in his confession. He grabbed her hair with one hand and stabbed her in the throat with the other. So the auto mechanic, who had a few years earlier stabbed and tried to rape a woman in Florida, watched as blood squirted from her throat."

Three days after the murder, Coe traded in his car for another one and drove to a bus station, where he waited for transportation out of state. He had dyed his blond hair jet black with shoe polish, which was dripping down his forehead and neck when he was arrested. Despite all of this evidence and a confession, he thwarted justice for 19 years. He later recanted his confession, claiming he was innocent. He also pleaded insanity. These were all ploys to buy time.

The length of time it takes to carry out the death penalty has to detract from its deterrent effect. The average wait on death row is now more than 10 years even in cases in which the guilt has been firmly established. Tyrone Gilliam, executed by chemical injection in the state of Maryland this year, was convicted in 1988—12 years ago—of the shotgun slaying of a 21-year-old Baltimore hardware store accountant. He and his criminal associates robbed her of $3 and forced her to drive to a secluded area, where he shot her in the head with a shotgun. He confessed twice to pulling the trigger and his confessions were corroborated by two co-defendants. The case was reviewed and upheld 16 times by state and federal appellate courts.

The Clinton-Gore Record

While trying to make the death penalty into a campaign issue, the media have permitted Clinton and Gore to act like supporters of capital punishment while questioning how it is being carried out in Texas. This has enabled them to get some partisan political mileage out of the controversy. In 1992, Bill Clinton left the campaign trail to return to Arkansas for the execution of Ricky Ray Rector, a black death-row inmate said to have brain damage. At the time, Clinton was selling himself as a "new Democrat" who believed in capital punishment.

But once he became president and had the power to influence the pace of executions on the federal level, Clinton changed. Congress reinstated the federal death penalty in 1988, and Attorney General Janet Reno can authorize prosecutors to seek the death penalty in federal cases. But a study last year found that she had allowed federal prosecutors to seek the death penalty in less than 30 percent of the cases in which it could have been applied.

The study by Rory Little, a professor at Hastings College of Law in San Francisco, was published by the Fordham Urban Law Journal. It found that Reno reviewed 397 cases from 1993 to 1998, authorized 116 for death penalty prosecution and turned down 281. By contrast, her Republican predecessors, Richard Thornburgh and William Barr, sought death in 19 of 21 eligible cases from 1990 to 1992. The greater number of cases eligible for the death penalty under Reno reflects changes in the law in 1994 and 2000.

Nullification Tactics

While the Clinton-Gore administration continues to claim it supports the death penalty, it has tried to put judges on the bench who oppose it. For example, Clinton tried to get the Senate to approve Ronnie White as a federal judge. White, a member of the Missouri Supreme Court, had voted to spare the life of a multiple murderer who had stalked and slaughtered a sheriff, two deputies, and a sheriff's wife. When the U.S. Senate rejected his nomination, the media echoed Clinton's dubious claims that the decision amounted to racism because the judge was black. Clinton was offended that the Senate had taken the time to examine White's real record.

Clinton recently stayed the execution of Juan Raul Garza, a convicted drug kingpin said to be responsible for eight murders. Scheduled to be the first federal inmate to be executed in 37 years, he is one of 21 felons awaiting federal execution. Now he won't be executed until after the election, if then. The execution was halted on the pretext that the Justice Department needed an opportunity to develop clemency guidelines so that Garza could have a chance to ask for clemency.

Senator Orrin Hatch, the chairman of the Senate Judiciary Committee, called the delay "senseless," noting that Garza had never indicated a desire for clemency. In a letter to Reno, he asked why the department had not formulated such guidelines during the seven years Reno has been Attorney General. Clearly, the delay was a calculated political move. The execution would have taken place just days before the Democratic convention at a time when the capital punishment issue was still considered a potent weapon against Bush.

Just days after the Republican convention, the New York Times on August 7 ran a story about a rapist/murderer on death row in Texas scheduled for execution on August 9. This time, the excuse the Times offered for delaying the execution was said to be the killer's mental state. The killer, Oliver Cruz, who had a history of violence and had stabbed his victim 20 times, was said to be mentally impaired. Implying that Gov. Bush was callous toward the handicapped, the Times said, "One of George W. Bush's first acts as governor, in January 1995, was to reject a request for clemency for Marion Marquez, who suffered from severe brain damage and who had an IQ of 60 and the skills of a 7-year-old. Marquez was executed on the evening of Bush's inauguration."

Hollywood's Contribution

Although the media's obsession with this issue has not yet had any discernible impact on George W. Bush's standing in the polls, the potential political impact has not been lost on those opposed to capital punishment. Actor Mike Farrell, an official of Death Penalty Focus, detects a "seismic shift in death penalty politics." Wayne F. Smith, executive director of the Justice Project, which calls for reform of the death penalty, says that declining support for capital punishment shows that the issue is turning their way.

The Hollywood left, a major source of financial support for the Democratic Party, has stepped up its exploitation of the issue. Last year alone there were three major motion pictures starring prominent actors that dealt with the theme. They are:

- **The Green Mile (1999). Starring Tom Hanks: About the lives of prison guards on death row leading up to the execution of a wrongly accused man.**
- **The Hurricane (1999). Starring Denzel Washington. About a boxer allegedly wrongly imprisoned for murder.**

- **True Crime (1999). Starring Clint Eastwood. About a journalist investigating the case of an innocent man on death row.**

It had been four years since Hollywood had last released a movie on this theme. That was, "Dead Man Walking," (1995). Starring Sean Penn, it was about a nun who tries to help a death row inmate avoid execution for murder.

On television, the popular NBC program "West Wing" aired an episode earlier this year about a liberal president (played by Martin Sheen) who asks forgiveness from a priest for not stopping a federal execution.

The Murder Capital

In real life, as President Clinton was stopping the execution of a drug kingpin, the rising murder rate got the attention of the Washington Post. In an August 5 editorial, the Post complained that, "Nine men have been shot to death in the past week. About 153 people have been murdered thus far this year—vs. 144 at this point last year." The paper called for "leadership" from city officials and asked the D.C. Council to pass legislation requiring at least 60 percent of the police department's officers be assigned to the streets. Noting that police chief Ramsey had failed in his promise to reduce crime, and that Mayor Anthony Williams has been negligent, the Post said that "A worried city—with any hope to be joined at some point by the mayor—wants to know why."

One possible answer is the failure to use every weapon in the arsenal, including the death penalty. D.C. has no capital punishment statute. The residents voted it down in 1992.

Reno, of course, can act independently, and federal authorities recently announced they would seek the death penalty against Tommy Edelin, the alleged ringleader of a violent D.C. drug gang accused of ordering the killings of 14 people. Ignoring D.C. law, under which the maximum sentence is life without parole, federal authorities said they are acting under a federal statute. This will be the first capital case to be tried in the District in 30 years. In a previous case where Reno had sought the death penalty the accused, the killer of three people at a Starbucks coffee shop, escaped with a life sentence by pleading guilty. Janet Reno accepted the deal.

The death penalty, of course, is meaningless unless there are juries that vote to apply it. Just outside of Washington, D.C., a convicted killer whose guilt was not in doubt escaped the death penalty because some jurors thought he had a bad childhood. The killer, Willis Mark Haynes, had kidnaped and murdered three young women in Prince George's County, Maryland, in 2000.

Because the killings took place on federal land, it became a federal case and prosecutors sought the death penalty. Even though Haynes showed absolutely no remorse for his crimes, the jury wouldn't accept capital punishment. Several jurors decided that the extensive social and legal services provided to the Haynes family when he was a child had been inadequate. This gross miscarriage of justice did not outrage the liberal editorial writers at the Post.

O.J. And "Hurricane"

The campaign against capital punishment should not be confused with a concern for justice. The media just seem to have a soft spot for killers. The movie, "Hurricane," was based on the case of Rubin "Hurricane" Carter, a black boxer who was twice convicted of shooting up

a New Jersey bar at 2:30 a.m. in 1966, with a shotgun and handgun, killing three whites. Today this might be prosecuted as a "hate" crime. Carter and his sparring partner were caught driving a rental car that matched the description of the get-away car given by an eyewitness. A shotgun shell and a bullet were found in the car. Carter, a street tough who had served four years in prison for muggings, was portrayed as a hero in the movie. The detective who investigated his case was demonized. The support of celebrities such as Mohammed Ali and a bleeding-heart judge, Lee Sarokin, helped free him from prison after 19 years.

O.J. Simpson, who was found legally liable for the brutal slashing murders of his ex-wife and Ron Goldman, was recently interviewed by Katie Couric on the NBC Today Show and on the Fox News Channel. He was found not guilty in a criminal court by a largely black jury. His black lawyer, Johnnie Cochran suggested Simpson had been framed by racist police.

Simpson's recent TV appearances hyped his involvement in an Internet company that allowed people to question him for a fee. Simpson claimed that the money would go to charities and that he wouldn't make any money from the venture. On the Today show Katie Couric revealed that one of the charities, a camp for children with cancer, didn't want Simpson's tainted money.

On the Fox program, Simpson made headlines by blaming his ex-wife for her own murder. He said she had been hanging out with the wrong people. Some Fox news personalities openly expressed disapproval of Fox giving Simpson a platform to spout such nonsense. Barbara Walters canceled Simpson's appearance on her daytime talk-show on ABC, "The View." But as the years pass and a generation that doesn't remember those horrible murders comes on the scene, Simpson, like Rubin Carter, may get the folk hero treatment from Hollywood.

What You Can Do

Send the enclosed cards or your own cards or letters to James E. Hall, chairman of the National Transportation Safety Board, Cong. John J. Duncan, Jr., Chairman of the House Subcommittee on Aviation, and to an editor of your choice.

AIM Report NOTES FROM THE EDITOR'S CUFF

WRITING THESE NOTES HAS BEEN DELAYED PARTLY BECAUSE OF AN AD THAT WE PUT IN the Washington Times on August 15 for the TWA 800 Eyewitness Alliance. Since there are no TWA 800 eyewitnesses in the Washington area that we know of, I agreed to take the phone calls that the ad stimulated. It has been keeping me busy. The ad had a big, bold headline that read, "We Saw TWA Flight 800 Shot Down by Missiles." It expressed the anger of the eyewitnesses that none of them was allowed to testify at the NTSB public hearing on TWA 800 in December 1997. That was done at the insistence of the FBI, which rightly feared that their testimony would undermine the video produced by the CIA to discredit the evidence offered by all the eyewitnesses who said they saw anything like a streak of light. You can see this ad on AIM's web site, www.aim.org. The response was so encouraging that we ran the ad again in the Washington Times on Aug. 22, the day the NTSB began its incestuous discussion of its final report on the cause of the TWA 800 crash.

FRED MEYER, THE COORDINATOR OF THE EYEWITNESS ALLIANCE, WROTE TO ALL

FIVE members of the NTSB, sending them a copy of the ad and warning that history will not treat them kindly if they close down the investigation without having heard from a single one of the hundreds of eyewitnesses who have said that they saw a missile or missiles destroy the plane. Meyer said, "Your conduct of this investigation will go down in history as a good example of how aviation crash investigations should not be handled. As one of your employees has told us, this investigation would be much closer to finding the real cause of the crash if it had been handled with fairness and objectivity."

"AMERICA MUST KNOW THE TRUTH" WAS THE HEADLINE OVER THIS MESSAGE: "ON AUG. 22-23 the NTSB will meet to review and approve its final report on what caused the crash....[T]his board will be under heavy pressure to say the initiating event was a fuel tank explosion....We, the eyewitnesses, know that missiles were involved. We don't know who launched them, but for some reason our government has lied and tried to discredit all of us to keep that question from being addressed....The claim that our evidence is worthless is false and we want to know who is behind it. Hundreds of us saw what happened. The FBI, CIA and NTSB must not be allowed to get away with this cover-up by defamation of the eyewitnesses. We appeal to those who know why this is being done to share their information with us. Confidentiality is guaranteed."

THIS HAS GENERATED A LOT OF CALLS. SOME ARE EXPRESSIONS OF GRATITUDE THAT someone is doing something about this cover-up. Some callers can hardly believe that our government would behave so badly. Many of them want to know how they can help. Some have volunteered without being asked to contribute to the cost of running the ads. A few have interesting information to offer. A retired lieutenant commander called to say that he has wrestled with his conscience and has decided that it is better to tell what he knows because his first duty is to the Constitution. What he knows is that in August, 2000 he learned that the highly specialized unit he commanded had been designated to take part in the bombing of Arab training camps in Sudan where the terrorists who shot down TWA 800 were believed to have been trained. They trained for this with an F-14 squadron for several weeks, but they never got the order to go. Someone evidently had second thoughts about it. This is evidence that in the first month after the crash many in the Navy were convinced that missiles were the cause. It doesn't prove that they were, but it does show that disregarding eyewitnesses is dumb.

ANOTHER CALLER SAID HE HAD A GOOD FRIEND WHO IS A GRADUATE OF WEST POINT who claims that everyone at the Pentagon knows that the plane was shot down by a missile that was launched from one of our ships by mistake. His friend had knowledge of the maneuvers that were scheduled to take place off Long Island that night. The caller promised to check with the friend and see if he would be willing to go public. We haven't yet heard back from him. Another caller, evidently an employee of the NTSB, advised us not to put all the blame for the botching of the investigtion on the FBI. He said a lot of it should go to Dr. Bernard Loeb of the NTSB. He was the genius who played an important role in the decision to blame the crash on the fuel tank.

THE NTSB DEMONSTRATED HOW MUCH IT FEARS THE EYEWITNESSES AT THE OPENING OF its board meeting on August 22. They got up in the morning and opened their Washington Times and found themselves confronted with that powerful full-page message from the TWA 800 Eyewitness Alliance. Then when they came into the auditorium where the meeting was held they were offered an 11 x 17 copy of the ad. I and others were handing them out. After 30 minutes or so, a security guard came up and told me that I could not distribute the ads. I pleaded my 1st Amendment rights to no avail. The guard, Jose, threatened to remove me forcibly if I did

not leave. I said, "You will have to carry me out." The lobby was loaded with television crews that didn't have anything to shoot, and I seized the opportunity NTSB Chairman Jim Hall was giving me. I went limp on the floor and they carried me out, with half a dozen TV cameras recording it all. As soon as I was on my feet, I gave a speech to those cameras. I said that the government not only won't let the eyewitness testimony be heard, but it has tried to discredit all those who described seeing anything like a missile by having the CIA produce a ridiculous video. It made the ABC evening news that night.

BILL KELLER, MANAGING EDITOR OF THE NEW YORK TIMES, INFORMED ME ON AUG. 7, that they are giving serious thought to improving their corrections. This was a response to my criticism of the four-sentence correction of their report that untold thousands had been killed or injured by the Chernobyl nuclear power plant accident. It didn't even say that the Chernobyl accident resulted in only 48 deaths. I pointed out to Keller that the Times recently published two articles about John Stossel saying on ABC's 20/20 that lab analysis had found no pesticide residues on either organic or conventional produce. There had been no lab analysis. The Times took credit for ABC's decision to correct this on Aug. 11. Its two stories took a total of 26 column inches. I have written to Keller saying, "Unless you have vastly different standards for ABC News than for your own paper, it is not too late to make a proper correction." I sent him clippings showing how other papers do a good job of using their letters columns to correct errors, something the Times has virtually eliminated by imposing a 150-word limit on letters to the editor. We have yet to see any change.

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Senate Judiciary Committee
"Protecting the Innocent: Proposals to Reform the Death Penalty"
Statement by Amnesty International
June 18, 2002

The Senate Judiciary Committee today will consider legislation to ensure justice prevails in the American judicial system and to protect against the execution of innocent people. Amnesty International urges the Congress to act quickly to address the problems that plague the death penalty system in this country and that make it inevitable to create new victims.

This year the 101st person was exonerated of capital charges in the US and the Supreme Court has considered five cases that affect the administration of the death penalty during the 2001-2002 session. The Department of Justice in 2001 launched its own study of the federal death penalty to determine whether the system is racially and ethnically biased, leads to arbitrariness and discrimination in its application, and could result in taking the life of an innocent person. Congress must respond to the growing tide of concern about the fallibility of the death penalty system and the possibility of executing innocent people.

Amnesty International USA supports the National Death Penalty Moratorium Act (S. 233) sponsored by Senator Russell Feingold as an important step to ensure justice and the rule of law in the United States. Governor George Ryan of Illinois and members of the Illinois Governor's Commission on Capital Punishment have provided important and timely perspectives on their state's experience with the challenges and shortcomings in Illinois' application of the death penalty. Amnesty International over many years has found that the death penalty systems of all 38 states and that of the federal government reflect to varying degrees the problems identified by the recent Governor's Commission on Capital Punishment in Illinois.

At a minimum, Amnesty International urges the Congress to act urgently to prevent the execution of innocents by immediately implementing a moratorium on federal executions and creating a National Commission on the Death Penalty, as stipulated by S. 233. Amnesty International strongly supports S. 233 as a step toward ensuring the United States government upholds fundamental principles of justice and human rights.

The Innocence Protection Act (IPA - S 486 / HR 912) is crucial legislation to remove innocent people from death row. Congress should act decisively on this issue, the outcome of which could literally determine life or death for the innocent. Amnesty International believes the IPA is an important first step toward securing a fair system of justice for all and for safeguarding against the execution of innocent people.

Amnesty International is a worldwide grassroots movement that promotes and defends human rights, with over 300,000 members in the United States and one million worldwide. For information, contact Ms. Alex Arriaga, Director of Government Relations, 202-544-0200, or visit www.amnestyusa.org.

Increasingly, inmates have been released because of DNA evidence. Unfortunately not all of those whose cases might have been reversed by DNA evidence will benefit from such developments -- they have already been put to death. While it is too late to save those wrongfully executed, we can ensure that DNA evidence is made available in current death penalty cases. Contrary to arguments by death penalty proponents, the releases due to exonerations are not an indication that the system is working: many of those released were able to prove their innocence only because of the tireless efforts of unpaid lawyers or activists who investigated their case.

The Innocence Protection Act is a matter of fairness. It is a bill to ensure that America's system of justice does not create more victims. It is a bill meant to address a broken system that can lead to the execution of innocent people by providing vitally important safeguards to every person accused of a capital crime, including access to competent, experienced counsel, juries that are informed of alternative sentencing options, and the right to DNA testing of available evidence. The Congress should act quickly to pass the IPA so that all who come before American courts receive a just trial and so that truth may prevail.

In a country that is founded on the principle of justice for all, it is especially tragic that the problems associated with the administration of capital punishment and the high risk of executing the innocent continue to effect individuals throughout the United States.

Amnesty International is a worldwide grassroots movement that promotes and defends human rights, with over 300,000 members in the United States and one million worldwide. For information, contact Ms. Alex Arriaga, Director of Government Relations, 202-544-0200, or visit www.amnestyusa.org.

A RESPONSE TO PROFESSOR LIEBMAN'S "A BROKEN SYSTEM"

Prepared by:

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November 2000

A. OVERVIEW

"A Broken System: Error Rates In Capital Cases, 1973-1995" published by Professor James S. Liebman of the Columbia Law School and several colleagues in June 2000 purports to track every death sentence case that went through the legal system in the 23 years following the United States Supreme Court's 1972 landmark decision in Furman v. Georgia, 408 U.S. 238 (1972) which held that the existing practice of absolute jury discretion in capital sentencing resulted in the arbitrary and discriminatory infliction of the death penalty in violation of the Eight and Fourteen Amendments.

The study had its origin in a request by Senator Joseph F. Biden, Jr., then chairman of the Senate Judiciary Committee, in 1991 to Professor Liebman to calculate the frequency with which federal judges found errors in appeal of death penalty cases and then set aside the sentence.

Professor Liebman derived information used for the study from a search of all published state and federal judicial opinions in

the United States conducting direct and habeas review of state capital judgments. He then 1) checked and catalogued all the cases the opinions revealed; and 2) collected hundreds of items of information about these cases from published decisions and the NAACP Legal Defense Fund's quarterly death row census; and 3) tabulated the results.

Notably, the study did not include New York, New Jersey, and Connecticut, states in which either no cases have been appealed or no appeals have gone through the full three-stage (direct appeal, state post-conviction review, and habeas) review process.

The principal findings set forth in the study are as follows: of the 4,578 death sentences adjudicated completely, i.e., through federal habeas review, during the 23-year period, 68% -- more than two out of three -- were found to be "seriously flawed." According to the study, 1,885 death sentences (41%) were reversed because of serious error when reviewed on direct appeal. Of the death sentences that survived state direct and post-conviction review, 599 were finally reviewed in a first federal habeas corpus petition during the 23-year study period. Of those 599 death sentences, 237 (40%) were reversed due to serious error. Based on the foregoing, the study concludes that "[n]ationally, over the 1973-1995 period, the overall error-rate in our capital punishment system was 68%."

The study identified the most common errors necessitating reversal as (1) egregiously incompetent defense lawyering (accounting for 37% of the state post-conviction reversals), and (2) prosecutorial suppression of evidence that the defendant is innocent or does not deserve the death penalty. In the three states with the most executions since 1976, error rates ranged from 18% in Virginia to 52% in Texas and 73% in Florida.

According to the study, the average time between sentencing and execution was nine years. As a result, only five percent of all defendants (5,760) who had been sentenced to death since 1973 had been executed.

B. PROFESSOR JAMES S. LIEBMAN

It is unlikely that even Professor Liebman would characterize himself as a "neutral" observer in the death-penalty debate. On the contrary, he is a zealous partisan, clearly committed to the abolition of capital punishment. Between 1982 and 1997, and most recently in Lindh v. Murphy, 521 U.S. 320 (1997), Liebman represented no less than eight capital defendants in appeals before the United States Supreme Court. Prior to joining the Columbia Law School faculty in 1985, Professor Liebman served as assistant counsel to the NAACP Legal Defense and Education Fund for six years. (Exh. 4). During his tenure with that organization he specialized in school desegregation, capital punishment, and habeas corpus matters. He is also co-author of a defense-oriented treatise on habeas practice entitled Federal Habeas Corpus Practice and Procedure.

His vehement opposition to capital punishment is plainly revealed in the opening pages of the study. It begins with a lengthy discussion of recent developments in various states, including the moratorium on executions imposed by the governor of Illinois, which Professor Liebman believes reflects a marked decline in support for capital punishment nationwide. Professor Liebman then specifically attributes this decline (unaccompanied by any supporting empirical evidence) to the fact that death sentences are perceived by the general public as "fraught with error, causing justice too often to miscarry, and subjecting innocent and other undeserving defendants -- mainly, the poor and racial minorities -- to execution."[1] Doubtless, the authors of "A Broken System" are confident that their study will intensify and galvanize opposition to capital punishment by broadly indicting a system which they allege is neither a success nor even "minimally rational."

C. GENERAL CRITICISMS

In response to the publication of "A Broken System," the preeminent sociologist and death penalty supporter, Professor James Q. Wilson, published an op-ed piece in the New York Times inviting readers to note what Liebman did not, nor evidently could not, claim: that, at present, there is no reliable proof that any innocent person has been executed since the resumption of capital punishment in 1973. James Q. Wilson, What Death-Penalty Errors?, New York Times, July 10, 2000. (Exh. 5). At best, according to Wilson, Liebman can only speculate that the large number of appellate reversals "leaves doubt [appellate courts] do catch" all of the errors.

Professor Wilson also astutely noted what is perhaps the report's most conspicuous shortcoming; the fact that it "lumps together cases going back to 1973 with those decided more recently, even though the Supreme Court in 1976 created new procedural guarantees that automatically overturned many of the death-penalty [verdicts rendered] between 1973 and 1976."

Because Professor Wilson is neither a legal historian nor a lawyer, he can be forgiven for understating the significance of the profound evolution and development of federal death penalty jurisprudence in the decade immediately following the United States Supreme Court's 1976 decision in Gregg v. Georgia, 428 U.S. 153 (1976) and the impact these developments necessarily have had on the viability of death sentences meted out prior to and during this period. Below is small selection of seminal Supreme Court cases decided between 1976 and 1988 which unquestionably generated numerous reversals in many cases tried shortly after Furman.

Woodson v. North Carolina, 428 U.S. 280 (1976): Invalidating as cruel and unusual a death penalty statutory scheme which mandated a death sentence when the jury found defendant guilty of first-degree murder.

Coker v. Georgia, 433 U.S. 584 (1977): Holding that the

sentence of death for the crime of rape was grossly disproportionate and an excessive punishment forbidden by the Eighth Amendment.

Lockett v. Ohio, 438 U.S. 586 (1978): Holding that a sentencer cannot be precluded from considering as a mitigating factor any aspect of defendant's character or record and any circumstances of the offense defendant offers in mitigation.

Godfrey v. Georgia, 446 U.S. 420 (1980): Holding that the Georgia Supreme Court's broad and vague construction of "outrageously or wantonly vile, horrible, or inhuman" aggravating factor violated both the Eighth and Fourteenth Amendments.

Enmund v. Florida, 458 U.S. 782 (1982): Holding that a death sentence for defendant who aids and abets a felony in the course of which murder is committed by accomplices, but who does not himself kill or intend that killing take place violated the Eighth and Fourteenth Amendments. Professor Liebman himself represented defendant in this case.

Mills v. Maryland (1988): Holding that a statute which precludes a jury from considering any mitigating evidence unless it is unanimous violates the Eighth and Fourteenth Amendments.

The foregoing, while abbreviated, is a representative sample of watershed decisions that profoundly altered and reshaped the legal landscape well after 1973 and into the next decade. And, as observed by Professor Wilson, it is not at all clear from "A Broken System" what percentage of the reversals reported were in fact attributable to "these big changes in rules." It may reasonably be assumed, however, that the percentage is not insignificant.

Other criticisms have been lodged against "A Broken System." Nevada's Attorney General recently took issue with Liebman's methodology, noting that although that state's death penalty records are kept by the Nevada Supreme Court, Attorney General, Department of Prisons, 17 district attorney and 17 court clerks, Liebman elected to obtain case information from criminal defense attorneys and the NAACP Capital Punishment Project, an organization

committed to the abolition of the death penalty. Liebman stated that, in Nevada, there were 34 reversals in 108 cases, for an error rate of 38%. Conducting an independent analysis of error rate, the Nevada Attorney General's Office, however, found that of 152 cases, only 30 death sentences were reversed. The actual error rate was thus a much lower 19%.

In addition, Nevada's Attorney General's Office echoed Professor Wilson's concern that "A Broken Window" may propagate the plainly erroneous perception that the innocent are being unjustly executed. On the contrary, the Nevada Attorney General's Office, in its assessment of death penalty cases, noted that most reversals were based on "attorney or judge procedural error," and others occurred "where juries followed the existing law, but later the Supreme Court changed it." At bottom, the Nevada Attorney General's Office expressed the common-sense perspective that a 19-23% error rate in all death penalty cases tried since 1973 hardly demonstrates a system in disrepair. Quite the contrary, it proves that Nevada's appellate courts function as an effective screen against potential miscarriages of justice with respect to the implementation of the death penalty.

D. THE NEW JERSEY EXPERIENCE

At present, the reversal rate of New Jersey capital cases reviewed on direct appeal exceeds the overall 68% reversal rate touted by Professor Liebman in his study. Specifically, since the reinstitution of capital punishment in this State in 1982, the Supreme Court has, commencing with State v. Ramsuer, 106 N.J. 123 (1987), reviewed 51 death sentences on direct appeal. Of those 51 cases, the Court found reversible error in 36, or 70%, of all cases examined.[1] (Exh. 3). In 19 out of these 36 cases, or 52%, the Supreme Court affirmed the defendant's capital murder conviction but vacated his or her death sentence.

Of greater significance, instructional error accounted for an

astounding 66% (24) of all reversals. Moreover, a substantial percentage of the foregoing errors were attributable to two profound yet entirely unforeseeable (from the trial court's perspective) changes or interpretations of the death penalty statute. The first of these developments was the Legislature's amendment of the death penalty statute in 1985 requiring the State to prove, in order to obtain a death sentence, that any applicable aggravating factor or factors outweigh beyond a reasonable doubt any applicable mitigating factors, and the Court's subsequent decision in State v. Biegenwald (II), 106 N.J. 13 (1987) that the death penalty could not be imposed, irrespective of whether the case occurred before or after the adoption of the 1985 amendment, "without a finding that the aggravating factors outweighed the mitigating factors beyond a reasonable doubt."[2] This holding resulted in the reversal of numerous death verdicts obtained prior to the Court's decision in Biegehwald (II) (Lodato, Koedatich, Zola, Hunt, (Marie) Moore, Davis, and Pitts).

Equally unanticipated was the Supreme Court's 1988 holding in State v. Gerald, 113 N.J. 40 (1988) that as a matter of state constitutional law, only those who knowingly or purposely cause death -- as opposed to those who purposely or knowingly cause serious bodily injury resulting in death -- were eligible to receive the death penalty. Subsequent to Gerald, the Court decided a number of cases which were tried or pled before that decision. The vast majority of these appeals resulted in reversals (Coyle, Long, Pennington, Dixon, Clausell, Harvey, and Erazo). In State v. Davis, 116 N.J. 341 (1989) and State v. Jackson, 118 N.J. 484 (1990), the Supreme Court vacated guilty pleas to capital murder because in neither case did the defendant establish under Gerald whether he intended to knowingly or purposefully kill. All told, the Gerald decision precipitated 10 (27%) of the 36 reversals.[3]

Also in 1988, the United States Supreme Court in Mills v. Maryland, 468 U.S. 367 (1988) announced that a sentencer must be

permitted to consider all mitigating evidence, and therefore a state may not constitutionally require mitigating factors to be found unanimously before they can be used in the weighing process. In the wake of Mills, death sentences were reversed in State v. Bey (II), State v. Hightower (I), and State v. Dixon. The United States Court of Appeals for the Third Circuit's decision in Humanik v. Beyer, 871 F.3d 342 (3d Cir.), cert. denied, 493 U.S. 812 (1989), which declared New Jersey's diminished capacity statute unconstitutional, compelled reversals in State v. (Samuel) Moore and State v. Oglesby, two cases tried before Humanik was decided. In State v. Purnell, 126 N.J. 518 (1992) the Supreme Court reversed defendant's death sentence and remanded for further proceedings, reasoning that the failure to charge felony-murder in a case where an aggravating factor was predicated on the commission of an underlying felony was reversible error.

Lastly, in State v. Brown, 138 N.J. 481 (1994) and State v. Mejia, 141 N.J. 475 (1995) the Supreme Court vacated death sentences based on the trial courts' failure to instruct the jurors in those cases that they need not be unanimous with respect to the finding of death eligible "triggers," i.e., "own conduct" and "intent to kill."

With respect to reversals unrelated to instructional error, in only two appeals, State v. Perry, 124 N.J. 128 (1991) and State v. (Marie) Moore, 113 N.J. 239 (1988) did the Supreme Court conclude that insufficient evidence had been introduced to establish the death eligible status of the defendants, although neither Perry nor Moore were factually innocent of the homicides they were charged with committing. In State v. DiFrisco (I), 118 N.J. 253 (1990) the Court concluded that defendant's death sentence had to be set aside for want of any extrinsic corroboration of his confession. Following a new penalty phase at which the jury reimposed the death penalty, his second death sentence was subsequently affirmed in DiFrisco (II).

Several capital defendants have raised claims of ineffective representation on direct appeal (Davis, Savage, Dixon, Marshall, Chew, and DiFrisco), yet only one, Savage, prevailed in overturning his conviction and death sentence on that basis. Notably, on remand the State obtained a capital murder conviction with regard to one of Savage's two victims and a non-capital verdict of murder as to the other. At Savage's second penalty trial, the jury unanimously found two aggravating factors but was unable to agree on the appropriate penalty. Obviously, Savage was anything but "innocent" of the killings. Furthermore, ineffective assistance of counsel claims have been rejected by the Supreme Court in all three appeals from the denial of post-conviction relief by those capital defendants, Marshall, Martini, and Bey, whose cases have proceeded to that stage of appellate review. There is thus no basis whatsoever to conclude that capital defendants -- particularly indigent defendants represented by the Office of the Public Defender -- have received and continue to receive anything less than exceptional representation at both the trial and appellate level.

In marked contrast to Professor Liebman's finding of widespread prosecutorial misconduct predicated on the withholding of exculpatory material in other jurisdictions, only one death sentence in New Jersey has been vacated based on the withholding of alleged "Brady" material.[4] In State v. Nelson, 155 N.J. 487 (1988) the Court overturned defendant's death sentence for the murder of a police officer because the Camden County Prosecutor's Office failed to turn over to the defense a complaint filed against it by the brother of one of defendant's victims. The Court believed that evidence of the complaint would have been favorable to defendant in the penalty phase because "[t]he allegation that law enforcement personnel had been inadequately trained lent direct support to defendant's catch-all mitigating factor." The defendant's plea to capital murder was left undisturbed by the Court. It bears noting

that two justices strenuously disagreed with the majority's finding of materiality, and expressed their view that the jury's verdict of death was indeed "worthy of confidence." In any event, the survey of capital appeals in New Jersey does not sustain Professor Liebman's thesis that prosecutors nationwide all-too-frequently cast aside their oaths to do justice when pursuing capital verdicts.

Finally, in 13 cases reversed by the Supreme Court, prosecutors again attempted to secure capital verdicts. Five of those retrials resulted in the reimposition of the death penalty (Bey, Biegenwald, Hightower, Harvey, and DiFrisco).[5] Prosecutors obtained murder convictions in the remaining cases. Indeed, with one exception, Walter Oglesby[6], every capital defendant whose death sentence was not ultimately affirmed by the Supreme Court presently stands convicted of murder. Put differently, no jury in this State has ever convicted and sentenced to death a factually innocent defendant.

E. CONCLUSION

Ultimately, New Jersey's relatively high reversal rate is predominantly attributable to early yet profound refinements to this State's death penalty statute wrought by the Supreme Court of New Jersey and the Legislature. Little else can explain why the Court is now strongly inclined to affirm, rather than reverse, death sentences on direct appeal.[7] Indeed, in the last ten direct appeals taken by capital defendants, the Supreme Court has reversed only one death sentence (Nelson). This development contrasts sharply with the period prior to Marshall (I) when the Court reversed every death sentence it scrutinized in an unbroken succession of opinions. Moreover, the Court has yet to reverse a death sentence on grounds of disproportionality or reverse a trial court's denial of post-conviction relief in a capital case.

Our Supreme Court is, furthermore, unrelenting in its effort to monitor for the presence of racism in the administration of the death penalty, as evidenced by its appointment of a standing special master, the Honorable David S. Baime, P.J.A.D., to conduct annual systemic studies of the death penalty. Indeed, this past term in In re Proportionality Review Project (II), 165 N.J. 206 (2000) the Court unambiguously embraced Judge Baime's finding that no reliable evidence exists demonstrating that the race of the defendant or victim plays any role in the imposition of capital punishment in New Jersey. When all is said and done, reversal rates, as reflected by New Jersey's experience, do not accurately measure whether the death penalty "works" as an effective system of punishment. Following a relatively brief period of refinement and clarification of the death penalty statute and death penalty practice, our Court is obviously confident that death penalty verdicts returned in New Jersey are exceptionally fair and just. Contrary to the portrait of the death penalty drawn by one of its harshest and prominent critics, Professor Liebman, New Jersey's system of capital punishment has never ensnared the innocent, nor is it tainted by racism. At bottom, New Jersey's death penalty works, and it works exceedingly well.

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[1] Interestingly, Liebman's findings confirmed a complaint by supporters of the death penalty who say the appeals process is entirely excessive. Liebman, however, hypothesizes that the reason capital sentences spend so much time awaiting judicial scrutiny is precisely because they are so persistently and systematically fraught with "alarming amounts" of error. A more compelling explanation for delay was articulated by Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit. In a lecture on the death penalty reprinted in the Case

Western Reserve Law Review, Judge Kozinski argued that "[t]he simple fact is the process takes so long because there is a concerted effort afoot to slow it down, and because our legal system requires scrupulous review before a death sentence can be carried out." Judge Kozinski wryly observed that "[i]t is somewhat akin to the classic definition of chutzpah for death penalty opponents to say we can't execute someone too fast because he is entitled to a searching review, and then to say what we are doing is immoral when we delay the execution precisely to afford such review." The Honorable Alex Kozinski, Death: the Ultimate Run-On Sentence, 46 Case W. Res. L. Rev. 1, 25 (1995).

1 A trial court vacated Raymond Kise's death sentence in 1987 because of error in the charge with respect to the jury's consideration of aggravating factors. Kise was spared the death penalty at a subsequent penalty trial before a judge.

2 When enacted in 1982, the statute authorized the imposition of the death penalty if the aggravating factor or factors proven beyond a reasonable doubt were not outweighed by one or more mitigating factors.

3 In response to Gerald, the New Jersey Constitution was amended in 1992 by the voters to permit "SBI" murderers to be sentenced to death.

4 The Supreme Court rejected "Brady" claims alleged in Marshall (I) and (III), DiFrisco (I), and Martini (IV).

5 Biegenwald and Hightower's second death sentences were subsequently reversed by the Supreme Court.

6 Walter Oglesby pled guilty to aggravated manslaughter in February 1992.

7 The trend toward affirmances is depicted in Exhibit 1.

Statement of Senator Maria Cantwell
Senate Judiciary Committee Hearing on:
Protecting the Innocent: Proposals to Reform the Death Penalty
June 18, 2002

Thank you Mr. Chairman for holding this hearing and for your fine work on the Innocence Protection Act of which I am a cosponsor. I'd like to thank you for your leadership on this issue, and I am hopeful that we will soon be voting on passage of this legislation.

As a supporter of the death penalty, I believe that this legislation is absolutely critical to making sure this punishment is fairly administered. We are facing a crisis. It is clear that in multiple states in this country there are currently people on death row who in fact did not commit the crime for which they were convicted. As a society, we cannot tolerate any question that a person executed by the state may not have been guilty.

The Innocence Protection Act, endorsed by President Bush during his campaign, assures that DNA testing will be available in all death penalty cases. DNA will be an invaluable tool in ensuring the fair and just application of the death penalty and preventing the execution of innocent people. We know that DNA has the potential to exonerate individuals currently serving time in prison for crimes they did not commit, and DNA has already exonerated over 100 individuals who have wrongly served a cumulative 800 years.

While improving access to DNA is a crucial step that we must take, The Innocence Protection Act also takes another key step to ensure that people facing the possibility of the death penalty are not wrongly convicted. By requiring the establishment of national standards to ensure that competent counsel is available in all death penalty cases, this bill will significantly increase our confidence that juries are making informed decisions about the guilt of those facing the death penalty.

As we have achieved new recognition of the importance of DNA testing, we have come to learn that many people convicted of offenses carrying a sentence of death have received quite abysmal legal representation that could well have had an impact on their conviction. As Justice Sandra Day O'Connor, a strong supporter of the death penalty, said last summer, "[p]erhaps it is time to look at minimum standards for appointed counsel in death penalty cases and adequate compensation for appointed counsel where they are used."

In my state of Washington, our state Supreme Court has recognized that we must do more to ensure the competency of counsel in death penalty cases. After a local study found that one out of every five people facing execution in Washington state was represented by counsel who had been disbarred, suspended, or arrested, the Supreme Court took a leadership role in establishing new standards for the appointment of counsel in capital cases.

The new standards, adopted just this month, require counsel to have demonstrated a proficiency and commitment to quality representation in capital cases. The new standards will ensure that each person facing the death penalty will have at least two attorneys appointed to represent him

or her, that each of the attorneys will have five or more years of experience in criminal law, and that no attorney will be handling more than one death penalty trial at a time.

I applaud the Justices on the Washington State Supreme Court for their leadership on this issue, and I believe that the time has come to expand upon the work done in my state and in other states to ensure that the people convicted of crimes carrying a sentence of death are in fact guilty of those crimes. I thank the Chairman and look forward to voting for his legislation.

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Friday, June 16, 2000

We're Not Executing the Innocent
By Paul G. Cassell

On Monday avowed opponents of the death penalty caught the attention of Al Gore among others when they released a report purporting to demonstrate that the nation's capital punishment system is "collapsing under the weight of its own mistakes." Contrary to the headlines written by some gullible editors, however, the report proves nothing of the sort.

At one level, the report is a dog-bites-man story. It is well known that the Supreme Court has mandated a system of super due process for the death penalty. An obvious consequence of this extraordinary caution is that capital sentences are more likely to be reversed than lesser sentences are. The widely trumpeted statistic in the report -- the 68% "error rate" in capital cases -- might accordingly be viewed as a reassuring sign of the judiciary's circumspection before imposing the ultimate sanction.

The 68% factoid, however, is quite deceptive. For starters, it has nothing to do with "wrong man" mistakes -- that is, cases in which an innocent person is convicted for a murder he did not commit. Indeed, missing from the media coverage was the most critical statistic: After reviewing 23 years of capital sentences, the study's authors (like other researchers) were unable to find a single case in which an innocent person was executed. Thus, the most important error rate -- the rate of mistaken executions -- is zero.

What, then, does the 68% "error rate" mean? It turns out to include any reversal of a capital sentence at any stage by appellate courts -- even if those courts ultimately uphold the capital sentence. If an appellate court asks for additional findings from the trial court, the trial court complies, and the appellate court then affirms the capital sentence, the report finds not extraordinary due process but a mistake. Under such curious scorekeeping, the report can list 64 Florida postconviction cases as involving "serious errors," even though more than one-third of these cases ultimately resulted in a reimposed death sentence, and in not one of the Florida cases did a court ultimately overturn the murder conviction.

To add to this legerdemain, the study skews its sample with cases that are several decades old. The report skips the most recent five years of cases, with the study period ostensibly covering 1973 to 1995. Even within that period, the report includes only cases that have been completely reviewed by state appellate courts. Eschewing pending cases knocks out one-fifth of the cases originally decided within that period, leaving a residual skewed toward the 1980s and even the 1970s.

During that period, the Supreme Court handed down a welter of decisions setting constitutional procedures for capital cases. In 1972 the court struck down all capital sentences in the country as involving too much discretion. When California, New York, North Carolina and other states responded with mandatory capital-punishment statutes, the court in 1976 struck these down as too rigid. The several hundred capital sentences invalidated as a result of these two cases inflate the report's error totals. These decades-old reversals have no relevance to contemporary death-penalty issues. Studies focusing on more recent trends, such as a 1995 analysis by the Criminal Justice Legal Foundation, found that reversal rates have declined sharply as the law has settled.

The simplistic assumption underlying the report is that courts with the most reversals are the doing the best job of "error detection." Yet courts can find errors where none exist. About half of the report's data on California's 87% "error rate" comes from the tenure of former Chief Justice Rose Bird, whose keen eye found grounds for reversing nearly every one of the dozens of capital appeals brought to her court in the 1970s and early 1980s. Voters in 1986 threw out Bird and two of her like-minded colleagues, who had reversed at least 18 California death sentences for a purportedly defective jury instruction that the California Supreme Court has since authoritatively approved.

The report also relies on newspaper articles and secondhand sources for factual assertions to an extent not ordinarily found in academic research. This approach produces some jarring mistakes. To cite one example, the study claims William Thompson's death sentence was set aside and a lesser sentence imposed. Not true. Thompson remains on death row in Florida today for beating Sally Ivester with a chain belt, ramming a chair leg and nightstick into her vagina and torturing her with lit cigarettes (among other depravities) before leaving her to bleed to death.

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These obvious flaws in the report have gone largely unreported. The report was distributed to selected print and broadcast media nearly a week in advance of Monday's embargo date. This gave ample time to orchestrate favorable media publicity, which conveniently broke 24 hours before the Senate Judiciary Committee began hearings on capital-sentencing issues.

The report continues what has thus far been a glaringly one-sided national discussion of the risk of error in capital cases. Astonishingly, this debate has arisen when, contrary to urban legend, there is no credible example of any innocent person executed in this country under the modern death-penalty system. On the other hand, innocent people undoubtedly have died because of our mistakes in failing to execute.

Collen Reed, among many others, deserves to be remembered in any discussion of our error rates. She was kidnapped, raped, tortured and finally murdered by Kenneth McDuff during the Christmas holidays in 1991. She would be alive today if McDuff had not narrowly escaped execution three times for two 1966 murders. His life was spared when the Supreme Court set aside death penalties in 1972, and he was paroled in 1989 because of prison overcrowding in Texas. After McDuff's release, Reed and at least eight other women died at his hands. Gov. George W. Bush approved McDuff's execution in 1998.

While no study has precisely quantified the risk from mistakenly failing to execute justly convicted murderers, it is undisputed that we extend extraordinarily generosity to murderers. According to the National Center for Policy Analysis, the average sentence for murder and non-negligent manslaughter is less than six years. The Bureau of Justice Statistics has found that of 52,000 inmates serving time for homicide, more than 800 had previously been convicted of murder. That sounds like a system collapsing under the weight of its own mistakes -- and innocent people dying as a result.

Mr. Cassell is a professor of law at the University of Utah.

(See related letter: "Letters to the Editor: Wrong by the Margin Of a Person's Life" -- WSJ June 23, 2000)

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June 25, 2002

Honorable Jefferson B. Sessions, III
United States Senate
Room 493, Russell Senate Office Building
Washington, DC 20510

Dear Senator Sessions:

This letter is in response to an inquiry from a member of your staff. During the state and federal post-conviction stages of review, death row inmates through counsel file petitions which allege numerous claims of ineffective assistance of counsel. Presently, there are 97 cases pending in the state post-conviction stage and 36 cases pending in the federal post-conviction stage. In every one of these cases, the death row inmate challenges the effectiveness of his trial/appellate counsel. In some of these cases, the post-conviction lawyer raises up to 50 instances of ineffective assistance of counsel. Claims of ineffective assistance are "boilerplate" claims in death penalty cases in the sense that they are raised in every case with no investigation of whether trial counsel was truly ineffective.

The post-conviction lawyers that raise claims of ineffective assistance of counsel in death penalty cases are generally either anti-death penalty activists or lawyers from large out-of-state law firms. Generally speaking, post-conviction lawyers do not have any experience at handling a capital trial. It is indeed ironic that anti-death penalty activist lawyers are hailed as experts on capital litigation when they have never actually tried a capital case.

The passage of the so-called "Innocence Protection Act" will not reduce the number of cases where post-conviction lawyers raise claims of ineffective assistance of counsel. Even if this legislation becomes law, claims of ineffective assistance of counsel will be raised in every post-conviction petition.

Respectfully submitted,

Clay Crenshaw
Assistant Attorney General

PRESS RELEASE

Release Date: February 8, 2002
Contact: Michael Rushford, President (916) 446-0345

DEATH PENALTY STUDY CALLED BIASED, DISHONEST

On Monday, February 11, another report is scheduled to be released by opponents of capital punishment, claiming to show that the system of capital trials is "broken" because of the large number of verdicts reversed on appeal. This study is a follow-up to a study released June 12, 2000, that received widespread criticism as not supporting its conclusions, stating its data in misleading ways, and, in some respects, simply dishonest. (See references at end.) That report is often called the "Liebman Report" after its lead author, Columbia Law School Professor James Liebman, a long-time opponent of capital punishment.

The fact that a large percentage of capital verdicts are overturned is not news. The controversy is, and has been for many years, whether that number reflects problems in the system for trying capital cases, as the anti-death-penalty group contends, or whether it constitutes obstruction of valid, deserved sentences, as death penalty supporters have long contended.

Although the full report is not available at this time, preliminary indications are that the follow-up report contains the same flaws as the first report. Below is a guide to those flaws, with a discussion based on a partial draft of the new report focused on whether they have been corrected. Since the report is being released in a manner calculated to hit the newspapers before the full report is available for analysis and critical review, these necessarily tentative comments are offered to provide some semblance of balance to the initial news stories. We will prepare a follow-up commentary after the Liebman group makes its full report available and we have an opportunity to analyze it.

Ignoring Erroneous Reversals

One of the largest, on-going problems in capital litigation is the erroneous overturning of valid sentences by courts hostile to capital punishment. The U.S. Court of Appeals for the Ninth Circuit, with jurisdiction over nine western states, has been particularly notorious in this regard. A 1995 study by the Criminal Justice Legal Foundation looked at cases where that court overturned sentences based on disagreement with state courts on an issue of capital sentencing law, and where the U.S. Supreme Court subsequently resolved the disagreement. On all but one of a dozen issues, the state court decision upholding the sentence was correct, and the federal court decision finding "error" was itself erroneous. For example, the Ninth Circuit overturned the death sentence of organized crime "hit man" John Harvey Adamson for the car-bomb death of Arizona reporter Don Bolles on the ground that Arizona's death

penalty for "especially cruel" murders was too vague. Two years later, in a different case, the Supreme Court held that the Arizona law was valid. Unfortunately, there are far more cases than the Supreme Court can review, so erroneous reversals such as *Adamson* very often stand.

The first Liebman report simply ignored this problem. It counted as "serious error" every finding causing reversal of a conviction or sentence. There is no indication in the available materials for the second report that any attempt has been made to distinguish valid from erroneous reversals. On the contrary, the new report looks at the low rate of reversals in California state courts and the large number of these cases subsequently overturned by the Ninth Circuit, and concludes the federal court is making up for "lax" review by the state court. The Ninth Circuit is the one court in the nation most often reversed by the Supreme Court, and the obvious alternative explanation is that the Ninth is wrongly overturning correct judgments. It does not appear that the new report even considers that possibility.

Constantly Changing Rules

In legal jargon, a judgment may be deemed in "error" if it is contrary to the rules as they exist at the time of the appeal, even if it was perfectly valid under the rules in effect at the time it was rendered. For over 25 years, the Supreme Court and other courts have continuously tinkered with the rules, and all of the changes apply retroactively to all cases still pending on the first round of appeals. Justice Scalia aptly called this the high court's "annually improvised" jurisprudence. Here are a couple of examples. A court instructs a jury in accordance with a statute the Supreme Court has just upheld as valid, and nine years later that instruction is declared constitutional "error." Another court uses a standard instruction and verdict form telling jurors they must deliberate and agree on the circumstances to be weighed in reaching their verdict, in complete accord with the long-standing American tradition of jury decision-making. Years later, out of blue sky, that instruction and form are declared invalid, and all of the cases that used it (which may be all the capital cases in the state) are suddenly in "error" and must be retried.

These "errors" do not indicate anything at all wrong in the trial court, and their existence should not undermine public confidence in capital trials in the slightest. Yet the vast majority of them are included in the study's definition of "serious error." The new study indicates that it excludes the cases where the Supreme Court has declared a state's entire system unconstitutional, but that has not happened since the mid-1970's. Far more common is a decision throwing out a standard instruction, form, or practice that had previously been considered perfectly valid.

The new report decries the waste and delay that are caused when so many judgments are reversed, and supporters of capital punishment wholeheartedly agree. But nothing we can do at the trial level will prevent reversals of this type. The only answer is for the reviewing courts, and especially the Supreme Court, to stop inventing new restrictions. Whatever the intrinsic merit of these rules may be, the turmoil of the change exacts an enormous cost.

Blurring Guilt and Punishment

Several commentators criticized the first report for glossing over the distinction between the

determination of guilt of murder and the determination that the particular murderer ought to be sentenced to death. (See the Wilson article and the Latzer and Cauthen articles, cited below.) Most people would agree that the execution, or for that matter the imprisonment, of an innocent person is of far greater concern than the execution of any person who is actually guilty of premeditated murder. The question of greatest concern is the degree to which the system risks executing a person who neither killed the victim nor was a party to the killing. The "abuse excuse," "Twinkie defenses," rules excluding valid evidence because of how it was obtained, and compliance with the Supreme Court's Byzantine code of sentencing procedure are all matters of much lesser moment.

The first report told us very little along these lines. It does not appear that the new report will add much. For the most part, it lumps guilt and sentence reversals together. The report does indicate that 9% of the cases sent back for retrial of guilt verdict ended in acquittals. That is, these cases are retried, typically a decade or more after the fact, when memories have faded and witnesses may no longer be available. In some cases evidence used the first time is suppressed for reasons unrelated to its reliability, such as the *Miranda* rule. In a small percentage of these cases, the jury decides that guilt has not been proven to the exacting standard of "beyond a reasonable doubt." Our trial system is intentionally stacked in the defendant's favor in many ways, including the burden of proof and the fact that the prosecution cannot appeal trial errors. Many guilty people are acquitted as a result, and a handful of acquittals among the retrials would be expected even if 100% were actually guilty. The fact that the acquittal rate on retrial is so low serves to reinforce confidence in the system, not undermine it.

Intentionally Skewed Sampling

A major theme of the first report was to convince the public that incompetent lawyers for capital defendants and suppression of exculpatory evidence were the main problems. To this end, Columbia Law School put out a press release announcing the study with this statement:

"The study found that the errors that lead courts to overturn capital sentences are not mere technicalities. The three most common errors are: (1) egregiously incompetent defense lawyers (37%); (2) prosecutorial misconduct, often the suppression of evidence of innocence (19%); and (3) faulty instructions to the jurors (20%). Combined these three constitute 76% of all error in capital punishment proceedings."

This statement was a patent falsehood. Those percentages are not percentages of the total, but only of a narrow segment of cases, those overturned in "state post-conviction" review. That is the stage of the process particularly geared to claims of ineffective assistance and nondisclosure of evidence. Analogously, if a researcher stations an observer in the tire shop of an auto center, he will observe that most of the cars repaired there have tire problems. That observation, while true, means nothing.

The new study continues the effort to exaggerate the number of cases of defense lawyers deemed ineffective by the Monday-morning quarterbacks and of prosecutors who failed, often inadvertently, to turn over a piece of evidence that in hindsight might have made a difference. The mechanism, again, is the skewed sample. This time the sample is extended to

include federal as well as state habeas corpus review, but the result is largely the same. Cases on direct appeal are still excluded from the analysis of the reasons for reversal, even though that is where 80% of the reversals occur. Direct appeal is, not coincidentally, also where reversals for "mere technicalities" most often occur. It is not hard to get the results one wants if one can exclude the 80% of the cases where the inconveniently contrary data points are likely to be found.

The excuse offered by the study summary is that state and federal habeas corpus cases were selected because that is where data was "available." That assertion is not credible. Direct appeal is far and away the easiest segment of the process to track. Capital cases in most states are appealed directly to the state's highest court, which usually publishes all of its opinions. Cases on state or federal habeas corpus, by contrast, tend to be dispersed among multiple courts, and the petitions are far more likely to be disposed of without published opinions, or often without any opinions at all. The selection of the skewed sample has the distinct odor of intentional distortion.

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Dear Member of Congress:

The undersigned individuals are current and former prosecutors, law enforcement officers, and Justice Department officials who have served at the state and federal levels. Some of us support capital punishment and others of us oppose it. But we are united in our support for the federal Innocence Protection Act 2001 (S 486 / HR 912).

Capital cases present unique challenges to our judicial system. The stakes are higher than in other criminal trials and the legal issues are often more complex. When the government seeks a death sentence, it must afford the defendant every procedural safeguard to assure the reliability of the fact-finding process. As prosecutors, we feel a special obligation to ensure that the capital punishment system is fair and accurate.

The Innocence Protection Act seeks to improve the administration of justice by ensuring the availability of post-conviction DNA testing in appropriate cases, and would establish standards for the appointment of capital defense attorneys. The interests of prosecutors are served if defendants have access to evidence that may establish innocence, even after conviction, and if they are represented by competent lawyers.

For these reasons, we are pleased to endorse the Innocence Protection Act. Please feel free to contact any of us to discuss this matter.

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Former Attorney General
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Member, Constitution Project Death Penalty Initiative

Mr. W.J. Michael Cody
Former Attorney General
State of Tennessee
Member, Constitution Project Death Penalty Initiative

Mr. Lee Fisher
Former Attorney General
State of Ohio

Mr. Scott Harshbarger
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Mr. Jeremy Margolis
Former Asst. US Attorney
Former Director
Illinois State Police

Hon. Dom Rizzi
Appellate Court Judge (Ret.)
State of Illinois

United States Senate
Committee on the Judiciary

Testimony of the Honorable William D. Delahunt of Massachusetts
In Support of the Innocence Protection Act

Tuesday, June 18, 2002

Mr. Chairman, on behalf of the 236 House cosponsors of the Innocence Protection Act, I want to thank you for convening this hearing and for inviting me to testify today. I have been proud to sponsor this bill, together with you, Mr. Chairman, Senators Smith and Collins, and my distinguished colleague, Congressman Ray LaHood, who will shortly speak for himself.

I know that you have been working closely with Senator Specter and other members of the committee to reach an agreement on this legislation. And I am pleased to report to you that we are pursuing a similar effort in the House. This afternoon we have a hearing before the Crime Subcommittee. And I am hopeful that we will be able to reach an agreement with *our* chairman that can be reported out of committee.

This bill is not about the death penalty. It's about the quality of justice in America. Congressman LaHood and I have differing views on capital punishment, but we agree that a just society does not deprive innocent people of their life or their liberty.

Over the past 25 years, 782 people have been executed in the United States. During the same period, 101 have been exonerated after spending years on death row for crimes they did not commit. Some came within days or hours of being put to death.

Two of those people are here with us today: Kirk Bloodsworth, who spent nine years in prison in Maryland, including two years on death row; and Ray Krone, who spent 10 years in prison in Arizona, three of them on death row.

It's cases like theirs that have caused conservative judges like Justice O'Connor to express concern that the system, and I quote, "may well be allowing some innocent defendants to be executed." It's cases like theirs that convinced Governor George Ryan—a longtime supporter of the death penalty—to suspend executions in Illinois. And caused Governor Glendening of Maryland to take a similar step just last month.

As he will shortly testify, Professor Liebman looked at 4,500 capital sentences handed down over a 23-year period, and discovered that the courts had found serious, reversible error in 68 percent of those cases. That's an error rate of nearly seven in 10.

Seven in 10. A failure of such magnitude calls into question the fairness and integrity of the American justice system itself.

Some suggest that the high rate of reversals shows that the system is *working*. That is nonsense. We cannot know whether the appeals process is catching all the errors or not. But we *do* know that the errors are *not* being caught at trial. Innocent people like Kirk Bloodsworth and Ray Krone are serving lengthy sentences for crimes they did not commit, while the real perpetrators go free.

The Innocence Protection Act focuses on the two most effective steps we can take to ensure greater fairness and accuracy in the administration of justice: access to post-conviction DNA testing, and the right to competent counsel in death penalty cases.

These reforms have been endorsed by leading jurists, prosecutors and legal experts, including seven former State attorneys general and Judge William Sessions, a former director of the FBI. And by commentators from across the political spectrum, including Bruce Fein and George Will.

DNA has exonerated 12 of the people freed from death row, and another 96 who were wrongfully convicted of serious crimes. In at least 16 of these cases, the same test that exonerated an innocent person has led to the apprehension of the real perpetrator.

Yet access to testing is often opposed by prosecutors and must be litigated, sometimes for years. Evidence that might have established innocence has been misplaced or destroyed. Our bill would help ensure that biological material is preserved and DNA testing is made available in every appropriate case.

But DNA is not a "magic bullet" that will eliminate the problem of wrongful convictions. Even when it is available—even when it exonerates an inmate after years of imprisonment—it cannot give back the life that he or she has lost.

We must take steps to prevent wrongful convictions in the first place. And the single most important step is to ensure that every indigent defendant in a capital case has a competent attorney. The Innocence Protection Act would encourage States to develop minimum standards for capital representation, and would provide them with resources to help ensure that lawyers are available who meet those standards.

I was a prosecutor for over 20 years. And I know that the adversarial process can find the truth only when the lawyers on both sides are up to the job.

We cannot tolerate a system that relies on reporters and journalism students to develop new evidence that was never presented at trial. We cannot tolerate a system in which chance plays such a profound role in determining whether a defendant lives or dies.

Some have suggested that our society cannot afford to pay for qualified counsel in every capital case. The truth, Mr. Chairman, is that we cannot afford to do otherwise, if our system of justice is to have the confidence of the American people.

Thank you.

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NEVADA'S DEATH PENALTY SYSTEM IS WORKING!

After Columbia University released the "Liebman Study" of death penalty cases from 1973-1995 showing that Nevada has a 68% "overall error rate" in death penalty cases and has the largest "death row" in America per population, the Nevada Attorney General examined the Liebman study and did our own research. Liebman was flat wrong about Nevada!

First, some observations about Liebman's methods. Death penalty records are kept by the Nevada Supreme Court, Attorney General, Department of Prisons, 17 district attorneys and 17 court clerks, yet Liebman got his from criminal defense attorneys (who apparently reported their wins, but not their losses) and the NAACP Capital Punishment Project (whose agenda is the abolition of the death penalty).

Second, it appears Liebman picked and chose his cases, tailoring the study to get certain results. He took cases from 1973-1995 for some results; 1993-1995 for other results; and 1973-April, 2000 for others. He used only published opinions for some results, but used unpublished opinions for others. He used only Nevada Supreme Court or federal appeal cases for some results, but added lower state court cases to increase reversals. Liebman didn't count all Nevada cases. He excluded killers who discontinued their appeals. (He presumed they did so due to frustration with the system, not because they were proved guilty and accepted it.) Incredibly, he didn't even count the eight men executed in Nevada since 1977!

Liebman says Nevada seeks death too often and says we have 28.23 death sentences per every 1000 inmates. But that would be 268 capital inmates, and Nevada has only 88 on "death row" now, out of 992 convicted murderers and over 9500 total inmates. Nevada juries actually sentence only 9% of our convicted killers to death.

Liebman totally ignored Nevada's unique growth situation. Nevada's population grew by 50.6% between 1990-98 , more than any other state. The simple 23-year population averaging he did doesn't reflect our spike-in people, or in homicides. Nevada had 1.8 million residents by 1998, but also over 42 million visitors here that same year . "Per resident" statistics mis-portray Nevada because our tourist traffic gives us a high rate of transient crime, including murders. Other states with similar resident populations (Nebraska, New Mexico, West Virginia) have only 30-50% of our prison population . Over 40% of our current "death row" inmates were not residents when they committed murder in Nevada.

To accurately review Nevada's death penalty, we researched every death penalty decision reported by the Nevada Supreme Court from 1973 to April 2000-the longest time-frame Liebman used. We didn't use lower court rulings or unpublished reversals, like Liebman did, because we would've had to balance those against lower court or unpublished affirmations of the death sentence. Those aren't compiled in a single place, so we would've had to research every opinion written in every county or state court for 27 years-a monumental task.

Liebman reported 108 death sentences, with a total of 34 state court reversals for an overall error rate of 38%. Our research found 152 cases, with 30 reversals (two of which were inmates with two or more death sentences who got one reduced to "life without.") That's only a 19% error rate.

Liebman creates the impression that the reversals are due to innocence, but most are attorney or judge procedural errors. Some are cases where juries followed the existing law, but later the Supreme Court changed it, and constitutional changes are applied retroactively on death cases, to give the defendant every benefit. Liebman also failed to report that after a new trial or penalty hearing, in 12 of those 31 cases death sentences were imposed again. In 13 cases, inmates received "life-in-prison" sentences.

Those were not inmates found to be innocent of their murders!

Liebman took only a 2-year "snapshot" of federal habeas, found that four Nevada cases were reviewed and two of those were reversed. From that, he concluded that Nevada has a 50 % overall error rate for all years. We researched all reported Nevada federal habeas cases for the whole period.

We found 17 federal decisions with four reversals. That is only a 23% error rate. Again, Liebman failed to report that two of those four defendants received new death sentences upon re-sentencing.

The ACLU's claims of "gross patterns of [racial] discrimination in death penalty administration," aren't true for Nevada either. They said death was disproportionately given to non-white killers of white victims, and men instead of women. However, of the 50 men executed here since 1905, 42 were white; four were native American; two were black; and two were Asian.

Even the NAACP's "Death Row USA" (Spring 2000) reports that nationally, 52.48% of those executed in the USA were white killers of white victims; only 23.84% were black killers of white victims. Murder is not an "equal opportunity" crime either, as only 1.5% of America's killers are female, according to the NAACP. Nevada has not executed a woman yet, and the only one on "death row", (Priscilla Ford) is still pursuing appeals.

Liebman himself admits that over 2/3 of Americans still favor the death penalty. (Most polls show a higher rate.) There simply is no evidence from Liebman, or anyone else, that innocent people are being executed. If the courts are finding attorney or judge error in 19-23% of Nevada's cases over 27 years, that proves the review system is working well. When killers receive death sentences again after retrial or a new penalty hearing, that is justice at work!

U.S. Department of Justice
Office of Justice Programs

Bureau of Justice Statistics
Special Report

November 2000, NCJ 179023

Defense Counsel in Criminal Cases

By Caroline Wolf Harlow, Ph.D.
BJS Statistician

Almost all persons charged with a felony in Federal and large State courts were represented by counsel, either hired or appointed. But over a third of persons charged with a misdemeanor in cases terminated in Federal court represented themselves (pro se) in court proceedings prior to conviction, as did almost a third of those in local jails.

Indigent defense involves the use of publicly financed counsel to represent criminal defendants who are unable to afford private counsel. At the end of their case approximately 66% of felony Federal defendants and 82% of felony defendants in large State courts were represented by public defenders or assigned counsel.

In both Federal and large State courts, conviction rates were the same for defendants represented by publicly financed and private attorneys. Approximately 9 in 10 Federal defendants and 3 in 4 State defendants in the 75 largest counties were found guilty, regardless of type of attorney.

However, of those found guilty, higher percentages of defendants with publicly financed counsel were sentenced to incarceration. Of defendants found guilty in Federal district courts, 88% with publicly financed counsel and 77% with private counsel received jail or prison sentences; in large State courts 71% with public counsel and 54% with private attorneys were sentenced to incarceration.

Highlights

At felony case termination, court-appointed counsel represented 82% of State defendants in the 75 largest counties in 1996 and 66% of Federal defendants in 1998

	Percent of defendants	
	Felons	Misdemeanants
75 largest counties		
Public defender	68.3%	--
Assigned counsel	13.7	--
Private attorney	17.6	--
Self (pro se)/other	0.4	--
U.S. district courts		
Federal Defender Organization	30.1%	25.5%
Panel attorney	36.3	17.4
Private attorney	33.4	18.7
Self representation	0.3	38.4

Note: These data reflect use of defense counsel at termination of the case.
--Not available.

- Over 80% of felony defendants charged with a violent crime in the country's largest counties and 66% in U.S. district courts had publicly financed attorneys.
- About half of large county felony defendants with a public defender or assigned counsel and three-quarters with a private lawyer were released from jail pending trial.

Defendants with publicly financed or private attorneys had the same conviction rates

Case disposition	Public counsel	Private counsel
75 largest counties		
Guilty by plea	71.0%	72.8%
Guilty by trial	4.4	4.3
Case dismissal	23.0	21.2
Acquittal	1.3	1.6
U.S. district courts		
Guilty by plea	87.1%	84.6%
Guilty by trial	5.2	6.4
Case dismissal	6.7	7.4
Acquittal	1.0	1.6

- In State courts in the largest counties, 3 in 4 defendants with either court-appointed or private counsel were convicted; in Federal courts 9 in 10 felony defendants with public or private attorneys were found guilty.
- In Federal court 88% of felony defendants with publicly financed attorneys and 77% with private lawyers received a prison sentence.

Except for State drug offenders, Federal and State inmates received about the same sentence on average with appointed or private legal counsel

	State prison inmates		Federal prison inmates	
Offenses	Public counsel	Private counsel	Public counsel	Private counsel
Total	155 mo	179 mo	126 mo	126 mo
Violent	223	231	164	162
Property	118	128	59	59
Drug	97	140	126	132
Public-order	80	98	103	119

- Three-fourths of State and Federal inmates with an appointed counsel and two-thirds with a hired counsel had pleaded guilty.

This report uses information from Bureau of Justice Statistics (BJS) data collections that, although gathered for wider purposes, present information about the type of counsel defendants and inmates used in their criminal case. Data are from —

- U.S. district court statistics for persons accused of Federal crimes (fiscal year 1998),
- pretrial records for felony defendants in the Nation's 75 largest counties (1992-96),
- State court prosecutors' information gathered nationwide (1990-94),
- the Administrative Office of the U.S. Courts (1998), and
- personal interviews with nationally representative samples of inmates in local jails (1996) and State and Federal prisons (1997). For more information on the data used in this report, see *Data sources*, page 11.

In this report the type of counsel for Federal and State defendants was the type at case termination. Other counsel may have represented the defendant earlier. Data describing counsel at filing or initiation were not used because they were incomplete or unavailable. The terms "publicly financed attorneys," "public attorney," and "appointed attorney" used in this report include public defenders, panel attorneys, assigned counsel, contract attorneys, and any other government-funded attorney programs for those unable to provide their own attorney.

Right to counsel is in the U.S. Constitution

The sixth amendment to the U.S. Constitution, a part of the Bill of Rights, provides that "In all criminal prosecutions, the accused shall...have the Assistance of Counsel for his defence."

In the 1960's and 1970's, the Supreme Court expanded this clause by recognizing a constitutional right to counsel at public expense for those unable to pay a private attorney. In *Gideon* v. *Wainwright* (372 US 335 (1963)) the Supreme Court held that the sixth amendment requires indigent defendants in State court proceedings to have appointed counsel. *Gideon* involved a felony, but in another case, *Argersinger* v. *Hamlin* (407 US 25 (1972)), the Court ruled that an indigent defendant may not be imprisoned, even for a misdemeanor, unless afforded the right to counsel.

Two types of programs provide indigent representation in Federal cases

Pursuant to the Criminal Justice Act of 1964 (18 USC § 3006 A), the Defender Services Division of the Administrative Office of the U.S. Courts oversees spending for Federal defendants through two types of programs:

- *Panel attorneys*, appointed by the court from a list of private attorneys on a case-by-case basis. At the end of 1998 all 94 U.S. district courts used such panels, including 20 districts in which only panel attorneys were used.
- *Federal defender organizations* (FDO's), take one of two forms:
  — Federal public defender organizations staffed with Federal Government employees and headed by a public defender appointed by the court of appeals

  or

  — Community defender organizations that are incorporated, nonprofit legal service organizations receiving grants from the Administrative Office of the U.S. Courts.

At the end of 1998, 63 Federal or community defender organizations served 74 of the 94 U.S. district courts.[1]

Workloads rose more than spending for the Defender Services Division

The panel attorney and FDO programs can represent defendants at any time from arraignment through appeal and during supervised release. The Defender Services Division counts use of these publicly financed attorneys in terms of *representations*.

Total representations by panel attorneys and FDO's rose 26% from 80,200 in fiscal year 1994 to 101,200 in fiscal 1998 (table 1). The number of criminal representations grew substantially during the period (25%), with the FDO workload increasing 35% and the panel attorney workload 17%. The Defender Services Division estimates that court-appointed counsel represent 85% of

[1]Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts*, 1998.

Table 1. Federal representations closed, by type of Criminal Justice Act attorney, 1994-98

	All representations			Federal Defender Organization representations			Panel attorney representations		
Year	Total	Criminal	Other*	Total	Criminal	Other*	Total	Criminal	Other*
1994	80,200	54,200	26,000	42,100	26,300	15,800	38,100	27,900	10,200
1995	78,700	51,700	27,000	43,700	26,700	17,000	35,000	25,000	10,000
1996	83,700	55,400	28,300	47,900	29,100	18,800	35,800	26,300	9,500
1997	90,000	59,200	30,800	52,200	31,900	20,300	37,800	27,400	10,500
1998	101,200	68,000	33,200	57,600	35,500	22,100	43,600	32,500	11,100

Note: For a Federal Defender Organization a representation is counted usually when the case is closed or the client no longer needs or wants Criminal Justice Act services; for a panel attorney a representation is counted when the first payment claim is submitted. Representations may include defendants with a case pending at the end of the reporting period and those who retained private counsel after an initial representation by public counsel. Numbers are rounded to the nearest hundred.

*Includes appeals, probation/supervised release revocation hearings, motions to correct or reduce sentence, habeas corpus other than capital petitions, court-directed prisoner representations, bail presentment, witness representation, and other matters.

Source: Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts*, 1994 through 1998, and unpublished data.

criminal defendants at some time during the conduct of their case (unpublished correspondence).

From fiscal year 1994 through fiscal year 1998, spending grew 20% in constant 1998 dollars from $293 million to $353 million.

Criminal Justice Act obligations, 1994-98 (in 1998 dollars)

1994	$293,342,000
1995	$296,794,000
1996	$316,884,000
1997	$338,028,000
1998	$352,837,000

Note: An obligation is generally defined as a legal commitment for goods or services ordered or received by the government.

Source: Unpublished data, Administrative Office of the U.S. Courts, Defender Services Division.

All felony defendants in cases terminated in U.S. district court had an attorney in 1998

Nearly all defendants facing a felony charge terminated in U.S. district court in 1998 and almost two-thirds with a misdemeanor charge had lawyers to represent them in court (table 2). Felony defendants were more likely than misdemeanants to have publicly financed counsel. Sixty-six percent of those facing a felony charge and 43% with a misdemeanor charge had used either a FDO or panel attorney.

Defendants charged with a felony (33%) were also more likely than those charged with a misdemeanor (19%) to have private representation. About a third of misdemeanants represented themselves during judicial proceedings.

White collar Federal defendants most likely to use private counsel

Most likely to have a private attorney were defendants charged with a white collar offense, primarily fraud or a regulatory offense. Having private counsel were 43% of fraud defendants and 63% of those charged with a regulatory offense — violations of laws pertaining to agriculture, antitrust, food and drug, transportation, civil rights, communications, customs, and postal delivery (table 3). By contrast, about 2 in 10 defendants charged with a violent crime used private attorneys.

Table 2. Type of counsel for defendants in cases terminated in U.S. district courts, fiscal year 1998

Type of counsel	Total	Charged with — Felony	Misdemeanor
Federal Defender Organization*	29.3%	30.1%	25.5%
Panel attorney	32.9	36.3	17.4
Private attorney	30.8	33.4	18.7
Self representation (pro se)	7.0	0.3	38.4
Number of defendants	68,031	56,046	11,985

Note: Excludes 1,739 defendants for whom type of counsel was missing.
*Includes both Federal Public Defenders and Community Defender Organizations.

Source: Administrative Office of the U.S. Courts, Criminal Master File, FY 1998.

Table 3. Type of counsel for felony defendants in cases terminated in U.S. district court, by offense, fiscal year 1998

Type of counsel	Violent	Fraud	Other property	Drug	Regulatory	Other public-order
Federal Defender Organizations*	42.4%	26.9%	31.0%	21.7%	16.9%	43.9%
Panel attorney	38.0	29.9	34.3	42.2	19.8	32.4
Private attorney	19.3	42.8	34.2	35.8	63.0	23.4
Self representation (pro se)	0.3	0.3	0.5	0.2	0.2	0.3
Number of defendants	3,426	10,795	2,487	23,699	1,063	14,476

Note: Excludes 1,739 defendants with missing data on type of counsel and 494 with missing data on offense.
*Includes both Federal Public Defenders and Community Defender Organizations.

Source: Administrative Office of the U.S Courts, Criminal Master File, FY 1998.

9 in 10 Federal defendants found guilty regardless of type of attorney

In 1998, 92% of defendants with public counsel and 91% with private counsel either pleaded guilty or were found guilty at trial.

Disposition	Type of counsel: Public*	Private
Guilty		
By plea	87.1%	84.6%
By trial	5.2	6.4
Acquittal	1.0	1.6
Dismissal	6.7	7.4
Number of defendants	37,188	18,709

*Includes Federal Defender Organizations (FDO's) and panel attorneys.

Source: Administrative Office of the U.S. Courts, Criminal Master File, FY 1998.

Incarceration more likely for Federal defendants with public counsel than for those with private attorneys

Defendants found guilty after using a FDO or panel attorney were more likely to be sentenced to prison (about 88% of defendants found guilty) than those with private attorneys (77%). The difference in incarceration rates is explained in part by the likelihood of prison after conviction for different types of offenses. As has been shown, public counsel represented a higher percentage of violent, drug, and public-order (excluding regulatory crimes) offenders, who were very likely to receive a sentence to serve time, and private counsel represented a higher

Sentence	Type of counsel: Public*	Private
Incarceration	87.8%	76.5%
Probation only	12.1	22.4
Fine only	0.3	1.1
Number of defendants	33,068	16,622

*Includes Federal Defender Organization (FDO's) and panel attorneys.

Source: Administrative Office of the U.S. Courts, Criminal Master File, FY 1998.

Table 4. Length of prison sentence imposed on felony defendants convicted in U.S. district court, by type of counsel and offense, fiscal year 1998

Offense and type of counsel	Number of Federal defendants	Sentence to prison Mean	Sentence to prison Median
Total			
Public	28,453	58 mo	33 mo
Private	12,563	62	37
Violent offenses			
Public	2,266	84 mo	60 mo
Private	471	74	41
Fraud offenses			
Public	3,413	22 mo	15 mo
Private	2,426	23	15
Other property offenses			
Public	862	38 mo	18 mo
Private	380	40	24
Drug offenses			
Public	12,297	75 mo	51 mo
Private	6,753	84	60
Regulatory offenses			
Public	261	33 mo	17 mo
Private	244	23	15
Other public-order offenses			
Public	9,329	46 mo	27 mo
Private	2,283	44	24

Note: Excludes 304 inmates sentenced to life or death, 2,803 with suspended or sealed sentences, 383 with missing offense data, and 445 with data missing on counsel type.

Source: Administrative Office of the U.S. Courts, Criminal Master File, FY 1998.

percentage of white collar defendants, who are not as likely to receive incarceration sentences.[2]

Federal defendants with private attorneys had longer average sentences than defendants with publicly financed attorneys

Defendants with private attorneys were sentenced to an average of 62 months in prison, and those with publicly financed attorneys, to 58 months (table 4). The primary differences in average sentence length were between offenses, not between the types of attorney. Other factors not shown may also have had a role.

Among those sentenced to incarceration, drug offenders who used publicly financed counsel had shorter sentences on average than those who used private attorneys — an average of 75 months compared to 84 months.

Among Federal violent and regulatory offenders, those with private attorneys received shorter sentences than those with public lawyers. Violent offenders who used private attorneys were given 74 months on average, and those with public counsel, 84 months. Similarly, those sentenced for a regulatory offense with a private lawyer had an average sentence of 23 months, and those with a public attorney, 33 months.

[2] *Compendium of Federal Justice Statistics, 1998, BJS report,* NCJ 180258, table 5.1.

Most criminal defendants are tried in State courts

The bulk of the task of providing counsel for the indigent has fallen to lawyers working in State courts. Approximately 95% of criminal defendants are charged in State courts, with the remainder tried in Federal courts.

Two-thirds of State prosecutors reported that their courts used public defenders

Three systems now serve as the primary means for providing defense services to indigent criminal defendants charged in State court.

- Under a *public defender system*, salaried staff attorneys render criminal indigent defense services through a public or private non-profit organization or as direct government employees. In 1994, 68% of State court prosecutors reported that a public defender program was used to defend indigents in cases they prosecuted (table 5).

- In an *assigned counsel system*, courts appoint attorneys from a list of private bar members who accept cases on a judge-by-judge, court-by-court, or case-by-case basis. About 63% of prosecutors in State criminal courts reported an assigned counsel program in their jurisdiction.

- In *contract attorney systems*, private attorneys, bar associations, law firms, groups of attorneys, and nonprofit corporations provide indigent services based on legal agreements with State, county, or other local governmental units. Approximately 29% of prosecutors indicated that in their jurisdiction contracts were awarded to attorney groups to provide indigents with legal representation.

Although the Supreme Court in *Gideon* mandated that the States must provide counsel for indigents accused of serious crimes, the court did not

Table 5. Indigent defender systems for felony defendants in State general jurisdiction courts, 1990-94

Indigent defense system	Percent of prosecutors' 1990	1992	1994
Public defender programs	56.6%	64.9%	67.8%
Only	27.0	27.8	20.8
With assigned counsel	21.5	23.4	31.0
With contract attorney	4.2	7.8	9.6
With assigned counsel and contract attorney	3.9	5.8	6.4
Assigned counsel programs	57.8%	55.4%	62.5%
Only	30.7	23.0	19.3
With public defender	21.5	23.4	31.0
With contract attorney	1.7	3.1	5.7
With public defender and contract attorney	3.9	5.8	6.4
Contract attorney programs	20.8%	25.0%	28.9%
Only	11.0	8.2	7.1
With public defender	4.2	7.8	9.6
With assigned counsel	1.7	3.1	5.7
With public defender and assigned counsel	3.9	5.8	6.4
Number of prosecutors' offices	2,272	2,352	2,336

Source: BJS, National Survey of State Court Prosecutors, 1990, 1992, and 1994.

Table 6. Type of counsel for felony defendants in the Nation's 75 largest counties, 1992, 1994, and 1996

	Percent of felony defendants		
Type of counsel	1992	1994	1996
Public defender	59.3%	60.4%	68.3%
Assigned counsel	21.4	18.6	13.7
Hired attorney	17.6	20.1	17.6
Self (pro se)/other	1.7	0.9	0.4
Number of defendants	33,092	32,909	37,410

Note: Missing data were 40.2%, 1992; 37.7%,1994; and 31.1%, 1996.

Source: BJS, State Court Processing Statistics, 1992, 1994, 1996.

Table 7. Type of counsel for felony defendants in the Nation's 75 largest counties, by most serious charge, 1996

	Most serious charge at arrest			
Type of counsel	Violent	Property	Drug	Public-order
Public defender	67.9%	68.3%	69.5%	64.3%
Assigned counsel	14.9	12.8	14.8	8.7
Hired attorney	16.8	18.3	15.4	26.7
Self (pro se)/other	0.4	0.5	0.3	0.3
Number of defendants	9,003	12,006	13,338	3,063

Note: Data were missing on type of counsel for 31.1% of cases.

Source: BJS, State Court Processing Statistics, 1996.

specify how such services were to be provided. State court prosecutors increasingly report that their jurisdictions use more than one type of program to defend indigents. In 1990, 31% of prosecutors' offices reported that their courts used a combination of public defenders, assigned counsel, and contract attorneys; in 1994 — the last time BJS asked prosecutors about their indigent defense systems — 53% of the courts relied on more than one program.

In 1994 about 6% of prosecutors reported the court of their jurisdiction using all three systems: public defenders, assigned counsel, and contract attorneys. The most prevalent combination of two programs was public defenders and assigned counsel — indicated by almost a third of prosecutors' offices.

Table 8. Type of counsel for felony defendants in the Nation's 75 largest counties, by prior conviction and criminal justice status, 1996

	Type of counsel	
	Public	Private
Prior conviction		
Any	85.5%	14.2%
None	77.3	22.0
Criminal justice status at arrest		
Any	86.3%	13.5%
None	78.8	20.6

Note: Data were missing on type of counsel or prior convictions for 36.9% of cases, and on type of counsel or criminal justice status for 38.9% of cases. Pro se and other categories are included in the analysis but are not displayed.

Source: BJS, State Court Processing Statistics, 1996.

8 in 10 felony defendants in large State courts used publicly financed attorneys

In 1992 and 1996 about 80% of defendants charged with a felony in the Nation's 75 most populous counties reported having public defenders or assigned counsel while nearly 20% hired an attorney (table 6). Between 1992 and 1996 the percentage of felons in large counties using public defenders increased from 59% to 68% and the percentage with assigned counsel decreased from 21% to 14%.

Defendants charged with violent, property, and drug crimes were more likely to have been represented by public defenders or assigned counsel (81%-84%) than those charged with public-order offenses (73%) (table 7). Public-order offenses include weapons, driving-related, flight/escape, parole or probation, prison contraband, habitual offender, obstruction of justice, rioting, libel, slander, treason, perjury, prostitution/pandering, bribery, and tax law violations.

State defendants with a criminal record more likely than other defendants to use public counsel

Felony defendants with prior convictions were more likely than those without a criminal record to have used a publicly financed lawyer. According to criminal history records available to the court, 86% with a previous conviction and 77% without had public defenders or assigned counsel (table 8). When arrested for their current charge, about 86% of those already on criminal justice status — for example, on pretrial release, probation, or parole — and 79% not on criminal justice status used appointed counsel.

Pretrial release less common for State defendants with public attorneys

About half of defendants using a public defender or assigned counsel, compared with over three-quarters employing a private attorney, were released from jail prior to trial (table 9).

Release on bail, a payment to a court to guarantee the defendant's appearance at subsequent court dates, was awarded to 57% of defendants with public counsel and to 65% with a private lawyer. Of those allowed bail, about a third with a public attorney and three-quarters with a hired attorney were released before adjudication.

Table 9. Pretrial release of felony defendants in the Nation's 75 largest counties, by type of counsel, 1996

	Type of counsel	
Pretrial release	Public	Private
Released	52.2%	79.0%
Financial	19.2	51.0
Nonfinancial	32.3	27.7
Emergency	0.7	0.3
Detained	46.1	20.1
With bail	38.2	14.3
Denied bail	7.8	5.8
Case closed	1.8	0.9
Number of defendants	28,127	6,232

Note: Data were missing on type of counsel or pretrial release for 36.5% of cases.

Source: BJS, State Court Processing Statistics, 1996.

Table 10. Case disposition for defendants in the Nation's 75 largest counties, by type of counsel, 1996

Case disposition	Type of counsel: Public	Private
Convicted	75.3%	77.0%
Felony	60.2	62.7
By plea	56.3	59.3
By trial	3.9	3.5
Misdemeanor	15.1%	14.3%
By plea	14.7	13.5
By trial	0.5	0.8
Not convicted	24.3%	22.8%
Acquittal	1.3	1.6
Dismissal	23.0	21.2
Other	0.3%	0.2%
Number of defendants	29,984	6,583

Note: Data were missing on 32.4% of cases on type of counsel or case disposition.

Source: BJS, State Court Processing Statistics, 1996.

About 3 in 4 State defendants with public or private attorneys were found guilty

Conviction rates were about the same for defendants with court-appointed attorneys (75%) and for those who hired private counsel (77%) (table 10). Of those convicted, about 8 in 10 were convicted of a felony and the remainder of a misdemeanor, regardless of type of attorney.

Table 11. Sentences for convicted defendants in the Nation's 75 largest counties, by type of counsel, 1996

Sentences	Type of counsel: Public	Private
Incarcerated	71.3%	53.9%
Prison	31.0	23.6
Jail	40.2	30.3
Not incarcerated	28.7%	46.1%
Probation	27.8	43.3
Fine	1.0	2.9
Number of defendants	20,131	4,666

Note: Cases were missing for 36.4% of cases and excluded for an additional 17.8% that were acquitted, dismissed, or not yet adjudicated.

Source: BJS, State Court Processing Statistics, 1996.

Almost a quarter of defendants with publicly financed or private attorneys had their cases dismissed or were acquitted. Just over a fifth had charges dismissed and around 2% were acquitted.

State defendants with public counsel sentenced more often to prison or jail but for shorter terms than those with private lawyers

Convicted defendants represented by publicly financed counsel were more likely than those who hired a private attorney to be sentenced to incarceration. About 7 in 10 with appointed counsel and 5 in 10 with a private attorney were sentenced to a prison or jail term (table 11).

Of defendants sentenced to serve time, those using publicly financed attorneys had shorter sentences than those with private counsel. Those with publicly financed attorneys were sentenced to an average of 2½ years of incarceration and those with private counsel to 3 years (table 12).

Similar to drug offenders convicted in Federal court, those sentenced for drug offenses with court-appointed attorneys had shorter sentences (2 years) than those who hired their attorneys (3 years). For other offense categories, sentences were about the same for defendants with public and private attorneys.

Table 12. Sentence length to incarceration for defendants convicted of a felony in the Nation's 75 largest counties, by offense and type of counsel, 1996

Offense and type of counsel	Number of defendants	Sentence length: Mean	Median
Total			
Public	11,089	31.2 mo	16 mo
Private	1,857	38.3	17
Violent			
Public	2,102	55.2 mo	36 mo
Private	381	59.4	36
Property			
Public	3,276	27.4 mo	14 mo
Private	451	29.7	11
Drug			
Public	4,754	25.3 mo	12 mo
Private	773	38.8	21
Public-order			
Public	911	19.7 mo	16 mo
Private	244	19.9	12

Note: Data were missing on sentence length for 42% of cases.

Source: BJS, State Court Processing Statistics, 1996

Local jail inmates described their experiences with the criminal justice system

In addition to gathering information on defendants in Federal and State courts, BJS sponsors interviews of inmates in local jails and State and Federal prisons. Nationally representative samples of inmates describe their

Table 13. Type of counsel for jail inmates, 1996 and 1989

Type of counsel	Percent of jail inmates, 1996: Total	Charged with felony	Charged with misdemeanor	1989 total
Court appointed	68.1%	76.8%	56.3%	64.1%
Inmate hired	16.7	19.2	14.7	18.5
Both appointed and hired	1.2	1.3	0.7	--
No counsel	14.0	2.9	28.3	17.3
Number of jail inmates	483,438	204,700	97,855	373,259

--Not available.

Source: BJS, Survey of Inmates in Local Jails, 1996 and 1989.

Table 14. Type of counsel for jail inmates, by type of offense, 1996

Offense	Percent of all jail inmates with counsel: Public	Private	Both	Pro se
Violent offenses	70.7%	20.1%	1.4%	7.8%
Homicide	55.5	39.5	2.5	2.5
Sexual assault	66.5	24.8	2.1	6.7
Robbery	78.6	16.7	0.7	4.0
Assault	71.6	16.2	1.2	11.0
Property offenses	75.5%	11.5%	1.0%	12.0%
Burglary	82.0	9.1	1.2	7.7
Larceny	77.9	9.6	0.5	12.0
Fraud	65.2	19.1	1.9	13.9
Drug offenses	73.0%	17.4%	1.6%	8.0%
Possession	74.3	15.7	0.6	9.4
Trafficking	71.1	20.7	2.8	5.5
Public-order offenses	51.8%	18.1%	0.7%	29.4%
Weapons	68.2	25.0	0.1	6.7
DWI	49.7	28.1	1.1	21.2
Other public-order	50.1	11.1	0.5	38.2

Source: BJS, Survey of Inmates in Local Jails, 1996.

Table 15. Release before trial and disposition of case with a felony charge, by type of counsel, for convicted jail inmates, 1996

	Type of counsel: Public	Private
Release before trial*		
Released	22.5%	54.5%
Without bail or bond	3.8	4.1
With bail or bond	18.7	50.4
No release	77.5	45.5
Bail or bond set	57.0	26.0
Bail or bond not set	20.5	19.5
Disposition of case		
Not guilty	14.0%	20.7%
Bench trial	7.6	8.7
Jury trial	5.0	10.7
Unknown type of trial	1.4	1.3
Guilty/no contest plea	85.9	79.3
With plea bargain	53.5	48.7
Without plea bargain	32.4	30.6

*Counsel may have been appointed or hired after bail hearing.

Source: BJS, Survey of Inmates in Local Jails, 1996.

personal experiences with the criminal justice system. Jail inmates either may be awaiting trial or sentencing or may be serving their sentence; prison inmates are serving a sentence.

In the 1996 Survey of Inmates in Local Jails, most inmates charged with a felony reported they were represented by counsel; 97% had an attorney — 77% a court-appointed counsel and 20% a private attorney (table 13). Over a quarter of jail inmates charged with a misdemeanor had no attorney, and over half used public counsel.

The percent of all jail inmates who had been represented by a publicly financed attorney rose from 64% in 1989 to 68% in 1996.

Defendants in jail for homicide most likely to hire their own attorneys

About 40% of jail inmates charged with homicide hired their own attorney, as did 25% charged with rape or sexual assault, 28% driving while intoxicated, and 25% weapons offenses (table 14).

Public-order defendants were more likely than other defendants to represent themselves in legal proceedings. About 4 in 10 charged with a public-order offense such as obstruction of justice, a traffic violation, drunkenness, or a violation of probation or parole represented themselves. Two in ten charged with driving while intoxicated reported that they had no lawyer.

1 in 4 convicted jail inmates with public counsel and with bail set were released before trial

Whether their attorney was appointed or hired, about three-quarters of convicted jail inmates charged with a felony had bail or bond set for them (table 15). Of inmates with bail set, a quarter with a court-appointed attorney and two-thirds with hired attorneys were released on bond before their trial. The lack of financial assets that prevented hiring a private attorney may have also impeded posting bond.

Convicted jail inmates with a public attorney were more likely than those with private counsel to have entered a guilty plea after reaching an agreement with the prosecutor to plead guilty to a lesser charge or fewer counts. An estimated 54% with a publicly financed attorney and 49% with a hired attorney plea bargained.

Prison inmates — those already convicted — reported their experience with their attorneys

In 1997 publicly financed attorneys had represented in court proceedings 3 in 4 inmates in State prison and 6 in 10 in Federal prison (table 16). About 1%-2% represented themselves rather than using a lawyer.

From 1991 to 1997 the percentage of State inmates with appointed counsel remained the same, while that of sentenced Federal inmates increased from 54% to 60%.

Table 16. Type of counsel for State and Federal prison inmates, 1997 and 1991

Type of counsel	Percent of inmates in — State prison: 1997	State prison: 1991	Federal prison: 1997	Federal prison: 1991
Court appointed	73.4%	73.8%	60.3%	53.7%
Inmate hired	22.7	21.2	36.4	42.1
Both appointed and hired	1.6	2.1	2.1	3.2
No counsel	2.2	2.9	1.3	1.0
Number of prison inmates	1,048,236	702,116	88,483	53,342

Source: BJS, Survey of Inmates in State and Federal Correctional Facilities, 1997.

Prison inmates spoke to court-appointed lawyers later and less often than to private attorneys

Of inmates with court-appointed counsel, 37% of State inmates and 54% of Federal inmates spoke with their attorneys within the first week (table 17). In contrast, of those with hired counsel, about 60% of State inmates and 75% of Federal inmates had contact with their attorneys within a week of arrest.

Few inmates said they never spoke to their attorneys. Of those with appointed counsel, about 5% of State inmates and 2% of Federal inmates did not discuss their cases with an attorney; of those with hired attorneys, 1-2% never spoke to them.

Inmates with appointed lawyers spoke to them less frequently than inmates with private lawyers. About 26% of State inmates and 46% of Federal inmates with court-appointed attorneys discussed their cases with counsel at least four times. An estimated 58% of State inmates and 65% of Federal inmates who employed their own attorneys talked with them four or more times about their charges.

Inmates who used public counsel were less likely to proceed to trial than those employing private attorneys. A quarter of both State and Federal inmates with public counsel pleaded not guilty, as did about a third of those with hired attorneys.

In an Alford plea the defendant agrees to plead guilty because he or she realizes that there is little chance to win acquittal because of the strong evidence of guilt. About 17% of State inmates and 5% of Federal inmates submitted either an Alford plea or a no contest plea, regardless of the type of attorney. This difference reflects the relative readiness of State courts, compared to Federal courts, to accept an alternative plea.

State and Federal inmates who used public attorneys were less likely than those with private attorneys to have been tried by jury. Among State inmates 17% who used appointed counsel and 22% who employed a private lawyer were tried before a jury. Among Federal inmates 21% of those with appointed lawyers and 27% with privately hired counsel had jury trials.

State and Federal inmates with public attorneys and those with private lawyers were equally likely to have pleaded guilty to a lesser offense or fewer counts than originally charged. About half had plea bargained, regardless of the type of attorney or the jurisdiction of the court.

Table 17. Contact with counsel, type of plea, and case disposition, by type of counsel, for State and Federal prison inmates, 1997

	Type of counsel for			
	State inmates		Federal inmates	
	Public	Private	Public	Private
Contact with counsel				
Within 24 hours of arrest	8.8%	26.3%	17.6%	38.2%
Within week of arrest	27.7	33.9	36.1	36.3
More than week before trial	32.8	29.6	33.1	18.4
Within week of trial	12.6	4.8	6.6	4.3
At trial	13.6	3.5	4.9	1.7
Did not talk with counsel	4.5	1.9	1.6	1.2
Number of times talked with counsel				
0	4.6%	2.0%	1.7%	1.3%
1	24.6	9.6	10.4	6.7
2-3	44.5	30.6	42.3	27.0
4-5	13.4	20.7	23.1	19.7
6 or more times	12.9	37.2	22.5	45.3
Type of plea*				
Not guilty	24.3%	31.4%	25.4%	31.7%
Other plea				
Guilty	60.6	54.7	71.1	66.3
Alford	6.3	6.7	3.0	2.8
No contest	11.1	10.3	2.6	1.6
Other	0.4	0.3	0.2	0.1
Case disposition				
Not guilty plea	24.3%	31.4%	25.4%	31.7%
Bench trial	7.7	9.0	4.5	5.2
Jury trial	16.6	22.4	20.9	26.5
Guilty or no contest plea	75.7	68.6	74.5	68.3
With plea bargain	50.6	47.2	50.5	48.4
Without plea bargain	25.1	21.4	24.0	19.9
Number of inmates	765,763	236,550	53,215	32,032

* Inmates may have entered more than one type of plea if charged with multiple offenses.

Source: BJS, Survey of Inmates in State and Federal Correctional Facilities, 1997.

Table 18. Sentence length and total time to expected release, by offense and type of counsel, for State and Federal inmates, 1997

Offense and type of counsel	State inmates: Maximum sentence[a] Median	State inmates: Maximum sentence[a] Mean	State inmates: Mean time to expected release[b]	Federal inmates: Maximum sentence[a] Median	Federal inmates: Maximum sentence[a] Mean	Federal inmates: Mean time to expected release[b]
Total						
Private	120 mo	179 mo	96 mo	96 mo	126 mo	104 mo
Public	114	155	89	96	126	106
Violent offenses						
Private	180 mo	231 mo	131 mo	156 mo	162 mo	150 mo
Public	180	223	133	120	164	134
Property offenses						
Private	84 mo	128 mo	68 mo	36 mo	59 mo	43 mo
Public	72	118	64	36	59	52
Drug offenses						
Private	84 mo	140 mo	58 mo	114 mo	132 mo	111 mo
Public	60	97	46	108	126	107
Public-order offenses						
Private	54 mo	98 mo	50 mo	70 mo	119 mo	84 mo
Public	48	80	48	70	103	85

Note: Because data are restricted to persons in prison, they may overstate the average sentence and time to be served by those entering prison. Persons with shorter sentences leave prison more quickly, resulting in a longer average sentence among persons in the inmate sample.

[a]Based on the total maximum for all consecutive sentences. Means exclude prisoners sentenced to life or death.

[b]Based on time served when interviewed plus time to be served until the expected date of release. Excludes prisoners sentenced to life without expected release or to death.

Source: BJS, Survey of Inmates in State and Federal Correctional Facilities, 1997.

Table 19. State and Federal prison inmates with appointed counsel, by selected characteristics, 1997

Characteristics	Percent of prison inmates with appointed counsel: State	Federal
Gender		
Male	73.3%	60.1%
Female	75.9	63.3
Race/Hispanic origin		
White	69.0%	56.5%
Black	76.6	64.7
Hispanic	73.1	56.0
Other	75.2	73.2
Age		
24 or younger	71.9%	70.8%
25-34	74.1	64.3
35-44	75.9	57.8
45 or older	68.0	53.4
Educational attainment		
Less than high school diploma	78.0%	70.2%
High school diploma or GED	73.2	60.6
More than high school diploma	61.1	49.6
Citizenship		
United States	73.6%	60.7%
Other	69.7	58.7

Source: BJS, Survey of Inmates in State and Federal Correctional Facilities, 1997.

State inmates with public attorneys had shorter sentences than inmates with private counsel

On average State inmates who used appointed counsel expected to serve over 7 years on sentences of 13 years, while those who hired their attorneys expected to remain in prison 8 years on sentences of 15 years (table 18). Federal inmates expected to serve an average of almost 9 years for sentences of 10½ years, whether they had appointed attorneys or hired their own.

Drug offenders in State prison who had appointed counsel expected shorter prison stays on shorter sentences than those who hired their own lawyers. The average length of stay expected by State drug offenders who used appointed counsel was 4 years while that expected by those who employed their own lawyers was almost 5 years.

Federal public-order offenders with appointed counsel had on average shorter sentence lengths than those with private counsel (9 versus 10 years).

Minority inmates were more likely than whites to have appointed counsel

In State prisons, while 69% of white inmates reported they had lawyers appointed by the court, 77% of blacks and 73% of Hispanics had public defenders or assigned counsel (table 19). In the Federal system, blacks also were more likely to have public defenders or panel attorneys than other inmates; 65% of blacks had publicly financed attorneys. About the same percentage of whites and Hispanics used publicly financed attorneys (57% of whites and 56% of Hispanics).

Lower educational attainment among inmates was associated with higher use of court appointed attorneys. Over 7 in 10 with less than a high school diploma or GED used government financed attorneys. Sixty-one percent of State inmates and 50% of Federal inmates who had attended at least some college also had appointed lawyers.

Inmates who were unemployed were more likely than other inmates to use court-appointed attorneys

About 8 in 10 State inmates without a job before their most recent arrest, compared to 7 in 10 employed full time, had appointed counsel (table 20). Among Federal inmates two-thirds who were not employed and half who were employed full time had publicly financed attorneys.

Table 20. State and Federal inmates with appointed counsel, by selected economic characteristics, 1997

Selected economic characteristics	Percent of prison inmates with appointed counsel: State	Federal
Employment at arrest		
Full time	69.6%	56.6%
Part time or occasional	75.8	61.2
Not employed	79.4	67.6
Monthly income at arrest		
Less than $600	80.1%	71.2%
$600-$999	76.4	65.1
$1,000-$1,999	69.9	58.3
$2,000 or more	61.1	47.1
Homeless at any time in year before arrest		
Homeless	89.5%	90.6%
Not homeless	71.6	58.8

Source: BJS, Survey of Inmates in State and Federal Correctional Facilities, 1997.

Over three-quarters of State inmates with monthly personal incomes of less than $1,000 had publicly financed defenders. Less than two-thirds of those with incomes of $2,000 or more per month had publicly financed lawyers. Over two-thirds of Federal inmates with incomes less than $1,000 and nearly half with incomes of $2,000 or more per month had publicly supported attorneys.

For both State and Federal inmates, 9 in 10 who were homeless at any time in the year before their most recent arrest had court-appointed counsel.

Type of counsel for prison inmates varied by conviction offense

Among State offenders, those serving sentences for burglary, larceny, fraud, or robbery had relatively high rates of court appointed attorneys; about 8 in 10 had publicly financed counsel (table 21). Similarly in the Federal system, 8 in 10 robbery or burglary offenders used public defenders or panel attorneys.

State inmates convicted of serious violent and drug offenses made less use of publicly financed attorneys. Approximately two-thirds of those convicted of homicide, sexual offenses, drug trafficking, and drug possession reported using public defenders or assigned counsel.

Among Federal offenders about half convicted of fraud (46%), drug trafficking (55%), or drug possession (56%) reported using public defenders or panel attorneys. Over 8 in 10 sentenced for rape or other sexual crime, robbery, and burglary used publicly financed attorneys.

Table 21. State and Federal prison inmates with appointed counsel, by type of offense, 1997 and 1991

Offense	Percent of prison inmates with appointed counsel: State 1997	State 1991	Federal 1997	Federal 1991
Violent offenses	71.7%	73.0%	83.4%	77.5%
Homicide	67.0	65.2	76.0	76.7
Rape/sexual assault	67.5	70.4	72.3	82.2
Robbery	78.5	79.5	86.2	81.3
Assault	72.5	75.7	80.3	62.7
Property offenses	82.8%	82.0%	52.5%	51.8%
Burglary	84.5	83.8	82.6	79.6
Larceny	82.3	82.8	66.5	61.8
Fraud	76.3	74.0	46.1	47.7
Drug offenses	69.9%	67.8%	54.4%	48.2%
Possession	71.8	69.7	55.8	48.0
Trafficking	68.4	66.6	55.0	48.4
Public-order offenses	68.8%	69.7%	65.9%	48.6%
Weapons	73.1	70.5	72.8	59.2
Other public-order	67.3	69.5	59.7	39.4

Source: BJS, Survey of Inmates in State and Federal Correctional Facilities, 1997.

Methodology

Data sources

This report uses a variety of data sources.

• Data on Federal court representations were published by the Administrative Office of the U.S. Courts (AOUSC) in their annual, *Judicial Business of the United States Court.* The AOUSC's Defender Services Division supplied additional unpublished data.

• The AOUSC also provides BJS with data from their Criminal Master File. This dataset includes defendants in cases terminated each year in the Federal court system. Tables from the data are published each year in the *Compendium of Federal Justice Statistics.* BJS makes these data available on its Federal Justice Statistics website <http://fjsrc.urban.org/index.shtml>.

• In the National Survey of State Court Prosecutors, BJS has surveyed local prosecutors' offices biennially and several times has asked about types of indigent attorney programs in their jurisdictions. For more information, see the publication *Prosecutors in State Courts, 1996* (July 1998, NCJ 170092). The data, together with the code sheet and documentation, are available at <http://www.icpsr.umich.edu/NACJD/bus.html#nps>.

In 1999 BJS fielded the National Survey of Indigent Defense Systems to collect data from providers of criminal indigent services. Results are

Appendix table 1. Standard error of estimates for the Survey of Inmates in Local Jails, 1996

	Standard error of the estimates for type of counsel	
	Public	Private
All jail inmates	0.83%	0.63%
Those charged with a —		
Felony	1.04%	0.97%
Misdemeanor	1.84	1.21
Type of offense		
Violent	1.38%	1.24%
Property	1.33	0.91
Drug	1.47	1.23
Public-order	1.81	1.27

published in *Indigent Defense Services in Large Counties, 1999* (BJS Bulletin, NCJ 184932).

• In the State Court Processing Statistics data (formerly known as the National Pretrial Reporting Program) BJS collects a sample of records for felony cases filed in the Nation's 75 most populous counties in the United States. This survey includes information on the type of attorney used by the defendants. For more information, see *Felony Defendants in Large Urban Counties, 1996* (October 1999, NCJ 176981). Data are available at <http://www.icpsr.umich.edu/NACJD/bjs.html#scps>.

• Every 5 to 6 years BJS sponsors surveys of inmates in State prisons, Federal prisons, and local jails. In hour-long personal interviews with a nationally representative sample of inmates, respondents are asked about their current and prior offenses, personal and family characteristics, and the processes that resulted in their current incarceration. For further information, see *Profile of Jail Inmates, 1996* (April 1998, NCJ 164620) and *Substance Abuse and Treatment of State and Federal Prison Inmates, 1997* (December 1998, NCJ 172871).

Documentation, codebook, questionnaire, and the public use data files can be accessed at <http://www.icpsr.umich.edu/NACJD/bjs.html#silj> for the Survey of Inmates in Local Jails and at <http://www.icpsr.umich.edu/NACJD/bjs.html#siscf> for the Surveys of Inmates in State and Federal Correctional Facilities.

Standard errors and accuracy of the estimates

The accuracy of the estimates presented in this report for the State Court Processing Statistics, Survey of Inmates in Local Jails, and the Surveys of Inmates in State and Federal Correctional Facilities depend on the size of the sampling error. This error, as measured by an estimated standard error, varies with the size of the estimate and the size of the base population. Estimates of the standard error for selected characteristics have been calculated for each survey. (See appendix tables.) These standard errors may be used to construct confidence intervals around percentages.

For example, using standard errors from appendix table 1, the 95% confidence interval for the estimated 68% of jail inmates using court appointed counsel is calculated as 68.1% ± 1.96(.83), or 66.5-69.7%.

The standard error of the difference of two percentages is the square root of the sum of the squared standard errors for each group. For example, also using standard errors from appendix table 1, the 95% confidence interval for the estimated difference in the percentage with appointed counsel for jail inmates charged with a felony (76.6%) or misdemeanor (56.3%) is calculated as 20.3 ± 1.96(2.1), or 16.2 to 24.4. Because this interval does not include zero, we can conclude with 95% confidence that the percentages of those charged with a felony or misdemeanor using public counsel are actually different.

All relationships discussed in the text of this report are significant at the 95% confidence level.

Appendix table 2. Standard errors for felony defendants in the Nation's 75 largest counties, by type of offense, 1996

	Standard error of the estimates for type of offense				
Type of counsel	Total	Violent	Property	Drug	Public-order
Public defender	1.4%	1.0%	2.0%	1.1%	2.7%
Assigned counsel	0.7	0.7	0.9	0.9	0.8
Hired attorney	1.4	1.0	2.1	1.0	3.0
Pro se/other	0.1	0.2	0.1	0.1	0.1

Appendix table 3. Standard error of estimates for the Surveys of Inmates in State and Federal Correctional Facilities

	Standard error of the estimated percent of inmates with appointed counsel	
Characteristic	State	Federal
All prison inmates	0.48%	1.02%
Gender		
Male	0.50%	1.10%
Female	1.00	2.00
Race/Hispanic origin		
White	1.03%	2.39%
Black	0.82	2.14
Hispanic	1.38	2.68
Educational attainment		
Less than high school diploma	0.72%	1.87%
High school diploma or GED	0.71	1.49
More than high school diploma	1.46	2.04
Employment at arrest		
Full time	0.67%	1.34%
Part time or occasional	1.32	2.97
Not employed	0.79	1.86
Monthly income at arrest		
Less than $600	0.70%	1.71%
$600-$999	1.15	2.65
$1,000-$1,999	1.06	2.27
$2,000 or more	1.42	1.99
Offense		
Violent	0.72%	2.04%
Property	0.88	4.05
Drug	1.10	1.32
Public-order	1.64	2.61

Appendix table 4. Standard error of estimates from the Surveys of Inmates in State and Federal Correctional Facilities, 1997

Case disposition	Standard error of the estimate for type of counsel: Public	Private
State inmates		
Pleas of not guilty	0.55%	1.07%
Bench trial	0.34	0.66
Jury trial	0.47	0.96
Guilty or no contest plea	0.55	1.10
With plea bargain	0.64	1.13
Without plea bargain	0.55	0.94
Federal inmates		
Pleas of not guilty	1.18%	1.62%
Bench trial	0.56	0.77
Jury trial	1.10	1.54
Guilty or no contest plea	1.18	1.62
With plea bargain	1.35	1.74
Without plea bargain	1.16	1.39

The Bureau of Justice Statistics is the statistical agency of the U.S. Department of Justice. Jan M. Chaiken, Ph.D., is director.

BJS Special Reports address a specific topic in depth from one or more datasets that cover many topics.

Caroline Wolf Harlow wrote this report under the supervision of Allen J. Beck. In BJS, Carol DeFrances consulted extensively on research approaches and reviewed the State prosecutor data analysis; John Scalia provided numbers and reviewed the items dealing with Federal defendants; Tim Hart reviewed the section from State Court Processing Statistics; David Levin assisted in accessing the SCPS dataset; Tracy Snell provided a statistical review of material from the surveys of inmates in State or Federal prisons or local jails; and Greg Steadman reviewed the standard error calculations.

William Sabol, formerly of Urban Institute, verified the Federal data from the Criminal Master File. Staff of the Administrative Office of the U.S. Courts, Steven R. Schlesinger and Catherine Whitaker of the Statistical Division, and Theodore J. Lidz, Steven G. Asin, George M. Drakalich, and Stephan C. Macartney of the Defender Services Division, provided and verified data and reviewed text. Tom Hester and Ellen Goldberg produced and edited the report. Jayne Robinson prepared the report for final printing.

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U.S. Department of Justice

The Federal Death Penalty System:

Supplementary Data, Analysis and Revised Protocols for Capital Case Review

June 6, 2001

THE FEDERAL DEATH PENALTY SYSTEM:

Supplementary Data, Analysis and Revised Protocols for Capital Case Review

U.S. Department of Justice

Washington, D.C.

June 6, 2001

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THE FEDERAL DEATH PENALTY SYSTEM:

Supplementary Data, Analysis and Revised Protocols for Capital Case Review

U.S. Department of Justice
Washington, D.C.
June 6, 2001

INTRODUCTION

This report completes a survey and assessment of the federal death penalty system. At the direction of Attorney General Janet Reno, a study of decision-making processes and demographic factors in federal capital cases was carried out last year. The Department of Justice published an initial report setting out the results of this study on September 12, 2000 (hereafter, the "Sept. 12 report"). Attorney General Reno wished to supplement the information that was available at the time of the Sept. 12 report, and the Department undertook further information gathering and analysis. Noting the pendency of this follow-up study, President Clinton delayed the first scheduled federal execution in the modern period, and directed that the results of the Department's analysis be reported to the President by the end of April 2001.

Further study has now been carried out, and its results have been analyzed. The findings under the augmented data, and related policy decisions, may be summarized as follows:

The proportion of minority defendants in federal capital cases exceeds the proportion of minority individuals in the general population. The information gathered by the Department indicates that the cause of this disproportion is not racial or ethnic bias, but the representation of minorities in the pool of potential federal capital cases. A factor of particular importance is the focus of federal enforcement efforts on drug trafficking enterprises and related criminal violence. The prosecution of drug crimes has generally been a key priority both of Congress and of federal law enforcement for many years. Federal authorities are often better able to carry out effective prosecutions in this area for such reasons as the complexity of drug enterprise cases, their multi jurisdictional character, and the availability to federal prosecutors of greater investigative resources or more effective legal tools.

In areas where large-scale, organized drug trafficking is largely carried out by gangs whose membership is drawn from minority groups, the active federal role in investigating and prosecuting these crimes results in a high proportion of minority defendants in federal cases, including a high proportion of minority defendants in potential capital cases arising from the lethal violence associated with the drug trade. This is not the result of any form of bias, but reflects the normal factors that affect the division of federal and state prosecutorial responsibility: the nature of the offenses subject

to federal jurisdiction, the demographics of crime in areas where that jurisdiction is exercised, the respective capacities of federal and state law enforcement authorities, and the cooperative arrangements and divisions of responsibility that federal and state authorities develop in light of these considerations.

Within the universe of federal cases that may be pursued as capital crimes, cases in which the death penalty is actually sought depend on subsequent exercises of prosecutorial judgment and discretion. Under existing Justice Department procedures, United States Attorneys cannot decide unilaterally whether to seek the death penalty in cases involving capital charges, but are required to submit all such cases to a central review procedure. These cases are reviewed by a committee of senior attorneys, and the Attorney General personally makes a final decision whether to seek a capital sentence. The Sept. 12 report found that at no stage of the review process were decisions to recommend or approve the seeking of a capital sentence made at higher rates for Black or Hispanic defendants than for White defendants. For example, in the cases considered by the Attorney General, the Attorney General approved seeking the death penalty for 38% of White defendants, 25% of Black defendants, and 20% of Hispanic defendants.

The data available in the preparation of the Sept. 12 report was limited to information concerning cases involving capital charges that were submitted to the review procedure. Data was not available concerning cases in the United States Attorneys' offices which would factually support charging an offense punishable by death, but which were not actually charged as capital crimes and submitted for review. Attorney General Reno accordingly directed that more complete information be obtained. The United States Attorney offices submitted this supplementary information subsequent to the Sept. 12 report.

Like the data considered in the Sept. 12 report, the augmented data provides no evidence that minority defendants are subjected to bias or otherwise disfavored in decisions concerning capital punishment. Within the broader universe of potential capital cases, capital charges and submission to the review procedure for a decision about seeking the death penalty did not occur with any greater frequency in cases involving Black or Hispanic defendants than in cases involving White defendants.

While the Department's review of existing federal death penalty procedures has produced no evidence of bias against racial or ethnic minorities, it has suggested that changes could be made to promote public confidence in the process's fairness and to improve its efficiency. For example, as noted above, consideration of the broader universe of potential capital cases reinforced the findings of the Sept. 12 study which tended to refute any assumption of bias against racial or ethnic minorities. However, obtaining information about this broader class of cases required an extraordinary effort because the existing review procedure does not regularly obtain information about cases in which a capital charge is factually supportable, but the U.S. Attorney office decides to charge (or accept a plea to) a noncapital crime. Hence, in the future, U.S. Attorneys will be required to submit information, including racial and ethnic data, about potential capital cases, as well as those in which a capital offense is actually being charged. This should help to maintain public confidence in the fairness of the process by making more complete racial and ethnic data available for both actual and potential federal capital cases on a continuing basis.

Part I of this report describes the legal rules and administrative procedures governing federal capital cases, including the existing safeguards against racial and ethnic bias. Part II describes the

central findings of the Sept. 12 report, the reaction and policy decisions of Department and Administration officials at the time, their direction that more extensive data collection and analysis be carried out, and the results of further study. Part III analyzes the data as it bears on the role of racial or ethnic factors. Part IV discusses the contemplated revision of the Department's protocol for reviewing capital cases.

PART I: LEGAL RULES AND ADMINISTRATIVE PROCEDURES

Decisions of the Supreme Court beginning in the early 1970s imposed new restrictions on capital punishment, producing a temporary cessation in the use of the death penalty as a criminal sanction. Most states subsequently reformed their death penalty laws and procedures to conform to the new standards. Congress initially sought to do the same for federal cases through provisions of the Anti-Drug Abuse Act of 1988, which made the death penalty available for certain drug-related offenses. The federal death penalty was effectively revived on a broader basis through provisions of the Violent Crime Control and Law Enforcement Act of 1994, which added death penalty authorizations to many additional offense provisions, and established general statutory procedures for seeking and imposing capital sentences. The federal offenses for which the death penalty is currently authorized generally require as a necessary element the killing of a victim, but they include a few non-homicidal offenses, such as treason and espionage.

These federal legislative enactments have been paralleled by the Justice Department's adoption of administrative standards and procedures for death penalty decisions in federal cases. Following the 1988 enactment, the Department adopted a policy that required United States Attorneys to submit to the Attorney General for review and approval any case in which the United States Attorney wished to seek the death penalty. Following the 1994 enactment's expansion of federal death penalty authorizations, the Department adopted the current protocol for death penalty cases. The current protocol requires United States Attorneys to submit to a centralized review process all cases involving a pending charge of an offense for which the death penalty is a legally authorized sanction, regardless of whether the United States Attorney wishes to seek the death penalty.

Both the legal rules and the administrative procedures that currently govern federal capital cases incorporate extensive safeguards against any influence of racial or ethnic bias or prejudice. The main features of the existing system are as follows:

A. FEDERAL DEATH PENALTY LAW

The federal cases in which a defendant is eligible for a capital sentence are generally those in which: (1) the defendant is charged with a crime for which the death penalty is a legally authorized sanction, (2) the defendant intended or had a high degree of culpability with respect to the death of the victim, and (3) one or more aggravating factors specified in a statutory list are present in the case. The statutory aggravating factors include such factors as the commission of a killing in the course of another serious offense, the defendant's having a prior criminal history involving serious violent offenses, the commission of a killing after substantial planning and premeditation, killing multiple victims, or endangering the lives of other persons (in addition to the person killed) in committing the crime. 18 U.S.C. 3591-93.[1] To seek a capital sentence, a prosecutor must file a notice of intent to seek the death penalty. The notice must identify the aggravating factor or factors which the government proposes to prove as justifying a sentence of death. 18 U.S.C. 3593(a).

The prosecutor is constitutionally prohibited from engaging in discrimination or favoritism based on invidious factors, such as race or ethnicity, in deciding whether to seek a capital sentence, and is likewise prohibited from making any appeal to racial or ethnic prejudice in remarks to the jury. A showing that the prosecutor or other decision makers in the case acted on the basis of racial or ethnic bias would entitle the defendant to relief from a capital sentence.(2)

In cases where a capital sentence is sought, the defendant is entitled to the appointment of two lawyers to represent him, "of whom at least 1 shall be learned in the law applicable to capital cases." 18 U.S.C. 3005. Indigent capital defendants have a continuing right at all stages of litigation and review to provision of needed defense resources, and to appointment of defense counsel who satisfy specific years-of-experience standards or "whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation." 21 U.S.C. 848(q).

In the selection of the jury, potential jurors are subject to questioning ("voir dire") concerning bias, including possible racial or ethnic bias against the defendant. If it appears that a potential juror harbors such bias against the defendant, defense counsel can challenge the person "for cause," and the court will exclude the person from the jury. The parties in a capital case are also afforded a large number of peremptory challenges - 20 for each side - which they can use at their discretion. Fed. R. Crim. P. 24(b). For example, defense counsel who suspect that a potential juror or jurors might be affected by racial or ethnic bias against the defendant can use peremptory challenges to exclude these persons from the jury. However, neither the prosecution nor the defense is permitted to use peremptory challenges to exclude persons from the jury because of their race or ethnicity.(3)

If the defendant is convicted of a capital offense, the guilt-determination phase of the trial is followed by a special hearing to determine whether a sentence of death is justified. The hearing is normally held before a jury of 12 members. At the hearing, the prosecutor presents evidence in support of the aggravating factors for which notice has previously been provided, and the defense is free to present evidence concerning any mitigating factors. The government must prove the existence of aggravating factors beyond a reasonable doubt, and the jury must unanimously agree that such a factor or factors have been established. The defendant need only establish the existence of mitigating factors by a preponderance of the evidence, and each juror is free to conclude that such factors have been established, regardless of whether other members of the jury agree. To recommend a sentence of death, the jury must determine that the defendant had the requisite culpability with respect to the victim's death, and must unanimously agree that the aggravating factor or factors it has found sufficiently outweigh any mitigating factors to justify a capital sentence. If the jury does recommend a capital sentence, the court is required to sentence the defendant accordingly. If the jury does not unanimously agree that the death penalty should be imposed, the defendant is given a lesser (non-capital) sentence. 18 U.S.C. 3593-94.

The rules for capital sentencing hearings require special instructions and certifications to guard against any possible influence of bias or prejudice. The court instructs the jury that, "in considering whether a sentence of death is justified, it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim and that the jury is not to recommend a sentence of

death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or of any victim may be." On returning a recommendation concerning the sentence, the jury must also return to the court a certificate signed by each juror, "that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or any victim may be." 18 U.S.C. 3593(f).

In cases where a capital sentence is imposed, the court of appeals' review of the case includes a determination of "whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." If the appellate court finds that the sentence was based on such improper factors, it must send the case back to the trial court for another capital sentencing hearing or imposition of a noncapital sentence. 18 U.S.C. 3595. Following the appeal, there is regularly further judicial review in capital cases, including a motion for collateral relief under 28 U.S.C. 2255. The defendant may thereafter apply for executive clemency. As noted above, the defendant has a continuing right to adequate resources and representation by competent counsel at all stages of the process.

B. THE CAPITAL CASE REVIEW PROCEDURE

The Justice Department's capital case review procedure is governed by a protocol set out in section 9-10.010 et seq. of the United States Attorneys' Manual (USAM). The procedure "is designed to promote consistency and fairness." The protocol provides that "[a]s is the case in all other actions taken in the course of Federal prosecutions, bias for or against an individual based upon characteristics such as race or ethnic origin may play no role in the decision whether to seek the death penalty." USAM 9-10.080.

The protocol requires United States Attorneys to submit cases involving a pending charge of an offense for which the death penalty is a legally authorized sanction, regardless of whether or not the U.S. Attorney recommends seeking the death penalty. The death penalty cannot be sought without the prior written authorization of the Attorney General.

The U.S. Attorneys' capital case submissions are sent to the Criminal Division and must include a death penalty evaluation form for each defendant charged with a capital offense, a detailed prosecution memorandum, copies of indictments, written materials submitted by defense counsel in opposition to the death penalty, and other significant documents and evidence as appropriate. The Capital Case Unit of the Criminal Division reviews the submission, seeks additional information when necessary, and drafts an initial analysis and proposed recommendation.

The case is then forwarded to a committee of senior Justice Department lawyers, the Attorney General's capital case review committee. The review committee meets with the Capital Case Unit attorneys, the U.S. Attorney and/or the prosecutors in the U.S. Attorney's office who are responsible for the case, and defense counsel. During this meeting, defense counsel are afforded an opportunity to present any arguments against seeking the death penalty for their client. The review committee considers "all information presented to it, including any evidence of racial bias against the defendant or evidence that the Department has engaged in a pattern or practice of racial discrimination in the

administration of the Federal death penalty." USAM 9-10.050. The review committee thereafter meets to finalize its recommendation to the Attorney General, to whom all submitted materials are forwarded. The Attorney General makes a final decision as to whether a capital sentence should be sought in the case.

As a safeguard against any possible influence of racial or ethnic bias, the review process is carried out in a "race-blind" manner. The United States Attorney's office does not provide information about the race or ethnicity of the defendant to review committee members, to attorneys from the Criminal Division's Capital Case unit who assist the review committee, or to the Attorney General. The only individuals in Washington, D.C., who are ordinarily given racial or ethnic information are paralegal assistants in the Capital Case Unit who collect the statistics under separate cover from the United States Attorneys.[4] This information provides the pool from which most of the data of the Sept. 12 report on race and ethnicity in federal capital cases was drawn.

PART II: STUDY OF THE SYSTEM

A. THE SEPTEMBER 12, 2000 REPORT

On September 12, 2000, the Department released the results of a survey of the federal death penalty system. The findings from that survey are set out exhaustively in the Sept. 12 report and its accompanying statistical tables, and need not be repeated here in detail. The central findings regarding racial and ethnic proportions were as follows:

First, in cases submitted by the United States Attorneys for departmental review, the proportions of Black and Hispanic defendants were greater than the proportions of Blacks and Hispanics in the general population. Of the 682 defendants reviewed under the Department's death penalty decision-making procedures in the period 1995 to 2000, 134 (20%) were White, 324 (48%) were Black, and 195 (29%) were Hispanic. (Sept. 12 report at 6.)[5]

Second, recommendations and decisions to seek the death penalty were less likely at each stage of the process for Black and Hispanic defendants than for White defendants. In other words, United States Attorneys recommended the death penalty in smaller proportions of the submitted cases involving Black or Hispanic defendants than in those involving White defendants; the Attorney General's capital case review committee likewise recommended the death penalty in smaller proportions of the submitted cases involving Black or Hispanic defendants than in those involving White defendants; and the Attorney General made a decision to seek the death penalty in smaller proportions of the submitted cases involving Black or Hispanic defendants than in those involving White defendants. (Sept. 12 report at 7.)

In the cases considered by the Attorney General, the Attorney General decided to seek the death penalty for 38% of the White defendants, 25% of the Black defendants, and 20% of the Hispanic defendants. (Sept. 12 report at 7.) The finding that the death penalty was sought at lower rates for Black and Hispanic defendants than for White defendants held true both in "intraracial" cases, involving defendants and victims of the same race and ethnicity, and in "interracial" cases, involving defendants and victims of different races or ethnicities. (Sept. 12 report at 25-26.)[6]

B. RELATED JUSTICE DEPARTMENT AND ADMINISTRATION DECISIONS

In announcing the results of the Sept. 12 report, Attorney General Reno noted that the information showed racial/ethnic disparities in the federal death penalty system, in comparison to the general population. Specifically, as noted above, in the 682 cases submitted to the Department's death penalty review procedure by U.S. Attorney offices between 1995 and July 2000, 20% involved White defendants, 48% involved Black defendants, and 29% involved Hispanic defendants. She further noted, however, that statistical disparities relating to race and ethnicity are not unique in any sense to the federal death penalty context, but are "true of the entire criminal justice system, both state and federal." With respect to the decisions made in the Department's review process, she noted that the proportion of cases in which seeking the death penalty was actually authorized was higher for White defendants than for defendants of other races/ethnicities. Specifically, as noted, in the cases considered by the Attorney General, the death penalty was authorized 38% of the time for White defendants, 25% of the time for Black defendants, and 20% of the time for Hispanic defendants.(7)

Attorney General Reno did not believe that the findings of this study showed that racial or ethnic bias affected the decision-making process in federal death penalty cases. However, the available information was generally limited to the information submitted by U.S. Attorney offices in connection with the capital case review procedure. She accordingly directed that further study be carried out to illuminate any statistical disparities at other stages of the process, such as decisions whether to pursue federal rather than state charges in potentially capital cases.

Attorney General Reno rejected the idea of declaring a moratorium on the federal death penalty pending the completion of further study for several reasons: (1) defendants in federal capital cases are competently represented (including representation by two attorneys at least one of whom is experienced in capital litigation, with sufficient defense resources), (2) there is no issue of federal capital convicts being innocent of the crimes for which they have been sentenced to death, (3) the evidence and the law have justified the decisions in all cases to seek capital punishment, and (4) the study's findings did not show bias - as opposed to disparities which could result from non-invidious factors - in federal capital cases.(8)

However, President Clinton thereafter issued a reprieve which delayed for six months the first scheduled federal execution in the contemporary period, pointing to the pendency of further study and analysis of the issue of racial and ethnic disparities. He directed that the Department's analysis be reported to the President by the end of April 2001.(9)

C. THE SUPPLEMENTARY STUDY

The follow-up to the Sept. 12 report outlined by Attorney General Reno included solicitation of external research proposals, submission by the United States Attorneys within 60 days of data about potential capital cases in their offices that were not submitted to the Department's capital case review process, and other examination of factors used to decide which homicide cases are taken into the federal system when there is joint state and federal jurisdiction.

With respect to the potential solicitation of external research proposals, the National Institute of Justice held a meeting with researchers and practitioners on January 10, 2001. The discussion at the meeting indicated that attempting to obtain a comprehensive understanding of the statistical proportions found in federal capital (and potential capital) cases would entail a highly complex, multi-year research initiative. It further indicated that even if such a study were carried out, it could not be expected to yield definitive answers concerning the reasons for disparities in federal death penalty cases. It was also clear that this approach could not produce policy-relevant findings within the time frame specified by President Clinton, or in time to inform decisions about carrying out death sentences whose execution dates were approaching.

It was possible, however, to carry out promptly the more defined tasks identified by the President and the Attorney General. The U.S. Attorneys submitted information concerning cases in their offices in which the facts would have supported a capital charge, but which were not charged as capital crimes and submitted to the departmental review procedure. Analysis of this additional information produced findings which were similar in character to the findings of the Sept. 12 report.

Within the broader pool of potential capital cases, the racial and ethnic proportions were again found to be different from those in the general population. This broader pool of cases involved 973 defendants, in comparison with the 682 defendants in the cases submitted to the departmental review procedure.[(10)] Of the 973 defendants in the broader class, 17% (166) were White, 42% (408) were Black, and 36% (350) were Hispanic.[(11)]

The augmented data was also similar to the original data of the Sept. 12 report in that it provided no evidence of favoritism towards White defendants in comparison with minority defendants. Rather, potential capital cases involving Black or Hispanic defendants were less likely to result in capital charges and submission of the case to the review procedure. Specifically, capital charges were brought and the case was submitted for review for 81% of the White defendants; the corresponding figures for Black defendants and Hispanic defendants were 79% and 56% respectively.[(12)]

Likewise, considering the process as a whole, potential capital cases involving Black or Hispanic defendants were less likely to result in decisions to seek the death penalty. Specifically, the Attorney General ultimately decided to seek the death penalty for 27% of the White defendants (44 out of 166), 17% of the Black defendants (71 out of 408), and 9% of the Hispanic defendants (32 out of 350).[(13)]

It was also possible to carry out within a reasonable time frame additional consultation concerning the reasons for the exercise of federal jurisdiction in potential capital cases. The information obtained indicates that the racial and ethnic proportions found in the general pool of potential federal capital cases, and differences among the racial and ethnic proportions in different districts, result from non-invidious causes. Some of these causes are general in nature, and apply to the findings in many districts; others reflect unique conditions in particular districts and the relationship between federal and state authorities in those districts. Part III of this report provides more specific analysis of this information.

PART III: ANALYSIS OF THE DATA

As discussed in Part I of this report, a wide range of protections and remedies exist, both legal and administrative, to guard against any influence of racial or ethnic bias in the administration of capital punishment at the federal level. Nor is there anything in the character, training, or background of federal prosecutors that would dispose them to act from such invidious motives. Rather, they are experienced legal professionals whose values and practices are shaped by general societal attitudes and the specific values of the legal system that strongly condemn discrimination based on race or ethnicity.

Given the absence of any reason to expect a priori that racial or ethnic bias would play a role in federal capital punishment decisions, the question then becomes whether there is empirical evidence which nevertheless demonstrates that the system is subverted by such bias. The findings of the Sept. 12 report and the further study conducted thereafter do not support such a conclusion. The following analysis considers this issue first in relation to the general pool of potential federal capital cases, and thereafter in relation to the decisions made at subsequent stages of the review process.

A. POTENTIAL FEDERAL CAPITAL CASES

In assessing the implications of statistical data as possible evidence of bias or prejudice, it is necessary to distinguish between statistical disparities on the one hand and discrimination on the other. For example, in a federal district that prosecutes a large number of securities fraud cases, a finding that the defendants in these cases are practically all White would not imply that federal prosecutors in these cases are engaging in favoritism to potential Black and Hispanic defendants, or discriminating against White defendants. Rather, it may just be the case that most persons who commit these crimes in the district are White. Account must be taken of the differing incidences of crimes in different demographic groups.

This point applies to the pool of potential capital cases as in any other area. Both common experience and empirical data indicate that the offenses that may lead to homicides and capital charges are not evenly distributed across all population groups. Since crime and victimization are not evenly distributed across the general population, there is no reason to expect that the racial and ethnic proportions in potential capital cases will be the same as, or similar to, the racial and ethnic proportions in the general population.[14]

Turning to the area of federal capital cases, it must also be understood that federal criminal jurisdiction is limited, and generally supplementary, in character. The Sept. 12 report (at p. 4) explained:

> In evaluating the data . . . the reader should bear in mind that the vast majority of homicides in the United States, like most violent crimes, are investigated exclusively by local police officers working hand-in-hand with local prosecutors, who file charges against defendants in state courts, either as a capital case or non-capital case. When a homicide is prosecuted federally - either as a capital or non-capital case - it is often because of the availability of certain federal laws or because of a federal initiative to address a particular crime problem. Criminal organizations often operate in multiple jurisdictions, making it difficult for any single local prosecutor to investigate or prosecute a case. Additionally, many states lack the equivalent of the federal witness protection program and the ability to conduct complex long-term investigations using resource intensive investigative techniques such as court-ordered wiretaps and

undercover operations.

> Apart from these differences in laws and resources, which often affect whether a particular homicide is prosecuted in state or federal court - either as a capital or non-capital case - state and federal law enforcement officials often work cooperatively to maximize their overall ability to prevent and prosecute violent criminal activity in their respective communities. Such cooperation is a central feature of current federal law enforcement policy. In some areas, these cooperative efforts lead to agreements that certain kinds of offenses, particularly violent crimes, will be handled by federal authorities . . . . In some cities, a large number of cases involving multiple murders by drug and other criminal organizations are investigated by joint federal and local task forces and prosecuted federally due to some of the factors cited above, such as the geographic reach of the organization and the availability of a witness protection program.

As discussed in Part II of this report, the proportion of Black and Hispanic defendants in the pool of potential federal capital cases exceeds the proportion of Blacks and Hispanics in the general population. The Department's follow-up study of this issue produced no evidence that this statistical disparity results from bias or prejudice, as opposed to non-invidious factors like those discussed above, which can result in disparities in any part of the criminal justice system. To see concretely how these factors can affect the demographic proportions in federal capital cases, it is helpful to examine more specifically the nature of these cases, and the reasons for the exercise of federal jurisdiction, in a number of particular districts.

1. Eastern District of Virginia

In the 1995-2000 period considered by the Sept. 12 report, the U.S. Attorney office for the Eastern District of Virginia charged capital offenses in 66 cases and submitted these cases to the Department's capital case review procedure. Of these 66 defendants, 5 were White, 59 were Black, and 2 were Hispanic.

While the defendants in these cases were predominantly Black, analysis of the underlying grounds for federal prosecution shows only legitimate, non-invidious reasons for the district's actions. Of the 66 capital cases submitted by this district, 51% involved drug-related murders, 29% involved killings committed by inmates at the Lorton correctional facility, and 20% involved a mixed bag of offenses as discussed below. The reasons for the exercise of federal jurisdiction in these cases were as follows:

Drug-related killings

Most of the capital charges in the Eastern District of Virginia (51%) resulted from drug cases. The cases in this category originated primarily from large-scale trafficking organizations involving multiple murders, as indicated by the fact that 70% of them were charged under the provision defining the Continuing Criminal Enterprise (CCE) drug offense, 21 U.S.C. 848, or as conspiracies in relation to a CCE murder; 12% were charged as murder in aid of racketeering under 18 U.S.C. 1959, or under both 18 U.S.C. 1959 and 21 U.S.C. 848; and 18% were charged under 18 U.S.C. 924(j) (causing death through use of a firearm during drug offense). Most of these drug-related murder cases arose from federal, state, and local task forces.

The defendants in these cases are not White because the members of the drug gangs that engage in large-scale trafficking in the Eastern District of Virginia are not White. However, the large federal role in that district in prosecuting serious drug crimes generally, and potentially capital drug-related homicides in particular, has nothing to do with the race of the defendants. Rather, the factors which have contributed to this assumption of federal responsibility include the following:

First, Virginia prosecutors have had little ability to use state grand juries in investigations. The availability of compulsory process to federal prosecutors through the use of federal grand juries has provided a critical advantage in the investigation of ongoing drug conspiracies, which account for most of the drug-related murders in the district.

Second, until recently, each defendant was entitled to a separate trial in the state system. This is a severe disadvantage in prosecuting cases involving multiple defendants, whose joint activities may have resulted in numerous killings. There is no comparable problem in federal prosecutions, in which it is usually possible to secure a joint trial for defendants who have engaged in this type of coordinated criminal activity.

Third, Virginia has many prosecution units. The Eastern District of Virginia has within its boundaries 43 counties, each with its own Commonwealth's Attorney, and 21 independent cities, most of which also have their own Commonwealth's Attorneys. The state Attorney General does not have general prosecution authority throughout the state. Thus, in the state system, defendants who commit crimes in more than one jurisdiction must be prosecuted in each jurisdiction separately. Again, this is a serious disadvantage in attempting to prosecute drug trafficking activity, and related violence and homicides, which cut across jurisdictional boundaries within the state. The U.S. Attorney, in contrast, can prosecute a defendant or defendants in a single trial for activities committed in the various state jurisdictions which constitute federal crimes.

Fourth, Virginia prosecutors are generally in a less favorable position to prosecute conspiracy cases. Their offices often have limited resources and cannot devote the manpower to investigate ongoing conspiracies, particularly when the organizations permeate numerous other jurisdictions as well. Task forces including both law enforcement officers and prosecutors make the most sense in these cases. Combining the abilities of local law enforcement officers and the prosecution advantages of the federal system, it is possible to make many serious cases which might otherwise go unsolved or resist successful prosecution.

Cases from Lorton

As a result of recent reforms, persons sentenced to imprisonment for the commission of felonies under the District of Columbia Code will serve their sentences in the regular federal prison system. However, prior to these reforms, incarcerated D.C. felons were housed in a separate prison located in Lorton, Virginia. The Eastern District of Virginia was responsible for prosecuting killings committed by inmates at that institution, which accounted for 29% of the cases it submitted to the Department's capital case review procedure. Not surprisingly, the incarcerated felon population deriving from a majority Black urban jurisdiction (D.C.) has been predominantly Black, and the defendants in potential capital cases arising from killings by inmates in that incarcerated felon population have been Black.

Other cases

The remaining 20% of the cases submitted by the Eastern District of Virginia involved five espionage defendants, two bank robbery defendants, two kidnapping defendants, three carjacking defendants, and one murder in a federal enclave. The five espionage defendants were White. Their race, of course, had nothing to do with the decision to prosecute these cases federally; espionage, by its nature, is a crime that only the federal government prosecutes. Likewise, the murder in a federal enclave implicated obvious federal interests.

The carjacking case involved three members of the same family who hijacked trucks and killed the drivers. They committed their crimes in more than one state and in more than one local jurisdiction within Virginia. Federal prosecution made possible a joint trial of these crimes, which otherwise would have had to be tried separately in various local Virginia jurisdictions.

The bank robbery was a complicated case in which the need to utilize the powers of a federal grand jury made federal prosecution appropriate. The two kidnapping cases arose from abduction-murders in which state prosecution was not an option, because it was not provable which particular states the victims were in at the time the kidnappers killed them. This is not an impediment to a successful federal kidnapping prosecution.

2. District of Puerto Rico

The District of Puerto Rico submitted 72 cases, all involving Hispanic defendants, to the Department's capital case review procedure. The District of Puerto Rico has an unusually large number of homicide cases because the U.S. Attorney has agreed with the local authorities that the U.S. Attorney's office will prosecute fatal carjacking cases. The obvious reason the defendants in these cases were Hispanic is that the population of Puerto Rico is generally Hispanic.

3. District of Columbia

The United States Attorney's office for the District of Columbia submitted cases involving 23 defendants to the Department's capital case review procedure, of whom 22 were Black. Most of these cases (66%) involved defendants charged in multi-defendant racketeering (RICO) and Continuing Criminal Enterprise (CCE) drug offense cases. Of the remainder, 13% involved federal carjacking charges, 13% involved killing a federal witness, 4% involved killing a law enforcement officer, and 4% involved terrorism.

The U.S. Attorney's office is responsible for the prosecution of local crimes under the District of Columbia Code, as well as being responsible for the prosecution of federal offenses in D.C. Hence, in contrast to other districts, the U.S. Attorney office in D.C. has jurisdiction to prosecute crimes occurring in its geographic area regardless of whether it brings federal charges. The choice for that office in murder cases is between pursuing a murder prosecution under local D.C. law in the D.C. Superior Court, or bringing a federal charge and prosecuting the case in federal district court.

Because of D.C.'s demographics, cases involving serious violent crimes - whether prosecuted under federal law or local D.C. law - usually involve Black defendants. Where the choice is made to proceed in federal court, the decision has nothing to do with the defendant's race or ethnicity. Rather, it depends on the availability of a federal offense that applies to the criminal conduct, and whether there are prosecutorial advantages in litigating in one forum rather than the other.

For example, as noted above, most of the cases from D.C. submitted to the review procedure involved drug-related killings. The U.S. Attorney's office has frequently brought federal prosecutions involving drug trafficking groups and street gangs as a valuable alternative to single-incident murder cases in the local Superior Court for several reasons:

First, the federal courts are better suited and better equipped to handle multi-defendant complex criminal prosecutions than the local Superior Court. The federal district court in D.C. has extensive experience in handling these complex cases, which raise significant witness and jury security issues.

Second, use of the federal RICO and CCE offenses makes it possible to join together evidence relating to drug trafficking, murders, and other violence in a single case. This is a major advantage in comparison with single-incident prosecution of murders in the local Superior Court.

Third, the Federal Rules of Evidence are superior from a prosecutorial standpoint to the evidence rules applied in Superior Court proceedings - for example, in relation to the admissibility of evidence of the defendant's commission of similar or related crimes on other occasions.

Fourth, federal RICO/CCE prosecutions allow the government to: (1) introduce evidence of acts committed by violent defendants when they were juveniles, (2) avoid statutes of limitations issues for crimes other than murders (e.g., assaults and drug trafficking), (3) avoid venue problems in prosecuting multijurisdictional criminal operations, and (4) achieve consolidated trials of related criminal activity where severance would more likely occur in a Superior Court prosecution.

4. Central District of California

The Central District of California submitted cases involving 15 defendants to the Department's capital case review procedure, including three White defendants, four Black defendants, and six Hispanic defendants. The 40% (six out of 15) figure for Hispanics in this district was somewhat greater than the proportion of Hispanic defendants in submitted cases generally (29%). However, the proportion of Hispanic defendants in federal capital cases in this district is increased by federal prosecution of members of the "Mexican Mafia." This prison gang has been a serious problem in the California correctional system. The problem can be ameliorated through federal prosecution, which results in the defendants serving their sentences in the federal prison system.

Thus, the causes of the exercise of federal jurisdiction in potential capital cases are varied. Some, such as a federal enforcement emphasis on the prosecution of drug enterprises and related violence, are common to many districts. Others, such as the Eastern District of Virginia's jurisdiction over killings by inmates in D.C.'s prison, and the agreement concerning carjacking prosecutions in the District of Puerto Rico, are specific to particular districts. The common feature of these causes is that they may result in racial and ethnic disparities in federal capital cases when coupled with the demographics of crime in the areas where federal jurisdiction is exercised, but they do not involve any influence of racial or ethnic bias on federal prosecutorial decisions. Rather, as with the division of federal and state responsibility in other areas of prosecution and law enforcement, they reflect non-invidious decisions based on relative federal and state capacities, and cooperative arrangements developed with state and local authorities that take account of those capacities.

A final question in this area is that of "geographic" or "regional" disparity in federal capital cases, which was also identified as a matter meriting further examination in the follow-up to the Sept.12 study. This question, which relates to the fact that some districts have generated larger numbers of potential capital cases than others, can be taken in two ways:

Taken in one way, the reference to "geographic" disparities may reflect a concern that such disparities result from racial or ethnic bias. Articulated more fully, the thought would be that U.S. Attorney personnel in some districts, for reasons of racial or ethnic bias, may have a particular desire to secure the death penalty for minority defendants. Hence, they exercise federal jurisdiction to prosecute more potentially capital cases involving such defendants, so as to be able to convict them federally for capital crimes and secure their execution. This might account for the unusually large number of capital case submissions from some districts.

If this were actually what was going on, one would expect the districts with unusually large numbers of capital case submissions to seek the death penalty with special vigor in relation to minority defendants. The data do not support this notion. For example, aside from the Eastern District of Virginia and the District of Puerto Rico, which have been discussed above, the districts with the largest number of capital case submissions have been the District of Maryland, the Eastern District of New York, and the Southern District of New York. The figures from these districts are as follows:

- The District of Maryland charged capital crimes and submitted to the Department's review procedure cases involving 41 defendants, of whom 36 were Black. However, it recommended the death penalty for only five of the 36, a proportion of 14%. This is below the national proportion of 25% for recommendations by U.S. Attorneys that the death penalty be sought for Black defendants in submitted cases.

- The Eastern District of New York submitted cases involving 58 defendants to the review procedure, of whom 19 were White, 20 were Black, 12 were Hispanic, and 7 were in the "Other" category. It only recommended the death penalty for one of the Black defendants, and for none of the Hispanic defendants.

- The Southern District of New York submitted cases involving 50 defendants to the review procedure, involving 4 White defendants, 17 Black defendants, 28 Hispanic defendants, and 1 "Other" defendant. This was a considerably higher proportion of Hispanic defendants than the national norm - but the district recommended the death penalty for none of them. The district recommended the death penalty for 5 of the 17 Black defendants, a proportion of 29%, which differed little from the national norm of 25%.

In short, there is nothing in the data from these districts which suggests that their high incidence of capital case submissions had anything to do with a desire based on racial or ethnic bias to secure capital sentences for minority defendants.[15]

A second way of taking the reference to "geographic" disparities would be as reflecting a sense that

it is intrinsically necessary or desirable for capital cases to be distributed in some proportionate manner among the various districts, independent of any concern about racial or ethnic bias. In this sense, however, geographic "disparities" are neither avoidable nor undesirable. As this report has explained at length, the federal criminal jurisdiction is supplementary and complementary to state and local law enforcement jurisdiction. This necessarily results in large differences among the districts in enforcement priorities and in the division of responsibilities with their state and local counterparts. For example, in districts which accord a high priority to federal prosecution of violent drug gangs, that focus tends to generate a high volume of federal prosecutions involving drug-related killings. Other districts may not prioritize such prosecutions to the same degree because (for example) drugs are generally less of a problem in their areas, state and local authorities have relatively good capacities for dealing with such crimes, or there is relatively little advantage in federal, as opposed to state or local, prosecution in these cases.

There is nothing illegitimate about a district focusing on the actual needs of the geographic area for which it is responsible in decisions about the exercise of federal jurisdiction. Rather, a U.S. Attorney who failed to do so would be derelict in his or her basic responsibilities. To the extent that this results in varying numbers of federal capital cases among the districts, it is no different than, nor any more objectionable than, the "disparities" among the districts which occur equally in non-capital cases.

B. SUBSEQUENT DECISIONAL STAGES

With respect to recommendations and decisions by the Attorney General's review committee and by the Attorney General, there is little to add to the discussion in Part II of this report. Decisions to seek the death penalty have been recommended and approved in lower proportions of cases involving Black or Hispanic defendants than White defendants. There is nothing in these findings which suggests that the system involves racial or ethnic bias against minorities. As discussed above, the review process is designed to shield the review committee members and the Attorney General as far as possible from information concerning race and ethnicity in the submitted cases. What decisionmakers do not know about cannot influence their decisions.

Analysis of the actions of the U.S. Attorneys' offices is somewhat more complex, because they make a larger number of decisions which may affect the capital or non-capital treatment of their cases. However, the conclusion is the same. The U.S. Attorney offices have charged capital offenses and submitted cases to the review procedure in lower proportions of potential capital cases involving Black or Hispanic defendants than White defendants. They have also recommended seeking the death penalty in the submitted cases in lower proportions of cases involving Black or Hispanic defendants than White defendants. The racial and ethnic proportions in their recommendations have been similar to the racial and ethnic proportions in the recommendations and decisions by the review committee and the Attorney General. (Sept. 12 report at 7, 38-39.)

Following a decision by the Attorney General to seek the death penalty, a capital sentence may nevertheless not be sought because the U.S. Attorney office subsequently reaches a plea agreement to a non-capital charge with the defendant.[16] This has occurred for 48% of the White defendants, 25% of the Black defendants, and 28% of the Hispanic defendants in cases where the Attorney General approved the death penalty. (Sept. 12 report at 31-32).[17] While White defendants superficially fared better at this stage, inferring that these disparities resulted from racial or ethnic bias on the part of the U.S. Attorney offices would be unwarranted for a number of reasons:

First, in contrast to a recommendation for or against seeking the death penalty, the decision about pleas is not under the control of the U.S. Attorney's office. It takes two to make a plea agreement. Inferring bias from disparities in such agreements would not be justified unless non-invidious causes could be excluded, including possible differences in the inclination of defendants from different groups to seek or accept plea agreements. Indeed, since the actions of U.S. Attorney offices at all earlier stages of the process carry no suggestion of bias against racial or ethnic minorities - but rather involve seeking the death penalty with less frequency in cases involving Black or Hispanic defendants - it would be an odd assumption that such bias suddenly springs into existence at the end of the process, and becomes an operative factor at that point in decisions about non-capital pleas.

Second, the findings of the Department's study would not be suggestive of bias by the U.S. Attorneys' offices, even if one were to impute to those offices complete responsibility for the occurrence or nonoccurrence of pleas at the final stage of the process. Consider the class of potential capital cases in which a U.S. Attorney office concludes, either initially or at some point in the process, that a capital sentence should not be sought. The means the office potentially has at its disposal to achieve the desired non-capital treatment of the case include: (1) refraining from a capital charge and review procedure submission in the first place, (2) submitting the case to the review procedure with a recommendation against the death penalty and persuading the Attorney General to accept this recommendation, (3) reaching a non-capital plea agreement with the defendant following the review procedure submission of the case but prior to a decision by the Attorney General whether to seek the death penalty, or (4) reaching a non-capital plea agreement with the defendant subsequent to a decision by the Attorney General to seek the death penalty.

These methods will not necessarily be successful to the same degree at all stages of the process in achieving the desired result (i.e., non-capital treatment of the case) in relation to defendants from different population groups. To the extent that the desired result is not achieved at earlier stages in the process, there may be more motivation to use the methods available at later stages to secure a non-capital disposition. Given the possibility of such trade-offs between actions at different stages, the racial and ethnic proportions at the final plea stage are uninformative as possible indications of bias by the U.S. Attorney offices. Rather, one must look at what happens in the process as a whole.

This point can be assessed in quantitative terms by aggregating the effects of the various actions noted above that the U.S. Attorney offices can take to secure non-capital treatment of a case - refraining at the start from a capital charge and review procedure submission, submitting the case and successfully recommending against the death penalty, reaching a non-capital plea after submission but before an Attorney General decision, or reaching a non-capital plea after an Attorney General decision to seek the death penalty. When the figures are toted up, one finds that these actions of the U.S. Attorney offices secured non-capital treatment for 74% of the White defendants, 81% of the Black defendants, and 86% of the Hispanic defendants, in potential capital cases.[18] As with the other findings of the Department's study, there is nothing in these figures which suggests possible bias against minority defendants. Rather, the U.S. Attorney offices have exercised their powers with greater frequency to avoid death penalty prosecutions of minority defendants.[19]

A final point of some potential relevance is the outcome in capital cases that went to trial. Suppose

the Department in its decisions about seeking capital punishment were favoring White defendants over minority defendants in comparable cases. One would expect such favoritism to result in a larger proportion of relatively weak cases for capital punishment involving minority defendants in which the Department sought the death penalty. This would in turn make it less likely that capital punishment would actually be imposed in cases involving minority defendants that went to trial. However, the outcome of tried cases provides no support for such a hypothesis. Rather, the jury returned a verdict for the death penalty in about half of the cases in which the Department sought it, and this proportion was about the same for White, Black, and Hispanic defendants.[20]

PART IV: PROTOCOL REVISION

While the Department's study of its death penalty decision-making processes has found no evidence of bias against racial or ethnic minorities, the study has indicated that certain modifications of the capital case review procedure are warranted to promote public confidence in the fairness of the process and to improve its efficiency. Some of these changes effectively broaden the scope of the process, including submission of information concerning a larger class of cases by the U.S. Attorney offices. Other changes would simplify and abbreviate the process in cases where the decision is against seeking a capital sentence.

A. BROADENING THE SCOPE OF THE PROCESS

Under the existing protocol, U.S. Attorneys submit to the capital case review procedure only cases in which an offense is being charged for which the death penalty is a legally authorized sanction. This limited the information that was available for the Sept. 12 report. Information was subsequently obtained from the U.S. Attorneys' offices concerning a broader class of potential capital cases, but a special, ad hoc effort was necessary to do so.

The Department has concluded that information of this type should regularly be available. This should help to maintain public confidence in the system by making more complete racial and ethnic data available for both actual and potential federal capital cases. The amendment to the protocol will specifically require that, where a United States Attorney has obtained an indictment charging a capital offense or conduct that could be charged as a capital offense, the United States Attorney must fill out and submit a death penalty evaluation form, even if the United States Attorney does not intend to request authorization to seek the death penalty. These forms will include (among other information) gender, race, and ethnicity information for defendants and victims, the charges against the defendant, and the reasons the United States Attorney decided not to seek the death penalty or charge a capital offense.

The amendments to the protocol will also include two other changes in the direction of increased centralization:

First, in cases where the Attorney General approves seeking a capital sentence, the United States Attorney office will be required to submit the notice of intention to seek the death penalty it proposes to file in the case to the Criminal Division's Capital Case Unit. As discussed in Part I of this report, the notice includes a specification of the aggravating factors that the government intends to prove as the basis for imposing a capital sentence. Review by the Criminal Division will ensure consistent application of the statutory and nonstatutory aggravating factors in federal death penalty proceedings.

Second, where the Attorney General approves seeking a capital sentence, Attorney General approval will also be required for subsequent decisions to refrain from pursuing a capital sentence in the case. Under the current protocol, a United States Attorney can effectively negate a decision by the Attorney General to seek a capital sentence by subsequently reaching a plea agreement with the defendant to a noncapital offense. As in other areas, however, if subsequent developments show grounds for reconsidering a decision by the Attorney General, the proper recourse is to advise the Attorney General of the changed circumstances. The revised protocol will require this approach.

B. SIMPLIFICATION OF DECISIONS AGAINST SEEKING THE DEATH PENALTY

The revised protocol will maintain a uniform requirement that the approval of the Attorney General be obtained both for decisions to seek a capital sentence and for decisions not to seek a capital sentence. The United States Attorneys will be required to submit information concerning cases involving capital charges, regardless of their recommendations concerning the sentence. However, an expedited and simplified decisional process - not requiring the participation of defense counsel - will be authorized in cases in which the U.S. Attorney does not wish to seek a capital sentence. The full-dress review process will be reserved for cases in which: (1) the United States Attorney does wish to seek the death penalty, or (2) the reviewers decline to accept the United States Attorney's recommendation against seeking the death penalty on the basis of the abbreviated review process.

This modification of the protocol will produce a more efficient process with no loss of fairness. The data of the Sept. 12 report showed that the United States Attorneys recommended against seeking the death penalty for 494 out of 682 defendants in submitted cases. (Sept. 12 report at 12.) In such cases, notwithstanding the negative recommendation, the full process must be run through under the current system. This includes submission of information concerning the case and supporting materials by the U.S. Attorney; preparation of an initial analysis and recommendation by the Criminal Division's Capital Case Unit; consideration by the capital case review committee, including hearing argument from defense counsel and U.S. Attorney personnel; and further review and a final decision by the Attorney General. In the vast majority of these cases - 94% - the Attorney General concurs in the U.S. Attorney's recommendation not to seek the death penalty. (Sept. 12 report at 40-41.) Hence, the normal result is no change from what the U.S. Attorney recommended.

The revised protocol will make it possible to focus the review procedure's resources more fully on cases in which the U.S. Attorney does propose to seek the death penalty, while providing a quicker and less burdensome process for reaching a final decision against seeking a capital sentence where the U.S. Attorney recommends against the death penalty. Defense resources will be conserved by not regularly requiring a presentation to the review committee by defense counsel where the U.S. Attorney office is not seeking a capital sentence. In addition, the costs of appointing a second lawyer for the defendant - as required by 18 U.S.C. 3005 for death penalty cases - will more frequently be avoided because the abbreviated process will produce quicker final decisions by the Department not to seek a capital sentence.

The Attorney General will, of course, retain legal authority as head of the Justice Department to determine in an exceptional case that the death penalty is an appropriate punishment, notwithstanding the United States Attorney's view that it should not be pursued. However, if the Attorney General declines to accept the United States Attorney's recommendation against a capital sentence on the

basis of the abbreviated review process, the full review procedure will then be employed, including providing defense counsel an opportunity to be heard by the review committee. Hence, the protocol revision will increase the general efficiency of the process, while sacrificing no safeguard of fairness for defendants in cases where the Department may ultimately decide to seek the death penalty.

1. The capital sentencing procedures for most federal crimes appear in 18 U.S.C. 3591ff. Separate procedures of a similar character for certain drug-related capital offenses are set forth in 21 U.S.C. 848(e)-(r). Back

2. See McCleskey v. Kemp, 481 U.S. 279, 309 & n.30 (1987). Back

3. See id.; Batson v. Kentucky, 476 U.S. 79 (1986); Georgia v. McCollum, 505 U.S. 42 (1992). Back

4. Defense counsel, however, choose in some cases to provide participants in the review process with information concerning a defendant's race or ethnicity. Back

5. Except where otherwise indicated, the figures in this report relate to the operation of the Department's current capital case review procedure from its establishment in January 1995 until July 2000, which was the cutoff date for data considered in the Sept. 12 report. Defendants are classified for purposes of discussion and analysis as White, Black, or Hispanic. "Hispanic" includes Hispanic individuals regardless of race. It can be estimated that about 90% of the defendants in the "Hispanic" category would be characterized as White in racial terms. See Sept. 12 report at T-xvi & n.2. The Department's data also places some defendants in an "Other" category. This category is generally not discussed separately in this report because it combines individuals from several different groups - Asian, Pacific Islander, Native American, Aleut, Indian, or unknown - and the numbers involved are small. The "Other" defendants were 29 out of the 682 defendants considered under the review procedure, comprising 4% of the total. Back

6. The figures in the accompanying textual discussion relate to the period 1995-2000, during which the current statutes and capital case review procedure were in effect. In the period 1988-1994, the federal death penalty was only available for certain drug-related killings under 21 U.S.C. 848(e), and U.S. Attorneys submitted for the Attorney General's review only cases in which they recommended seeking the death penalty. See Sept. 12 report at 1-2. The cases so submitted involved 52 defendants, who were 13% (7) White, 75% (39) Black, 10% (5) Hispanic, and 2% (1) "Other." The Attorney General approved seeking the death penalty for 100% of the White defendants (7 out of 7), 87% of the Black defendants (34 out of 39), and 100% of the Hispanic defendants (5 out of 5). See Sept. 12 report at 6-7, 23-24. Back

7. Attorney General's Remarks Regarding the Federal Death Penalty Study (Dept. of Justice Sept. 12, 2000); Press Conference with Attorney General Reno and Deputy Attorney General Holder, Topic: The Death Penalty (Sept. 12, 2000). Back

8. See id. Back

9. Statement by the President: Staying the Execution of Juan Raul Garcia (The White House Dec. 7, 2000). Back

10. The supplementary data submitted by the U.S. Attorney offices included "A" data and "C" data.

The "A" data was data on 231 cases (beyond the 682 submitted to the review procedure) that the offices provided in response to a directive to submit information concerning: (1) any cases that should have been, but were not, submitted to the capital case review procedure, (2) cases exempted from submission because the defendant pled to a noncapital offense, and (3) cases that could have been brought as death eligible cases but were not. When added to the 682 defendants in submitted cases, the "A" data produced a broader class of 913 defendants who were 17% (158) White, 42% (387) Black, 37% (334) Hispanic, and 4% (34) "Other." The "C" data was data on additional cases which, according to the districts, had gone or were going through the review process, or involved fugitives. Adding the "C" cases as well as the "A" cases produces a universe of 973 defendants in potential capital cases, as indicated in the accompanying text. Back

11. The remaining 5% of defendants (49) in the augmented class were in the "Other" category. Back

12. The numbers of defendants whose cases were submitted to the review procedure were 134 out of 166 White defendants, 324 out of 408 Black defendants, and 195 out of 350 Hispanic defendants. See Sept. 12 report at 6. If only "A" cases are included in defining the universe of potential capital cases, the corresponding proportions of defendants in potential capital cases who were capitally charged and submitted to the review procedure are as follows: 85% of White defendants (134 out of 158), 84% of Black defendants (324 out of 387), and 58% of Hispanic defendants (195 out of 334). Back

13. The corresponding figures if "A" cases but not "C" are included in defining the universe of potential capital cases are as follows: 28% of White defendants (44 out of 158), 18% of Black defendants (71 out of 387), and 10% of Hispanic defendants (32 out of 334). Back

14. See, e.g., Bureau of Justice Statistics, Homicide Trends in the United States - Trends by Race, www.ojp.usdoj.gov/bjs/homicide/race.htm; Bureau of Justice Statistics, Violent Victimization and Race, 1993-98, at 2, 4, 6, 10 (Mar. 2001); Bureau of Justice Statistics, Correctional Populations in the United States, 1997, at iii, 4-5 (Nov. 2000). Back

15. The figures for submissions and recommendations by these districts, and the national average of 25% for recommendations to seek the death penalty in submitted cases involving Black defendants (81 out of 324 defendants), are documented in the Sept. 12 report, Table 5A, at T-14 to T-17. Back

16. The U.S. Attorneys currently have discretion to make such plea agreements. Under the revised protocol discussed in Part IV of this report, the Attorney General's approval will be required for a non-capital plea agreement subsequent to a decision by the Attorney General to seek a capital sentence. Back

17. The U.S. Attorney offices reached subsequent non-capital plea agreements with 51 out of the 159 defendants for whom the Attorney General authorized seeking the death penalty. See Sept. 12 report at 31. There were also 11 cases, almost all involving minority defendants, in which the Attorney General subsequently reversed her decision to seek the death penalty. See Sept. 12 report at 33, Table 3A at T-6 (reconsideration of decision to seek the death penalty for 1 White defendant, 3 Black defendants, 5 Hispanic defendants, and 2 "Other" defendants). In addition, in relation to 4 defendants (1 Black and 3 Hispanic), the death penalty was not pursued through trial because of dismissals or other judicial action. See id. Back

18. For example, the supplementary data submitted by the U.S. Attorney offices showed 166 White defendants in potential capital cases. Figures documented in the Sept. 12 report at 6, 41, 31-32 show

the following: In relation to 32 of these defendants, the U.S. Attorney offices refrained from a capital charge and review procedure submission. In relation to 62 of these defendants, the U.S. Attorney offices submitted their cases to the review procedure with a recommendation against the death penalty, and the Attorney General concurred. In relation to 8 of these defendants, U.S. Attorney offices reached a non-capital plea agreement with the defendant following submission to the review procedure but before an Attorney General decision about the death penalty. In relation to 21 of these defendants, U.S. Attorney offices reached a non-capital plea agreement with the defendant after an Attorney General decision to seek the death penalty. Summing 32, 62, 8, and 21 gives 123 White defendants for whom the U.S. Attorney office successfully sought and secured non-capital treatment of their cases. This is 74% of the 166 White defendants in potential capital cases. Carrying out the same computation process for Black and Hispanic defendants yields the figures of 81% and 86% appearing in the text.

These figures include both "A" and "C" cases in defining the universe of potential capital cases. If the starting point is the somewhat smaller universe of potential capital cases which includes "A" cases but not "C" cases, the corresponding figures (by the same process of computation) are that the U.S. Attorney offices successfully avoided capital treatment for 73% of White defendants, 80% of Black defendants, and 85% of Hispanic defendants. Back

19. The Sept. 12 report (at pp. 30-31) noted that focusing on plea agreements which occur after the Attorney General authorizes seeking the death penalty is potentially misleading, because plea agreements that foreclose a capital sentence can also occur at earlier stages of the process, including prior to indictment and review procedure submission, and during the pendency of cases in the review process. Statistical information was not available at the time concerning cases which were not submitted to the review procedure for such reasons as pre-indictment plea agreements to non-capital charges. The supplementary data submitted by the U.S. Attorney offices following the Sept. 12 report provided information on the broader universe of potential capital cases in the U.S. Attorney offices, making possible the accompanying textual discussion's more complete assessment of the treatment of defendants from different population groups. Back

20. Specifically, between the initial revival of the federal death penalty in 1988 and the July 2000 endpoint for data considered in the Sept. 12 report, juries convicted defendants of capital offenses in 57 out of 62 cases in which the government sought the death penalty. Where the defendant was convicted of a capital offense, the jury returned a death penalty verdict for 6 out of 14 White defendants, 16 out of 33 Black defendants, and 3 out of 6 Hispanic defendants. (Sept. 12 report at 32-34.) Back

PENNSYLVANIA DISTRICT ATTORNEYS ASSOCIATION NEWSLETTER

CAPITAL LITIGATION REPORT

Ronald Eisenberg
Deputy District Attorney
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"Innocence" and the death penalty

Death penalty opponents have been very successful in recent months in getting out their message that capital punishment is "unfair." They have relied on three connected strategies: 1) the availability of DNA evidence to look for "innocent" capital defendants, 2) the Liebman study about alleged "error" in death penalty cases (by a "professor" who in reality is an active criminal defense lawyer), and 3) calls for "moratoriums" on executions.

Typically, none of these tactics will give rise to actual legal challenges to individual capital sentences. However, because of the continuing efforts of anti-capital punishment advocates to influence citizens and judges, it is important for prosecutors handling capital cases to understand the issues presented by the latest publicity campaign.

DNA legislation

Contrary to loose characterizations in the press, there is presently no case in which an executed capital murderer has been proven innocent, by DNA evidence or otherwise. Death penalty opponents argue, however, that we must be executing innocent people, because the system does not let them present newly-discovered evidence such as DNA testing. The truth is that criminal defendants already can put forward new evidence of innocence, either in the courts or through requests for clemency and pardons.

Nonetheless, death penalty opponents are pushing for federal legislation to "fix" the supposed problem in the states. Senator Leahy has introduced a bill that would entitle convicted criminals to reopen their cases, even if they previously turned down DNA testing when it counted at their trial, and even if it wouldn't now prove them innocent. The bill tries to punish law enforcement by cutting off federal grants, and by authorizing defendants to sue prosecutors personally. At the same time it rewards criminal defense attorneys in capital cases by setting up a new federal bureaucracy to protect them, and by requiring states to pay them at legal "market" rates -- often $200-$300 an hour.

Senator Hatch has proposed more balanced legislation. His bill would also let defendants reopen their cases, but would require at least a minimal showing that favorable DNA testing would actually establish their innocence, and is not inconsistent with their previous assertions about the crime. Unlike the Leahy bill, the Hatch legislation does not seek to penalize states that do not agree with the Senator's views on criminal justice and capital punishment; instead, it gives a meaningful incentive by offering federal grant funding to increase the amount of DNA testing that state and local governments can afford.

At its summer meeting this year, the National District Attorneys Association passed a unanimous resolution supporting the Hatch DNA bill and opposing the Leahy bill.

Liebman study

The Liebman study contends that most capital cases wind up being overturned on appeal - two thirds, he claims. According to Liebman, this means that death penalty verdicts are unreliable, and that capital murderers are actually innocent victims of the system.

But the truth is that, after examining literally thousands of cases, Liebman could not find a single one in which he could show that the defendant was innocent. All of his supposed statistics about "error" rates simply cover up that fact.

First, it is clear that Liebman's numbers are significantly inflated.

For example, he counts cases thrown out when the United States Supreme Court overturned all existing death penalties in the 1970's. He also counts cases that were reversed on appeal, even if that reversal was itself reversed on further appeal, reinstating the original conviction. Obviously, none of these reversals says anything about the fairness of the current administration of capital punishment.

Second, aside from his miscounting, Liebman's basic notion is wrong - in fact he turns reality on its head. Whatever the exact numbers are, it is clear that capital murder cases are reversed much more than non-capital murder cases - perhaps three or four times as often. But do judges and lawyers believe that there are really three or four times more errors in murder trials that result in a death penalty than in murder trials that don't? Certainly Liebman and his supporters make no such claim.

Nor could they. Murder cases are tried by the same prosecutors and defense lawyers and judges whether they ultimately wind up with a capital verdict or not. It's only at the end that we find out from the jury what the sentence will be. So if capital cases are reversed at a much higher rate, of course it is not because they have more errors; it is because judges are more willing to reverse in death penalty cases.

If the Liebman study means anything, it means this: that the courts are already quite favorable to appeals by capital murderers. For years we have been hearing from capital punishment opponents that judges were politically motivated to ignore death penalty errors, and that restrictions on habeas corpus would eliminate any chance for successful appeals. The Liebman study is actually an admission that those claims were all untrue.

Moratorium

Death penalty opponents have long argued that capital punishment is immoral, even for the very worst murders. The large majority of American citizens, however, continue to disagree. As a result, many of the opponents now say that they are not against capital punishment "in theory," but that the system is flawed. They contend that we should put a "temporary" hold on all executions, while we study them. They understand that this would have the practical effect of abolishing capital punishment, but that the idea of a "moratorium" sounds more palatable.

The moratorium strategy received a huge push forward when the governor of Illinois, George Ryan, declared that he was blocking all further executions in that state. The governor has been under federal investigation for a bribery scheme, and the moratorium has diverted some attention from the scandal. But the legal authority for the governor's action is unclear: the Illinois Supreme Court had recently issued a ruling rejecting a move to impose a moratorium as a matter of law, and in most states the governor does not have the power on his own to refuse to schedule lawful executions without issuing a reprieve or pardon.

The factual basis for the Illinois moratorium is even more suspect. Governor Ryan claims that, more than half the time, Illinois capital defendants were actually innocent: twelve men executed; thirteen freed. But in reality there have been 247 death-sentenced defendants in Illinois, not just 25. Of the thirteen "innocents," five were acquitted on retrials -- which means not that they were really innocent, but that they were not proven guilty beyond all reasonable doubt. In the other eight cases, prosecutors dismissed charges without a retrial because of evidence problems. Only one of the thirteen has been clearly established to be innocent.

Questions about the Illinois moratorium, however, obscure a more fundamental problem with the

moratorium movement: we already have a moratorium, in fact hundreds of them, in each and every death penalty case.

Every capital verdict is held up for years, often for decades, while the case is studied and restudied and studied again in the courts, in all its individual detail. The only defendants who would benefit from a general moratorium are those whose appeals have been rejected every time -- in other words, the capital murderers who least deserve more years of delay.

Prosecutor
January/February, 2001

Highlights from the Prosecutor

***16 PROSECUTOR COMMENTS ON LATZER AND CAUTHEN**

Ronald Eisenberg
Deputy District Attorney, Philadelphia, and Vice President, Association of Government Attorneys in Capital Litigation

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WHEN THE SO-CALLED Liebman study was released last year, claiming that more than two thirds of all death penalties are overturned as a result of appellate review, the press reported it with great fanfare and as established fact. There has been little or no media effort to explore the flaws and exaggerations in Liebman's assertions.

The article by Professors Latzer and Cauthen (that appears on page 25 of this issue of The Prosecutor) opens a more objective examination of the Liebman study. Upon examining Liebman's statistics, the authors conclude that he actually overstated his death penalty reversal rate by 25 percentage points--a huge discrepancy that dramatically alters the terms of the public debate Liebman hoped to generate.

It is important to note that Latzer and Cauthen discovered this statistical error even while assuming the accuracy of Liebman's basic data: that is, whether he accurately counted the number of reversals--not just the percentage, but the raw numbers. Indeed the authors point out that they could not have checked Liebman's numbers, because he refused to give them the underlying data. But we now have specific reason to doubt that Liebman counted accurately. Reports from Florida and Utah prove that he mislabeled cases as reversals when they were not, and anecdotal evidence from other states suggests additional problems. Thus, the factual basis for the Liebman study is suspect, not just in the manner in which he analyzed the data, but in the manner in which he collected it.

The refusal to share underlying data with researchers is particularly troubling in light of the media misrepresentation of Liebman as a neutral professor heading a Columbia University study. In truth, Liebman maintains an active criminal defense practice, and has been litigating against the death penalty since long before he became a professor. His study was funded in large part by a grant from the anti-capital punishment Soros Foundation, with the stated purpose of "find[ing] effective ways to curb the [death] penalty's use."

Even aside from these other problems, however, the analysis by Professors Latzer and Cauthen is of great significance. Working with Liebman's own numbers, they calculate a death penalty reversal rate of 43% rather than Liebman's 68%. While the new figure is still higher than the reversal rate for non-capital cases, the number is unsurprising given the consideration shown by courts to capital appellants.

That special attention comes in two forms. First, every capital case is really two full trials in one: one trial to determine guilt or non-guilt, and a separate trial to decide on a death sentence or a life sentence. This dual procedure is unique to capital litigation, and it automatically doubles the universe of potential legal claims that can be raised on appeal. Indeed, Latzer and Cauthen observe that most of the errors counted by Liebman concerned sentencing issues, not guilt and innocence.

Second, even when the same claims are raised by murder defendants who received the death penalty and murder defendants who did not--that is, guilt- phase claims--it appears that the death penalty defendants are more successful on appeal. But potential capital murder cases are tried by the same prosecutors and defense lawyers and judges whether they ultimately wind up with a capital verdict or not. It's only at the end that we find out from the jury what the sentence will be. So if capital convictions are reversed at a higher rate, it is not because they have more errors; it is because judges are more willing to reverse in death penalty cases.

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If the Liebman study means anything, then, it means this: that the courts are already quite sensitive to appeals by capital murderers. For years we have been hearing from capital punishment opponents that judges were politically motivated to ignore death penalty errors, and that restrictions on habeas corpus would eliminate any chance for successful appeals. The Liebman study is actually an indication that those claims were untrue.

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Statement of U.S. Senator Russell D. Feingold
Senate Judiciary Committee
Hearing on "Protecting the Innocent:
Proposals to Reform the Death Penalty"

June 18, 2002

Mr. Chairman, I commend you for holding this hearing. I am proud to be an original cosponsor of your bill, the Innocence Protection Act. Your leadership on the issues of access to DNA testing and adequate counsel for capital defendants has been tremendous. Passage of the Innocence Protection Act is long overdue, but also, in my view, just the beginning of Congress' responsibility to ensure that our criminal justice system is a truly just system.

Mr. Chairman, your bill addresses two major flaws in our nation's current administration of the death penalty. First, it provides access to modern DNA testing. Dozens of wrongfully convicted persons, including a dozen who were sentenced to death, have been later found innocent as a result of modern DNA testing of biological evidence. Last week, I conducted a hearing in the Senate Judiciary Subcommittee on the Constitution on the report of the Illinois Governor's Commission on Capital Punishment. Illinois Governor George Ryan created this commission two years ago after he took the courageous and extraordinary step of placing a moratorium on executions. The Commission reviewed the Illinois death penalty system with a particular focus on reducing the risk of executing the innocent. In the audience at that hearing were two men – Ray Krone and Kirk Bloodsworth – who were wrongfully convicted and sentenced to death in Arizona and Maryland, respectively. They each served close to ten years in prison, some of that time on death row, for crimes they did not commit. Modern DNA testing provided the key evidence that exonerated these men. As their experience shows, Mr. Chairman, Congress should do all it can to ensure that innocent people are not

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wrongfully convicted and sentenced to death by ensuring post-conviction access to DNA testing.

Mr. Chairman, the Innocence Protection Act also addresses the important issue of incompetent counsel. All too often inadequate defense counsel has been a factor in wrongful convictions. Drunk lawyers, sleeping lawyers, or lawyers who are later disbarred sometimes represent those who face society's ultimate punishment, the death penalty. Standards that ensure competent counsel in these cases are necessary if we are to guarantee the accused's constitutional right to a fair trial and effective assistance of counsel. Mr. Chairman, your bill's provision of a commission to establish minimum standards for competent counsel is a good step toward addressing this egregious problem.

I commend my colleagues – Senator Specter and Senator Feinstein – for joining the Chairman in recognizing that the system is broken. I especially commend Senator Specter for his leadership on the issue of closing the unjust procedural loophole that can allow inmates to be executed even while their petition for review is pending before the Supreme Court.

But it is important to remember that flaws in the death penalty system are not limited to DNA testing and inadequate counsel. Racial and geographic disparities, police and prosecutorial misconduct, and wrongful convictions based solely on the testimony of a jailhouse snitch or a single eyewitness all taint this country's use of the death penalty. The Innocence Protection Act, Senator Specter's bill, and Senator Feinstein's bill do not address these flaws.

So, Mr. Chairman, while I urge this Committee and Congress to pass the Innocence Protection Act without delay, I also believe that Congress can and should do more to address the errors in the death penalty system at the state and federal levels. If my colleagues can agree that the current system is broken – for example, that inmates should have post-conviction access to DNA testing – then surely my colleagues can agree that it would be unjust and unconscionable to proceed with executions while these reforms are debated and implemented.

Mr. Chairman, you first introduced this important legislation more than two years ago. The Senate Judiciary Committee has now had its third hearing on the key components of your bill. Yet, executions have continued at the state levels and resumed at the federal level. Over 140 people have been executed during the last two years. During this same period, more than a dozen more death row inmates have been found innocent and released from death row, bringing the total to more than 100 innocent people in the modern death penalty era later exonerated and released from death row. With each execution, our nation runs a real risk of executing an innocent person, if we have not done so already. How many more innocent people must bear the ultimate

nightmare of being sentenced to death for a crime they did not commit before Congress acts?

Governor Ryan did the right thing when he suspended executions over two years ago to allow time for a thorough review of the death penalty system in Illinois and for reform proposals to be considered. Following Governor Ryan's footsteps, last month Governor Parris Glendening of Maryland placed a moratorium on executions in his state to allow a study on racial disparities he ordered two years ago to be completed. I commend Governor Ryan and Governor Glendening and hope that other governors follow their lead.

Congress also has a responsibility here, now that federal executions have resumed, and should heed the wise example set by Governor Ryan and now Governor Glendening. I have introduced a bill that would apply the Illinois model to the rest of the nation. The National Death Penalty Moratorium Act, S. 233, would place a moratorium on federal executions and urge the states to do the same, while a National Commission on the Death Penalty examines the fairness of the administration of the death penalty at the federal and state levels. Yes, Congress should enact legislation like the Innocence Protection Act. But if my colleagues recognize that the current system is broken and that reform legislation like this is needed, then the only rational and just response is a suspension of executions and the creation of an independent, blue ribbon commission to conduct a nationwide review of the fairness of the administration of the death penalty.

I thank you again, Mr. Chairman, for holding this hearing. I look forward to hearing from the witnesses.

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WRITTEN TESTIMONY OF

ROBERT A. GRACI

ASSISTANT EXECUTIVE DEPUTY ATTORNEY GENERAL
FOR LAW AND APPEALS OF THE CRIMINAL LAW DIVISION
PENNSYLVANIA OFFICE OF ATTORNEY GENERAL

BEFORE THE

JUDICIARY COMMITTEE OF THE HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY
HONORABLE LAMAR SMITH, CHAIRMAN

ON

H.R. 912, THE INNOCENCE PROTECTION ACT OF 2001

JUNE 18, 2002

Chairman Smith and members of the Judiciary Committee Subcommittee on Crime, Terrorism and Homeland Security.

My name is Bob Graci. I am the Assistant Executive Deputy Attorney General for Law and Appeals of the Criminal Law Division of the Office of Attorney General of Pennsylvania. On behalf of Attorney General Mike Fisher, I would like to thank you for giving me the opportunity to comment on H.R. 912 , the Innocence Protection Act of 2001. He would be here himself, but he is hosting the Annual Summer Meeting of the National Association of Attorneys General in Fayette County, Pennsylvania, and is currently at an executive board meeting.

At the outset, let me say that to a great extent, the goals of this bill are laudable. At General Fisher's direction, I have been involved in the drafting of Pennsylvania's post-conviction DNA testing procedures bill which has cleared the State Senate and is awaiting action in our House of Representatives. Though I am a prosecutor and have been for most of my career, I have also been involved over the years in continuing legal education efforts, including those involving capital defense representation and have co-authored a treatise — "Prosecution of a Death Penalty Case in Pennsylvania" — which is used by prosecutors, defense counsel and judges throughout the country.

My concerns about this bill have little to do with its subject matter. They are instead concerns of federalism and the manner in which compliance with some of the provisions of these bills is forced upon the several states — the "carrot and stick" referred to by Chairman Leahy of the Senate Judiciary Committee at the outset of the hearing held on June 27, 2001, on S.486, the Senate version of H.R. 912.

H.R. 912 largely addresses two very serious issues: post-conviction DNA testing and counsel standards in capital cases. As to the former, the bill establishes procedures for federal cases and impose obligations on the federal courts and federal prosecutors. It imposes those same standards on State courts and State prosecutors and inflicts penalties for non-compliance in a variety of substantial ways. As to the latter, the bill seeks to establish national standards for counsel appointed to represent indigent capital defendants and penalizes the States for any failure to comply with these extra-constitutional, congressionally-mandated standards.

Obviously, how the Congress chooses to direct the federal courts and federal prosecutors is of little or no concern to the States. As I said at the outset, my concerns are those of federalism and the extent to which any federal legislation intrudes on the responsibility of the States to define crimes, their punishment and the procedures to be followed in their courts. These same concerns were voiced in 2000 when 30 of the States' Attorneys General signed a joint letter to then-Senate Judiciary Chairman Hatch and then-Ranking Member Leahy in opposing S.2073, the predecessor of S.486 and H.R. 912.

To be sure, some of the concerns raised in that letter by the Attorneys General were addressed by the Congress in enacting legislation to authorize grant funds for States such as the DNA Analysis Backlog Elimination Grants (Public Law 106-546) and the Paul Coverdell National Forensic

Sciences Improvement Grants (Public Law 106-561). However, many of the objections raised to S.2073 still persist in S.486 and H.R. 912.

The letter from the Attorneys General pointed out that many States already had adopted post-conviction DNA testing statutes and procedures and that others were actively considering them. That process continues today. As I noted previously, the Pennsylvania General Assembly is now considering a post-conviction DNA testing bill, drafted in large measure by my staff and with Attorney General Fisher's public support. That bill goes far beyond the provisions of the bills currently pending in the Congress, including H.R. 912. In light of these on-going developments, the Attorneys General urged the Congress not to "preemptively short-circuit this process with legislation that imposes mandatory obligations on the [S]tates." I reiterate that request. The States are addressing these issues with solutions based on their views of them and with consideration of how best to deal with them in the contexts of their respective systems of criminal justice. This point, of course, is consistent with the view, long recognized by the United States Supreme Court, that the States serve as laboratories for testing solutions to novel legal problems. If Congress speaks on the subjects addressed in the pending legislation (assuming it has the constitutional authority to do so which is seriously questioned in some quarters), experimentation by the States in attempting to deal with these problems (which are, essentially, of local, not national concern) will be stifled under pains of substantial loss of revenues generally unconnected to the obligations placed on the States. Motivated by these concerns in 2000, 30 Attorneys General opposed any efforts by Congress to circumvent that process and prematurely intrude on it. These same concerns underscore my comments today.

Allow me the opportunity to explain my concern and those of many of my colleagues. Section 103 of H.R. 912 requires a State applying for specified grants to "certify that it will make post-conviction DNA testing available to any person convicted of a State crime in a manner consistent with" the newly-minted sections of federal law contained in section 102 of the bill setting forth procedures for federal convicts seeking relief from federal crimes in the federal courts based on DNA evidence. Section 103 also requires the State to "certify that it will preserve all evidence that was secured in relation to the investigation or prosecution of a State crime, and that could be subjected to DNA testing" for the same periods of time as set forth in section 102 as applicable to the federal DNA testing procedures. Apparently, it will be up to a federal bureaucrat to determine whether the applicant State's procedures are "consistent with" the federal provisions. In this regard, I think the bill being considered in Pennsylvania would provide relief based on positive DNA testing in circumstances over and above those that will be available to federal convicts under H.R. 912. However, some might think that the requirements for a DNA motion under Pennsylvania's proposed statute which include an assertion of actual innocence not found in H.R. 912 (which we think is critically important in the post-conviction DNA context and which is found in S. 2441 recently introduced by Senator Specter) would make that law, if enacted, inconsistent with H.R. 912. To avoid losing important federal dollars, States would be disinclined to experiment and would simply adopt whatever the Congress dictates. That is clearly not what the Founders envisioned of our federal system.

With this view in mind, I will address concerns with the merits of H.R. 912. First, the legislative findings on which it is based are suspect. If persons have been released from confinement because of newly-available DNA evidence or otherwise, it simply shows that the corrective processes of the States are working as intended. Surely State courts have ordered DNA testing in the post-conviction setting and, when warranted, afforded relief. That certainly does not demonstrate widespread, systemic flaws in the system that handles thousands upon thousands of cases every year. Instead, it shows that meaningful safeguards do exist and provide relief, when appropriate.

Any bill on this subject should recognize that DNA evidence is only relevant where the perpetrator's identity was an issue at trial. S.800 and S. 2441 recognize this and attempt to take appropriate precautions to ward off frivolous, delay-effecting claims. H.R. 912 does not. Moreover, H.R. 912 generally requires preservation of evidence for so long as the convict "remains subject to incarceration." As written, this would include any period of time during which the offender is on probation or parole for the underlying conviction because he or she would still be "subject to incarceration." Such a requirement will have a tremendous financial impact on the local police and prosecutorial authorities who will have to store all of this material for what could be extremely lengthy periods of time beyond conviction. Both S.800 and S. 2441 would only require preservation while a defendant is "serving a term of imprisonment" and for a finite time.

The Fourteenth Amendment enforcement mechanism found offensive to the 30 States Attorneys General in S.2073 remains in H.R. 912, though its reach has been limited to capital cases. Like its predecessor, H.R. 912 places no limit on the number of times evidence may be re-tested and invites a battle of so-called "experts" over whether "the type of testing...now requested...may resolve an issue not resolved by previous testing." Indeed, this provision is even broader than its 2000 counterpart. And can anyone imagine the developer of a type of DNA testing who would not contend that his or her test will resolve an issue not previously resolved?

In concluding my remarks on the DNA portions of H.R. 912 I will echo the sentiments of Attorney General Fisher. Any post-conviction DNA testing statute must, at a minimum, do the following:

- establish a procedure by which a convicted defendant may request that DNA testing be performed on physical evidence left at the crime scene where there is a reasonable question as to the defendant's identity as the perpetrator;
- set standards and parameters within which testing may be administered in order to guarantee the integrity of the test results; and
- ensure that testing is only ordered where the result of the test has the potential to produce new, materially relevant evidence of the convicted defendant's assertion of innocence.

H.R. 912 fails this test in at least two regards. The perpetrator's identity is not specifically delineated as a factor to be considered in determining if relief is appropriate and the bill requires no

assertion of innocence. What has generally motivated the discussion of post-conviction DNA testing is concern for actual, factual innocence and the availability of a procedure which could establish true innocence. When speaking of actual innocence, as the United States Supreme Court recognized in *Sawyer v. Whitley*, 505 U.S. 333 (1992), we are generally speaking of the "prototypical example" where the State has convicted the wrong person of the crime. *Id.* at 340. That was the context in which this subject was first discussed: the possibility that a person who had not committed the offense could be executed. Everyone agrees that, if technology exists that would establish a convicted defendant's actual innocence, that defendant should be able to obtain its benefit. In Pennsylvania, it was General Fisher's office and the State's prosecutors who urged expansion of any post-conviction DNA testing bill to include persons serving terms of imprisonment and not just those sentenced to death. We were and continue to be unable to rationalize the continued incarceration of a person who would be proven factually innocent by postconviction DNA testing of a rape, for instance, any more than we could allow the execution of a death sentenced prisoner who would be exonerated by such testing. And there is no opposition to an expansion of these protections to claims of innocence of crimes used to enhance sentences currently being served, including those used to seek a sentence of death. H.R. 912, however, appears to have jettisoned any link to actual innocence, unlike S. 800 and S. 2441. Accordingly, it has lost its theoretical underpinning.

The second major component of H.R. 912 is found at Title II and purports to be for the purpose of "ensuring competent legal services in capital cases." Like its predecessor S.2073, H.R. 912 contains onerous legal representation requirements in death penalty cases. Failure to comply with the requirements for what the bills calls "an effective system for providing adequate representation" in capital cases, including investigative and expert services, may result in obligatory reductions in grants having nothing to do with capital cases or capital representation, including violent offender incarceration grants and truth-in-sentencing incentive grants. Surprisingly, unlike S.800, H.R. 912 does not condition the newly-minted "Capital Defense Incentive Grants" and "Capital Defense Resource Grants, " which are both clearly related to capital representation to any particular level of compliance with the new counsel standards provision.

Though H.R. 912 has substituted what appears to be a broad-based commission for the federal bureaucrat who was to establish the standards under S.2073, the system to be devised is fraught with potential pitfalls. In this regard, I echo the sentiments of Alabama Attorney General Pryor who testified before the Senate Judiciary Committee on S. 486, the Senate version of H.R. 912. This commission, if populated primarily by those opposed to the death penalty, could hamstring capital prosecutions by setting standards that are virtually impossible to meet and refusing to appoint counsel, thereby achieving a *de facto* abolition of the death penalty. Moreover, experience in capital cases shows those of us who labor in those vineyards that establishment of such standards will neither eliminate nor substantially reduce claims of ineffective assistance of counsel which are raised in virtually all capital cases and successful in but a few.

I note in passing that if the Pennsylvania General Assembly directly tried to impose in Pennsylvania the counsel standards and appointment system that H.R. 912 will impose, the State Supreme Court would, I believe, declare the action unconstitutional as violative of the separation of

powers doctrine embodied in our State Constitution. Such legislative action would intrude on the Pennsylvania Supreme Court's constitutional, if not inherent, power to regulate the practice of law and to adopt rules of procedure for the State courts of Pennsylvania. Requiring an "independent appointing authority" (which presumably would be independent of the courts) to appoint counsel having specified "qualifications" would run counter to what has traditionally, in Pennsylvania at least, been a function of the courts. I am not here to argue about what I believe will result in a diminution of power historically reserved to the State courts (which the State courts may argue on their own), but, instead, to point out that this is just another example of how H.R. 912 is an affront to our federalism, the overriding concern of my remarks.

Returning to the specifics of H.R. 912, even if a State should comply with the standards developed by the National Commission, the bill adds an additional layer of litigation to every State capital case tried a year or more after the commission formulated its standards. In every one of those cases, it would be up to the whim of the federal judge to whom the federal *habeas corpus* challenge was assigned to determine if the convicted and death-sentenced murderer was afforded the counsel, investigative, expert and support services required by the commission's standards. Though the bill is less than clear in this regard, the burden would presumably fall to the State to demonstrate compliance. This determination would have to be made in every federal *habeas* case and would have to be made in regard to every level of the proceedings, resulting in the imposition and affirmance of a sentence of death from pretrial motions through trial and direct appeal to post-conviction proceedings and appeal therefrom. If the State did not carry its burden, it would lose the presumption of correctness of State court factual findings on the federal constitutional issues raised by the convicted murderer in challenging the conviction in State court. Moreover, the federal judge would be permitted to examine claims which the State court was precluded from addressing because of violations by the convicted murderer of the State's procedural rules.

This provision is problematic for another reason, as well: its uneven effect on *habeas corpus* jurisprudence. The federal courts will apply the bar and presumption in all non-capital cases but refuse to apply them in some capital cases. They will always apply in cases from non-death penalty States but apply only sometimes in cases from death penalty States. Both of these results are a great affront to the States and constitute punishment for a non-existent problem.

On a point not related to either DNA testing or counsel standards, it must be noted that section 305 of H.R. 912 intrudes on the right of each State to define crimes, their punishments and the procedures to be followed in its courts. That section would require judges in capital cases to provide specific instructions on "all statutorily authorized sentencing options." The bill goes beyond that which is required by the Constitution as interpreted by the Supreme Court in *Simmons v. South Carolina*, 512 U.S. 154 (1994), and *Kelly v. South Carolina*, 534 U.S. 246 (2002). It conditions grants under the Violent Crime Control and Law Enforcement Act of 1994 on assurances that an instruction not required by the Constitution is given whenever requested by a capital defendant. Like most of what I have addressed this afternoon, this, too, is an affront to State sovereignty in that it requires State court proceedings to be conducted in conformity with congressional mandate.

In closing, I note that more than a decade ago the National Association of Attorneys General, without dissent, resolved to oppose any legislation that would, among other things, "undermine or weaken the procedural default doctrine or broaden any exception to that doctrine," that would "create new requirements concerning the experience, competency, or performance of counsel beyond those required by the United States Constitution, as interpreted in *Strickland v. Washington*, 466 U.S. 668 (1984)," or that would "expand the grounds on which habeas corpus relief may be granted."

I was in accord with those views then and remain so now. H.R. 912 will undermine procedural default and eliminate the presumption of correctness accorded to State court fact-finding in capital cases. It will impose counsel requirements on the States far beyond that which the Constitution requires. It will expand federal habeas corpus relief by allowing new claims and by allowing litigation of claims procedurally barred in State court and relitigation of claims already decided on the facts by the State courts where a federal court decides that the State system of defense services is deficient when measured against the requirements established by the National Commission on Capital Representation. These provisions will render nugatory finality of State court judgments and will drastically increase federal habeas corpus litigation of State court convictions.

I hope these comments are helpful to the Committee.

Statement of Senator Orrin G. Hatch
Ranking Republican Member
Before the Senate Judiciary Committee
Hearing on "The Innocence Protection Act of 2001"

June 18, 2002

Thank you, Mr. Chairman. First, I want to thank you for convening this hearing. I appreciate your leadership on issues relating to our nation's death penalty. I also want to take time to commend our other colleagues – Senators Feinstein, Feingold and Specter – for their efforts in this area. Each has introduced significant legislative proposals that address our death penalty system and have sparked significant debate. I look forward to working with all of you on these critical issues.

We examined these issues in a number of hearings in 2000 and 2001.

At the outset, let me remind everyone that the issue here is not whether we should have a death penalty in our country. There is little question that the American people support the death penalty, especially as new terrorists plots threaten to kill thousands of Americans, but they, like Congress, want our system to be fair and accurate. Most of us here agree on that principle and are committed to that goal. We must be vigilant in ensuring that the death penalty is imposed fairly.

Our hearing today focuses on a number of critical issues: the standard, scope and time period for permitting capital defendants to obtain post-conviction testing of DNA; and the need for competent counsel for capital defendants. It is my hope that by holding this hearing we can come closer to reaching a consensus on how best to address these issues, whether independently or combined together, if possible.

DNA Testing

In the last few years, scientific advances in DNA testing have created a reliable forensic technique for ensuring that only guilty defendants are prosecuted and convicted. DNA testing lends support and credibility to the accuracy and integrity of capital verdicts and provides a powerful safeguard in capital cases.

Pre-trial DNA testing is now routine, and we have made great strides to ensure that such testing is performed promptly to identify the actual perpetrator and clear other suspects. With the help of several federal funding programs, state have been able to analyze a large number, over 300,000 samples. Given the routine nature of pre-trial DNA testing today, the issue of post-conviction DNA testing now applies to a limited number of defendants - those who did not have access at the time of trial to DNA testing, or to new technologies that are now available.

As I have made clear before, I believe that federal defendants should be permitted, within a reasonable time period, to seek DNA testing, but only where such testing will establish their actual innocence. I also believe that where a DNA test establishes a defendant's innocence, he or she should be allowed to seek a new trial, notwithstanding existing procedural bars to such a motion.

Competent Counsel

With respect to the effectiveness of counsel in capital cases, we all agree that every defendant, whether charged with a capital crime or not, must be represented by a capable attorney. This right is guaranteed by the Sixth Amendment to the United States Constitution and emphasized by numerous United States Supreme Court decisions.

Our disagreement centers on whether capital defendants are receiving adequate representation and, if not, how we can best ensure that they do. Those who suggest that the system is broken rely on a parade of horrible stories where defense attorneys have been described as asleep, drunk, without resources or otherwise inadequate.

I simply do not believe that we should overturn the important reforms to our death penalty laws in the 1996 Anti-terrorism and Effective Death Penalty Act. I do not believe we should create a federal commission that would impose unworkable and unnecessary requirements on the state criminal justice systems.

In closing, let me emphasize again that I am committed to ensuring that our death penalty system operates in a fair and effective manner. As I have stated again and again, I believe justice for defendants means access to DNA testing where such testing will prove their actual innocence, and we must ensure that all capital defendants are represented by competent and effective counsel, as guaranteed by our Constitution. But in seeking to protect the rights of capital defendants, we must not lose sight of the role of the states, and most importantly, the victims and their families. Justice for them does not mean justice delayed through frivolous and interminable litigation.

I look forward to hearing from today's witnesses and expect that they will help this Committee in its continuing quest to resolve these difficult issues. I also look forward to working with you Mr. Chairman and the members of this Committee to make sure that our commitment to justice is kept.

Thank you.

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Special Feature: The Harry Pratter Professorship Lecture

*939 VIOLENCE AND THE TRUTH [FNd1]

Joseph L. Hoffmann [FNa1]

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First, I would like to thank Dean Aman, Dean Robel, and the members of the law school committee who were involved in selecting me for this honor. I am deeply grateful for all of the support I have received from this great law school, and I rededicate myself today to the task of justifying the confidence all of you have so often placed in me.

I would like to thank my colleagues on the Indiana University law faculty for contributing so much over the past fifteen years to my development as a scholar and teacher. Simply put, there is no law school faculty anywhere in this country, or beyond, to which I would rather belong.

I would like to thank the many, many students whose insightful questions, comments, and criticisms over these fifteen years have helped to hone my mind and keep me on my toes. The learning environment at this law school is, I truly believe, second to none and our students play a major role in making it so.

I would like to thank my wife, Mary, as well as the rest of my family, for the unconditional love and support they have always given to me. Without them, I would not have been able to manage any of the accomplishments that have led to receiving this honor. In that sense, I share this honor completely with them.

I would like to thank the donors who made this professorship a reality. Without them, of course, this event would not be possible. I would like to give special thanks to the person who was, perhaps, the primary catalyst for the creation of this professorship: Robert Montgomery Knight.

Last, but certainly not least, I would like to thank Harry Pratter for allowing me, from this day forward, to use his name as part of my official title. No words are sufficient to express how meaningful it is, to me, to be named the inaugural Harry Pratter Professor of Law.

The 1996 Harry Pratter Lecture was delivered by one of Harry's former students, Professor George P. Smith of Catholic University. [FN1] Professor Smith described how he and his fellow Indiana University law students were the prime beneficiaries of Harry's lifelong pursuit of "knowledge for the sake of knowledge." [FN2]

But those of us who have been Harry's colleagues on this law faculty have also benefitted tremendously from Harry's intellectual curiosity. Although Wittgenstein may be his favorite subject, even on much more mundane topics Harry always manages to ask questions and make comments that provoke new and creative thought. And he always does it with a twinkle in his eyes that reflects the lively and youthful spirit of the man within. Thank you, Harry, for being such an inspiration to me throughout my career here at Indiana University.

The title of my lecture today is Violence and the Truth. This title is a variation on the title of an essay written in 1986 by the late Professor Robert Cover called Violence and the Word. [FN3] In it, Cover made many observations about law, legal ***940** interpretation, the nature of judging, torture, punishment, and death. But one particular passage from the article has always stayed with me. Commenting on the legal controversy surrounding the death penalty, Cover wrote:

> Because in capital punishment the action or deed is extreme and irrevocable, there is pressure placed on the word-the interpretation that establishes the legal justification for the act. . . . Capital cases, thus, disclose far more of the structure of judicial interpretation than do other cases. [FN4]

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In other words, when judges make legal rulings that uphold the imposition of a death sentence, their words-that is, the opinions they write to justify their rulings-are subject to greater scrutiny than in any other kind of case simply because the consequence is so violent. This is an extreme manifestation of the distinctiveness of legal interpretation. Unlike literary interpretation, or interpretation of texts of political philosophy, legal interpretation is defined by its capacity to produce action, including violence and even, in rare cases, death.

In his essay, Cover referred only to what judges do in death-penalty cases. But I have often thought about how the same words apply to what juries do in the same cases. Recent developments have brought this subject to the forefront.

We are witnessing today a true crisis of confidence in the death penalty in the United States. For the first time in more than twenty-five years, public support for the death penalty seems to be waning. The evidence of trouble is everywhere. The most prominent example is the moratorium on executions in Illinois declared by Republican Governor George Ryan, [FN5] which followed a sensationalistic series of Chicago Tribune stories detailing cases of men who were erroneously convicted and sentenced to death in Illinois. [FN6] These stories were largely prompted by earlier research by a Northwestern University journalism professor and his students. [FN7] In New Hampshire, a state bill to repeal the death penalty was passed by the legislature but vetoed by the governor. [FN8] In Nebraska, a legislatively enacted moratorium was also vetoed by that state's governor. [FN9] In my own home state of Indiana, a comprehensive review of the death penalty was recently ordered by Governor Frank O'Bannon. [FN10] And, at the federal level, bipartisan legislation, which has been working its way through Congress, would expand the rights of death-row inmates to challenge their ***941** convictions and sentences based on DNA evidence. [FN11]

What's going on? If you happened to be out of the country for the past year and returned to find all of this activity, you might wonder what had prompted it. What earth-shaking event could have brought about this sudden crisis in confidence about the administration of capital punishment in America?

Your first, and most logical, guess would probably be that this crisis must have been precipitated by the one singular event that has always loomed, as a spectre, over the future of the death penalty: The execution of an innocent man. But your guess would be wrong. Despite the many resources that have been devoted to finding such an error, nothing has changed. We still have no proven instance, not one, of a mistaken execution during the modern era of American capital punishment.

If such an instance ever is proven, of course, it will likely mean the beginning of the end of the death penalty, at least in most states. Just such a case helped lead to the abolition of capital punishment in England about forty years ago.

For now though, we know of no such proven case here. So what's going on? It seems the attention of the nation has suddenly become focused on the risk of substantive error in death-penalty cases. When Pat Robertson calls for a national moratorium on executions, [FN12] when Senator Orrin Hatch cosponsors pro-death-row-inmate legislation, [FN13] and when George Will writes columns critical of capital punishment, [FN14] you know there is a perception problem with the death penalty. Even the broadest measures of public sentiment reflect a significant recent shift in attitudes about the death penalty-with public support dropping sharply. [FN15] This represents a watershed event in the modern history of the death penalty in America, and it is an event that nobody anticipated would occur so suddenly, if at all. In particular, lawyers on both sides of the death-penalty divide have been stunned by these recent developments.

For the past twenty-five years, the legal battle over the death penalty in this country has been fought almost entirely on a battleground of procedure. [FN16] Litigation in death-penalty cases has been focused almost exclusively on Eighth Amendment, "super due process" procedural issues. [FN17] Even in those cases where there was concern about a possible substantive injustice, litigants and judges were forced to deal with these ***942** concerns indirectly, if at all. [FN18] This has led to the explosive growth in procedural law in death-penalty cases, and, perhaps more importantly, to the concomitant virtual demise of substantive legal review of those same death- penalty cases. [FN19] Today, as a matter of federal constitutional law, there is almost no substantive review after the trial of a death-penalty case. [FN20]

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This situation did not develop by accident. It was the direct byproduct of a deliberate strategy by those committed lawyers who have led the legal campaign against the death penalty. That strategy has been to promote procedural litigation in the hope that a never-ending sequence of new procedural rulings would interfere with the administration of capital punishment by blocking executions.

What is so fascinating about the events of the past year is that the worm has turned so quickly and unexpectedly. After twenty-five years during which the legal dialogue in death-penalty cases has been focused almost exclusively on procedural issues, suddenly our national dialogue has become obsessed with the substance of these same cases.

I believe that this sudden change occurred because of a basic difference between lawyers and people. In the court of public opinion, nobody much cares about "lawyers' issues" of procedure, such as the wording of jury instructions or verdict forms. Rather, in the court of public opinion, the public cares mostly about three things when it comes to the death penalty: (1) Did we get the right person? (2) Does he deserve to die for what he did? (3) How much will it cost us, as taxpayers, to implement the death penalty?

I'm not going to say much more about cost. I did predict, two years ago in an article for a Japanese law journal, that the continuing, enormously high cost of death-penalty litigation (a cost that I believe to be largely irreducible) was one force in society that could bring about the abolition of the death penalty. [FN21] Just last year, for example, the Indiana legislature held hearings on an abolition bill for the first time in the modern era. The main reason the bill finally got a hearing probably was not increasing moral qualms over the death penalty, but increasing cost. [FN22]

***943** What I did not foresee, when I wrote my article about cost, was the explosion, over the past two or three years, of concern about the substantive justice of the death penalty. This, even more than cost, now has the potential to bring down the death penalty.

It is said that those who do not learn from history are doomed to repeat it. The history of the death penalty in England now appears eerily similar to what we are presently experiencing in the United States. In England, the death penalty was abolished as the direct result of three notorious cases of substantive injustice. [FN23] The first was the Ruth Ellis case, in which a beautiful woman was hanged in 1955 for murder despite substantial public outcry seeking her pardon. [FN24] The second was the Bentley-Craig case. Bentley, a retarded nineteen-year-old, was executed in 1953 for a murder in which he was the minor participant. [FN25] The major participant, Craig, who had planned and instigated the crime, could not be executed because he was only sixteen. [FN26] The third was the Evans-Christie case. Timothy John Evans was convicted and hanged in 1950 for the murder of his wife and infant child, largely on the testimony of John Halliday Christie, his landlord, who lived in another apartment in the same building. Three years after Evans was hanged, however, Christie admitted killing not only Evans's wife, but also several other women, including Christie's own wife, all of whose bodies were found in the same building. [FN27]

In all three cases, the British government steadfastly refused to admit error. Indeed, in the Evans-Christie case, the government for many years continued to maintain Evans's guilt, even after convicting and executing Christie as a serial murderer. [FN28]

Note that none of these cases had anything to do with the procedural law applicable to death-penalty cases. They were all about substance. The key questions in each were: Did we get the right person? And does he/she deserve to die? In the United States, lawyers can argue about "super due process," and can keep striving to find the perfect procedures to ensure perfect outcomes in death-penalty cases, but the court of public opinion will be roused into action only by substantive injustice-such as what happened in England during the abolition movement of the late 1950s and 1960s.

So what has provoked the American public into action? Why have we witnessed this recent crisis in confidence? It seems that the same folks who have always opposed the death penalty on moral and political grounds have persuaded the media ***944** (and a large segment of the public) into believing that cases of mistaken death sentencing are legion, and that (as a result) the risk of mistaken executions is real and substantial.

Although there are many pieces to the puzzle of American public opinion, it seems that three of those pieces are by

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far the most important in explaining the sudden shift in attitudes about the death penalty.

The seeds of this crisis were sown by the biggest criminal-law event of the 1990s-the trial of O.J. Simpson. The O.J. trial focused the public's attention, for months on end, on a particularly nasty and troubling criminal case. It was a case in which almost everything went wrong-the crime labs screwed up, a law enforcement official got caught lying, the lawyers turned the proceedings into a circus that had little to do with the facts, the trial judge lost control, and, in the end, the jury reached a verdict that most Americans found ludicrous. No matter how often, and how loudly, most legal experts tried to convince the public that the O.J. case was a bizarre aberration, that message got lost. Instead, the O.J. case served to teach Americans that the criminal justice system, including the police, prosecutors, defense lawyers, trial judges, and especially the jury, can't be trusted to produce a substantively correct outcome. Ever since O.J., the public has been primed to believe almost any kind of negative report about the criminal justice system. [FN29]

This attitude is also consistent with the broad sweep of American history. One of the dominant themes of that history is Americans' distrust of government in all of its forms. The criminal justice system has managed to avoid the public's distrust for most of American history, but the O.J. case may have changed all that.

In 2000, the revelations involving the death penalty in Illinois sent a shockwave that continues to reverberate across the country (and around the world). The aforementioned Chicago Tribune series [FN30] made for compelling reading, and was almost impossible for any thinking person to ignore. Regardless of the level of hyperbole that may have existed in the series, everyone should be able to agree that the presence of innocent men on death row is a legitimate matter of serious public concern. In view of the massive publicity that was given to the Illinois situation, it may be that Governor Ryan did the best he could do by calling a temporary halt and ordering strong steps to restore public confidence in the system. At first glance, it appeared that his actions would ultimately succeed-especially when momentum began to build behind other efforts better to ensure, beyond all doubt, the substantive accuracy of death-penalty verdicts. In this sense, the aforementioned federal legislation to allow review of capital cases based on DNA evidence could be seen as another reassuring layer of protection for innocent defendants.

In June 2000, the third shoe dropped when Professor James Liebman of Columbia University Law School, and two research colleagues, Valerie West and Professor Jeffrey Fagan, released the first installment of a massive study, entitled A Broken System: Error Rates in Capital Cases, 1993-1995. [FN31] This study purported to find a ***945** huge number of serious, substantive errors in death-penalty cases nationwide. Coming on the heels of the Illinois moratorium, the study hit the media channels-and the public-like a bombshell.

According to the official press release that accompanied the Liebman study, [FN32] there are three key findings. First:

Nationally, during the 23-year study period, the overall rate of prejudicial error in the American capital punishment system was 68%. (In other words, courts found serious, reversible error in nearly 7 out of every 10 of the capital cases that were finally reviewed during this period.) [FN33]

Also:

The study found that the errors that lead courts to overturn capital sentences are not mere technicalities. The three most common errors are: (1) egregiously incompetent defense lawyers (37%); (2) prosecutorial misconduct, often the suppression of evidence of innocence (19%); and (3) faulty instructions to jurors (20%). Combined, these three constitute 76% of all error in capital punishment proceedings. [FN34]

Finally:

High error rates lead innocent persons to be sentenced to die. The study of post-reversal outcomes reveals that 82% of those whose capital judgments were overturned due to serious error were given a sentence less than death after the errors were cured on retrial. Seven percent were found to be not guilty of the capital crime. [FN35]

In other words, according to the Liebman study, not only are mistakes rampant in death-penalty cases across America, but these mistakes are predominantly substantive mistakes-mistakes that lead directly to the conviction and sentencing of persons who are innocent or do not deserve to die. But there's something wrong with this statistical

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picture.

First, Liebman did not-and could not-base his statistics on a complete sample. [FN36] This is because during the study period many of the cases in his study had been reviewed only on direct appeal, but not on state postconviction or federal habeas review. Liebman, therefore, made an assumption that error rates on state postconviction and federal habeas review would remain constant over time, and he extrapolated those rates of error to calculate the overall percentages reported in the ***946** study. This is not a safe assumption, especially in federal habeas, where reversal rates have been dropping as the U.S. Supreme Court's Eighth Amendment law has gradually begun to stabilize. [FN37] Thus, it is not necessarily a good idea to extrapolate from earlier federal habeas reversal rates. If you recalculate Liebman's data, without extrapolation, you find that the study identified 2370 actual reversals out of a total universe of 5760 capital cases-for an actual error rate of about 40%, not the 68% figure that the study reported. [FN38]

Second, what are the primary sources of error? Liebman suggests that two of the most common errors are ineffective assistance and prosecutorial misconduct, which account for, he says, more than half of the reversals. This is simply untrue. If you read the study carefully, you will notice that the data about the reasons for reversal come only from state postconviction review (i.e., state habeas) cases. This is highly problematic, for two reasons: (1) it's a very small sample (only 248 cases, out of the total of 2370 reversals) [FN39] and (2) it's a highly nonrepresentative, or biased, sample. State habeas is the only review stage in state court where legal issues that cannot be decided on the face of the trial record because they require additional factual development-such as, most prominently, ineffective assistance and prosecutorial misconduct-can be litigated in a meaningful way. [FN40] Indeed, in at least some states, a defendant is not even permitted to raise such issues on direct appeal. A defendant must wait for state habeas review to raise such issues, if he wants to raise such issues at all. [FN41] In short, ineffective assistance and prosecutorial misconduct issues are much more likely to show up in state habeas review than elsewhere in the overall review process. One would expect to see these issues only rarely on direct appeal (if at all), [FN42] and to see them primarily in state habeas. It is simply wrong, therefore, to assume that the presence of such issues in state habeas review is necessarily indicative of their presence elsewhere in the review process. That is why Liebman's conclusion about the most prevalent reasons for error is flawed. If one recalculates the study data to ***947** correct for this flaw, one finds that only 139 cases-or about 2.5% of the total in the study-are known to have been actually reversed for ineffective assistance or prosecutorial misconduct. [FN43]

Third, are the defendants in the reversed cases innocent or nondeserving of the death penalty? Again, there are serious problems with the study. Liebman says that, on retrial, 82% of these defendants received a sentence of less than death, and that 7% were found to be innocent. But these numbers are based on the same small and biased sample (i.e., state postconviction review cases) discussed above. As previously noted, ineffective assistance and prosecutorial misconduct issues are disproportionately prevalent in state postconviction review. Such errors, by their very nature, are more likely to lead to the conviction and sentencing of an innocent, or non-death-deserving defendant than are other, more "technical" kinds of legal errors. Thus, capital cases reversed on state postconviction review are likely to contain a disproportionate number of substantively flawed results. In other words, such reversals are more likely than the average reversal to involve an innocent or non-death-deserving defendant.

Moreover, within these numbers, Liebman included all cases where the defendant was allowed to plead guilty and receive a life sentence even though, in many such cases, the plea may have been based on factors totally unrelated to innocence or death-deservedness, such as the prosecutor's desire to avoid putting the victim's family through a retrial. [FN44] The reality is that, overall, Liebman identified only twenty-two cases nationwide-out of the original sample of 5760 death-penalty cases-in which a defendant was actually acquitted of the capital crime on retrial. [FN45]

How many more cases involved a defendant who was guilty of the capital crime, but undeserving of the death penalty? It's simply impossible to say, based on Liebman's data-because there is no basis for concluding whether any particular reversal was based on an underlying substantive injustice or merely procedural errors that might, in a particular case, be unrelated to substantive injustice. Our legal system has spent the past twenty-five years creating an incredibly complex body of Eighth Amendment procedural law unique to capital cases. The existence of this precedent is directly responsible for most of the reversals identified by Liebman. [FN46] The core question, in a sense, is whether the reversals identified in the Liebman study stand as evidence that there are significant numbers of

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substantively flawed death sentences, or whether they stand as evidence that our system is simply overregulating (and overlitigating) the procedures that are used in capital cases. The data do not, and cannot, answer this question.

Having pointed out some of the problems with the Liebman study, I will now proceed to discuss that study in its broader context. First, none of my criticisms of the study should be interpreted as a general defense of the system by which we currently administer the death penalty in this country. Although the Liebman study greatly overstates the statistical case about substantive injustice in death-penalty cases, that ***948** does not mean that the system is operating as it should. As Liebman and others have noted, the current system remains plagued by examples of overzealous police and prosecutors, inadequate defense lawyers, and strained resources. [FN47] Even if these problems lead to substantively unjust outcomes in only a small handful of capital cases, that is still too many.

We know that substantively unjust outcomes do occur. Perhaps the clearest recent example is the case of Anthony Porter in Illinois. Porter was convicted and sentenced to death in 1983 for a double-murder. Porter's defense lawyers did a poor job of defending him at trial. Many years later, it was learned that Porter's jury was tainted. One of the jurors was an acquaintance of the mother of one of the victims, and in fact had attended the victim's funeral. [FN48] Even Porter's prosecutors now concede that he was completely innocent of the crime. [FN49] Whether or not capital punishment in this country is broken in general, Anthony Porter's case stands as stark evidence that substantive mistakes do occur, and that it is often difficult and time consuming to find and correct them.

If there are even twenty-two cases like Anthony Porter's, in which an innocent defendant was sentenced to die, that is a serious problem. There are certainly many more cases in which the defendant was guilty, but was given an undeserved death sentence-even if Liebman's study cannot tell us exactly how many.

In this sense, the Liebman study has been a good thing for the system, provoking a long-overdue shift in emphasis from procedure to substance. While we may never truly know the extent of substantive injustice in capital cases, we can see the impact that the Liebman study has had-including the executive and legislative responses that were mentioned earlier. If the legal system does not respond in what the public views as an appropriate manner, then the future of the death penalty is in serious jeopardy.

To make the point more clearly: Even if abolitionists do not find the "Holy Grail" of an innocent person who has been executed, they will prevail, in at least some states, if (1) the American public comes to believe (as they may now do, by virtue of the Liebman study) that substantive error occurs widely in capital cases and (2) the American public further believes that the government does not care, or even worse, is trying to hide the nature and extent of the problem.

It should be obvious, of course, that the same kind of problems exist in noncapital cases. The difference is that the public is less concerned about wrongful imprisonment than it is about wrongful execution. For this reason, the public does not focus so much, or so often, on substantive problems in noncapital cases.

The same point that Professor Cover made about judging in capital cases, and about the procedural rulings made by judges, thus turns out to be even more true about the substantive decisions of guilt and appropriate sentence in such cases. After all, the legal justification for a death sentence begins with the defendant's conviction. If the ***949** conviction is substantively tainted, nothing else matters, not even perfect legal procedures. In capital cases, the extreme violence of the outcome places extreme pressure on all of the constituent legal decisions-including the substantive legal decisions that, in our system, are usually made by juries.

The recent emphasis on substantive injustice in capital cases is thus both inevitable and desirable. We should not need federal legislation to allow death-row inmates to have access to DNA evidence that might prove their innocence. We should support such legislation, regardless of our opinions about the death penalty. Paradoxically, it turns out that the future of the death penalty may depend on the willingness of prosecutors to admit the possibility-indeed, the certainty-of substantive error, and on their willingness to join with defense attorneys in searching for, and correcting, such error.

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[FN1]. George P. Smith, II, Challenging Family Values in the New Society 2- 3 (1996).

[FN2]. Id. at 3.

[FN3]. Robert M. Cover, Violence and the Word, 95 Yale L.J. 1601 (1986).

[FN4]. Id. at 1622-23.

[FN5]. Ken Armstrong & Steve Mills, Ryan Suspends Death Penalty: Illinois First State to Impose Moratorium on Executions, Chi. Trib., Jan. 31, 2000, § 1 (Evening Update ed.), at 1.

[FN6]. Special Report, Failure of the Death Penalty in Illinois, Chi. Trib., at http://www.chicago.tribune.com/news/metro/chicago/ws/0,1246,49183,00.html (last visited June 12, 2001) [hereinafter Special Report].

[FN7]. Flynn McRoberts, NU Professor Now a Media Superstar, Chi. Trib., Feb. 7, 1999, § 4, at 1.

[FN8]. John DiStaso, Shaheen Vetoes Death Penalty in NH: Legislators React to Veto, Union Leader (Manchester, N.H.), May 20, 2000, at A1, LEXIS, News Library, UNIONL File.

[FN9]. Robynn Tysver, Moratorium Vetoed: Death Penalty Timeout Is Poor Policy, Johanns Says, Omaha World-Herald, May 26, 1999, at 1, LEXIS, News Library, OMWHLD File.

[FN10]. Diana Penner, Governor Calls for Study of State's Death Penalty: O'Bannon Asks Legal Commission to Review Law's Fairness and Integrity, Indianapolis Star, Mar. 10, 2000, at A1.

[FN11]. Helen Dewar, Support Grows for Execution Safeguards: Exonerations Spur Bills in Congress, Wash. Post, June 16, 2000, at A1.

[FN12]. Brooke A. Masters, Pat Robertson Urges Moratorium on U.S. Executions, Wash. Post, Apr. 8, 2000, at A1.

[FN13]. See Dewar, supra note 11.

[FN14]. George F. Will, Editorial, Innocent on Death Row, Wash. Post, Apr. 6, 2000, at A23.

[FN15]. See William Claiborne & Paul Duggan, Spotlight on Death Penalty: Illinois Ban Ignites a National Debate, Wash. Post, June 18, 2000, at A1 ("[A] Gallup poll in February found that 66 percent of Americans support capital punishment, still a solid majority, but down from 80 percent in 1994.").

[FN16]. Joseph L. Hoffmann, Substance and Procedure in Capital Cases: Why Federal Habeas Courts Should Review the Merits of Every Death Sentence, 78 Tex. L. Rev. 1771 (2000).

[FN17]. Joseph L. Hoffmann, Is Innocence Sufficient? An Essay on the U.S. Supreme Court's Continuing Problems with Federal Habeas Corpus and the Death Penalty, 68 Ind. L.J. 817, 818 (1993).

[FN18]. Id. at 819; see also Hoffmann, supra note 16, at 1771.

[FN19]. See Hoffmann, supra note 17, at 818; Hoffmann, supra note 16, at 1771.

[FN20]. See Hoffmann, supra note 17, at 817; Hoffmann, supra note 16, at 1771.

[FN21]. See Joseph L. Hoffmann, The Death Penalty in America-Recent Developments in Law and Research 1 n.3 (1999) (English version of manuscript published in Japanese with the Journal of Proceedings of the Criminal Law

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Society of Japan, on file with the Indiana Law Journal). It has been estimated that the costs associated with a death-penalty case range from three to six times the total costs of maintaining that same person for life in prison. See Rudolph J. Gerber, Death Is Not Worth It, 28 Ariz. St. L.J. 335, 356 n.106 (1996). For example, in California alone, a recent study concluded that taxpayers could save an estimated $90 million per year by abolishing the death penalty. See Ronald J. Tabak & J. Mark Lane, The Execution of Injustice: A Cost and Lack of Benefit Analysis of the Death Penalty, 23 Loy. L.A. L. Rev. 59, 136 (1989) (citing Stephen Magagnini, Closing Death Row Would Save State $90 Million a Year, Sacramento Bee, Mar. 28, 1988, at 1).

[FN22]. See Heather Cocks, Capital Cases Costly to Public, S. Bend Trib., Mar. 22, 1999, at A1, 1999 WL 14037265; Susan Dillman, Bill Abolishing Death Penalty Likely to Fail, S. Bend Trib., Feb. 17, 1999, at D1, 1999 WL 5768415; Cary Solida, Breaking the Bank over the Death Penalty: Small Counties Struggle to Finance Capital Punishment, Ind. Law., Feb. 3, 1999, at 1.

[FN23]. See James B. Christoph, Capital Punishment and British Politics 97- 107 (1962).

[FN24]. Terence Morris, Is It Now Time to Rethink Our Law on Murder?: In 1955, Protests over the Hanging of Ruth Ellis Forced a Legal Revolution, Daily Mirror, Apr. 28, 2000, at 6, LEXIS, News Library, MIRROR File.

[FN25]. Steve Doughty, U-Turn on Payout over Bentley Hanging, Daily Mail (London), May 13, 1999, at 5, LEXIS, News Library, MAIL File.

[FN26]. Id.

[FN27]. See Ken Armstrong & Maurice Possley, Fatal Judgment: In England, a Search for Long-Buried Mistakes, Chi. Trib., Dec. 31, 2000, §2, at 1; Colin Tapping, An Honorable End to a Miserable Story, N. Echo (Darlington, U.K.), Sept. 13, 1999, at 8, LEXIS, News Library, NECHO File.

[FN28]. In 1966, Queen Elizabeth posthumously pardoned Evans, declaring him innocent. See Armstrong & Possley, supra note 27; Tapping, supra note 27.

[FN29]. See Craig M. Bradley & Joseph L. Hoffmann, Public Perception, Justice, and the "Search for Truth" in Criminal Cases, 69 S. Cal. L. Rev. 1267 (1996).

[FN30]. Special Report, supra note 6.

[FN31]. James S. Liebman, Jeffrey Fagan & Valerie West, A Broken System: Error Rates in Capital Cases, 1973 - 1995, at http:// www.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf (June 2000) [hereinafter A Broken System], reprinted in part in James S. Liebman et al., Capital Attrition: Error Rates in Capital Cases, 1973-1995, 78 Tex. L. Rev. 1839 (2000).

[FN32]. Press Release, Columbia Law School, Landmark Study Finds Capital Punishment System "Fraught with Error" (June 12, 2000), http:// www.law.columbia.edu/news/PressReleases/lieb_study.html.

[FN33]. Id.

[FN34]. Id.

[FN35]. Id.

[FN36]. See A Broken System, supra note 31, ch. IV; see also id. at 153 n.40.

[FN37]. See id. at app. E-5 tbl. 3 (showing reversal rates on habeas dropping from between 71% and 81% from 1980-82, to between 39% and 49% from 1985-88, and to between 24% and 36% from 1991-94).

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[FN38]. See id. at app. A (reporting actual reversal figures).

[FN39]. Id.

[FN40]. See, e.g., Guy Goldberg & Gena Bunn, Balancing Fairness & Finality: A Comprehensive Review of the Texas Death Penalty, 5 Tex. Rev. L. & Pol. 49, 74 (2000) ("The next level of appeal is state habeas review, where the inmate raises claims based on facts outside the trial record, such as ineffective assistance of trial counsel.").

[FN41]. See Woods v. State, 701 N.E.2d 1208, 1215-16 (Ind. 1998) (mentioning "the view, followed in many state and federal courts, that ineffective assistance of trial counsel, irrespective of the nature of the contentions, can (or even must) be postponed until collateral review" (citing Donald E. Wilkes, Jr., State Postconviction Remedies and Relief (1996 & Supp. 1997) (state views) and Kimmelman v. Morrison, 477 U.S. 365 (1986) (federal view))). The court in Woods held that, in Indiana, "[f]or the reasons outlined, a postconviction hearing is normally the preferred forum to adjudicate an ineffectiveness claim." Id. at 1219.

[FN42]. The only time ineffective assistance claims are likely to arise on direct appeal is if (1) the defendant has a new lawyer on appeal, and (2) the trial record is adequate, on its face, to support such a claim. The only time a Brady claim is likely to arise on direct appeal is if the undisclosed evidence- of which, by definition, the defense was unaware during the trial-is discovered before the time for filing the direct appeal has expired.

[FN43]. See A Broken System, supra note 31, at app. G (illustrating actual figures for state postconviction cases).

[FN44]. See id. at 154 n.45.

[FN45]. See id.

[FN46]. See Hoffmann, supra note 16, at 1782 n.58; see also Hoffmann, supra note 17, at 825.

[FN47]. See Stephen B. Bright, Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights, 54 Wash. & Lee L. Rev. 1 (1997).

[FN48]. See Ken Armstrong & Steve Mills, Special Report, Death Row Justice Derailed, Chi. Trib., Nov. 14, 1999, § 1, at 17.

[FN49]. Id.

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Special Feature: The Harry Pratter Professorship Lecture

***957 A BRIEF RESPONSE TO LIEBMAN, FAGAN, AND WEST [FNd1]**

Joseph L. Hoffmann [FNa1]

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Professor Liebman and his colleagues, Valerie West and Professor Jeffrey Fagan, have mounted a vigorous defense of their study. I agree with much of what they say. [FN1] But their response does not alter the facts, nor does it address the most important of my criticisms. I will make two brief responses.

First, with all due respect to Liebman, Fagan, and West (and setting aside dubious analogies to Ford Explorer assembly lines and Indiana Pacers free-throw shooting), the facts speak for themselves: Out of 5760 cases in the study, 2377 [FN2] were reversed as of the study's completion date. That is an actual reversal rate of about 40%, not 68%.

Liebman et al. accuse me of "extrapolation in the purest sense" in highlighting the 40% figure, because many of the cases had not yet been reviewed at one or more of the direct appeal, state postconviction, or federal habeas stages. [FN3] They argue that it is "absurd" to assume that all of those cases ultimately would survive such review. [FN4] I agree.

But this pox should be upon both of our houses. Both the 68% figure in the Liebman study and the 40% figure cited in my lecture are based on "extrapolation in the purest sense." Both figures rely-as they must-on guesses about the unknown (and unknowable): How many of the as-yet-unreviewed cases would be reversed, if they were completely reviewed?

To fill this gap, the Liebman study makes an assumption that reversal rates will remain as high in the future as they were in the past-despite what we know about the maturation of Eighth Amendment law and recent procedural reforms (especially in federal habeas) that have made such reversals much less likely. Even Liebman's own data show how "absurd" such an assumption is. [FN5]

In the end, the only thing we can say for sure is that the reversal rate, if all of the cases were reviewed at all stages, would be somewhere between 40% and 68%. [FN6] I ***958** agree with Liebman that, even at 40%, the reversal rate would be "depressingly high." [FN7] But I disagree with his saying that the reversal rate is 68% when it is not.

Second, and more importantly, Liebman et al. do not address the criticism of their study that I believe to be the most damning. Statistical quibbles aside, there is a fundamental problem with characterizing all of the reversals in capital cases (whether the rate is 40% or 68%) as involving serious, substantive errors. The problem can be illustrated with a simple example.

Imagine that the U.S. Supreme Court is presented with a case, on certiorari from direct appeal, in which it is claimed that a particular jury instruction, given routinely in capital cases, is unconstitutional. Imagine further that the Court concludes that the challenged instruction might adversely affect the outcome, producing a death sentence where such a sentence might not be legally proper or deserved, in about one out of every ten cases. The Court thus declares the challenged instruction unconstitutional. Because it is virtually impossible to tell whether a particular death sentence was adversely affected by the challenged instruction, lower courts respond to the Court's decision by reversing the death sentence in every case that included the challenged instruction. [FN8]

If a hundred death sentences get reversed in this manner, how many of those reversals represent examples of serious, substantive injustice? In the example, about ninety out of the hundred cases would have come out the same

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way even without the challenged instruction. [FN9] Because reviewing courts cannot say with certainty which *959 particular cases would have come out the same way, it is right for them to reverse all hundred of the death sentences. But only about ten of the reversals involve serious, substantive injustice, in the sense that the defendant should not have been sentenced to death in the first place. In the other ninety cases, defendants who were both guilty of the capital crime and deserving of death under the law receive a windfall benefit. Yet, according to the Liebman study, all hundred of the reversals count as examples of serious, substantive injustice.

This is the biggest deficiency in the Liebman study. It does not, and cannot, tell us how many of the reversals that occur in capital cases involve defendants who are (or even might be) either innocent of the capital crime or undeserving of a death sentence. For all we know, very few of the capital cases that get reversed involve such innocent or non-death-deserving defendants. For all we know, most of the reversals identified in the Liebman study involve, instead, the kind of procedural error that warrants reversal despite the guilt and death-deservedness of the particular defendant involved. [FN10] Because the Liebman study does not, and cannot, help us to resolve this fundamental problem, its findings-important as they are to the ongoing debate over capital punishment-must be taken with the proverbial grain of salt.

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[FN1]. I also look forward to reading the second phase of the study, and to eating my words if the results therein prove that my current criticisms are mistaken.

[FN2]. There seems to be a slight discrepancy between the figures reported in the original study, which show 2370 reversals, and the figures cited in reply to my lecture, which show 2377 reversals. The 40% figure was based on the 2370 reversals in the original study.

[FN3]. Valerie West, Jeffrey Fagan & James S. Liebman, Look Who's Extrapolating: A Reply to Hoffmann, 76 Ind. L.J. 951, 951 (2001) (emphasis omitted) [hereinafter Look Who's Extrapolating].

[FN4]. Id. at 953.

[FN5]. See Joseph L. Hoffmann, Violence and the Truth, 76 Ind L.J. 939, 945 n.37 (2001). This, by the way, is also the reason why Liebman's analogies are so inapt. One can reasonably assume that assembly-line error rates and free-throw-shooting percentages remain relatively constant over time. But reversal rates in death-penalty cases do not remain constant, which means that the Liebman study essentially seeks to hit a constantly moving (and thereby unhittable) target.

[FN6]. There is no evidence to suggest that reversal rates are increasing over time, so the 68% figure should represent an upper bound.

[FN7]. Look Who's Extrapolating, supra note 3, at 953.

[FN8]. This is a routine situation. In the context of discretionary capital sentencing, harmless-error rules are defined very narrowly, often providing little opportunity for a reviewing court to avoid reversing a death sentence once a constitutional violation has been identified. See Barclay v. Florida, 463 U.S. 939, 958 (1983) (plurality opinion) (defining "harmless error" in capital sentencing as limited to those situations where the error "could not possibly affect the balance"); Zant v. Stephens, 462 U.S. 862 (1983). The example given in the text is loosely based on the real case of Mills v. Maryland, 486 U.S. 367 (1988), in which the U.S. Supreme Court invalidated the jury instructions and verdict forms that were routinely used with respect to mitigating circumstances in Maryland capital cases, based on the existence of a "substantial risk" that the jury in particular cases might have been thereby misled. Id. at 381; see also McKoy v. North Carolina, 494 U.S. 433 (1990) (applying Mills to invalidate similar procedures routinely used in North Carolina capital cases). After Mills and McKoy, virtually all Maryland and North Carolina death sentences had to be reversed, see infra note 9, even though, by the Court's own analysis, most of the cases

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involved defendants who were both guilty of the capital crime and deserving of a death sentence under the law.

[FN9]. Professors Liebman et al. note that six out of eight Maryland defendants (75%) whose death sentences were reversed on state habeas because of Mills actually received life upon retrial. See Look Who's Extrapolating, supra note 3, at 955 n.21 Good data is better than speculation and the point is well taken-especially since it confirms, rather than rebuts, my claim that not all reversals involve "serious, substantive injustice." But questions remain: At the time the Mills case was decided, it was estimated that almost one hundred Maryland and North Carolina death-row inmates would require resentencing as a result of that decision. See Vivian Berger, Victories for Capital Defendants, Nat'l L.J., Aug. 22, 1988, LEXIS, News Library, NTLAWJ, at *3 (stating that "almost 100" in Maryland and North Carolina will likely be affected by Mills); Response Sought on Death Penalty, N.Y. Times, Mar. 7, 1990, at 22 (stating that "about 70" in North Carolina were affected by McKoy, which applied Mills to the North Carolina statute). What happened to the ninety or so defendants whose ultimate outcomes are not documented in the Liebman study? How many of those ninety obtained resentencing hearings, and how many were then resentenced to death? We do not know, and until we do, it seems rash, if not foolhardy, to base any judgments on a sample of only eight cases. Even with respect to the six Maryland defendants who were resentenced to life, were those life sentences really caused by a difference in jury instructions, or simply by submitting the cases to different juries? More data, which may be provided in future phases of the Liebman study, will be needed to answer such questions.

[FN10]. I leave it to others to decide whether or not such procedural errors should be called "technicalities."

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June 17, 2002

Honorable Jeff Sessions
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Dear Senator Sessions:

In reply to your Office's inquiry relating to the Columbia death-penalty study, a colleague and I did have a chance to review the "Broken System" report when it was first mentioned in the local press and we did issue an immediate response, which was published locally.

When the study was first released, we looked at the figures cited for Wyoming and found that they are entirely erroneous. It is impossible to say where "The Broken System" got its Wyoming numbers, but the data was completely wrong.

The Columbia study reported Wyoming with **30** death sentences imposed in the reporting period - we actually had **seven**. They showed us with **21** cases still in the direct appellate process at the close of the reporting period - we actually had **none**. Of the seven cases we did actually process in the report period, one went all the way to execution after a multitude of state and federal appeals/reviews.

Of the remaining six, four were reversed on the basis of Furman v. Georgia itself, while one was reversed due to the USSC's decision in Mills v. Maryland, (1988) which declared impermissible the mandatory "double-counting" of a statutory aggravator under felony murder. Thus, in Wyoming, five of the six reversals were directly due to subsequent changes in United States Supreme Court death penalty jurisprudence affecting the underlying statutory scheme, **not** as a result of flawed fact-finding or adversarial breakdown/misconduct. In other words, "serious error" in the proceedings as defined by the report, at least in Wyoming's cases, had to do with the way the United States Supreme Court changed the rules **after** the conviction was obtained

One case was remanded for trial (the original conviction was based on the defendant's plea!) after the Tenth Circuit found ineffective assistance of counsel - and on the capital trial to jury, the defendant abandoned his 'defense' in mid-trial and entered a guilty plea to avoid the almost certain imposition of the death penalty.

We also noted that "Appendix D: Examples of Serious Error Warranting Federal Habeas Corpus Relief" cites a Wyoming case, Haworth v. Shillinger as one of the 'examples' – but Haworth was **not** and **never had been** a capital case.

As mentioned above, we provided this information to the local newspaper after they published the AP report on the release of the Columbia Study and they then followed up with a story noting the flaws in the study as it pertained to Wyoming.

We have no idea if the study's treatment of other states' data is as sloppy as it is of Wyoming's, but clearly the study is seriously flawed as it relates to us. Further, the report's characterization of all reversals as due to "serious error" is semantically misleading, at least in terms of Wyoming's experience. While the report tries to leave the impression that it only deals with cases post-Furman, the report begins its survey in 1973, and so picks up every reversal occasioned by Furman in Wyoming, given the inevitable lag between conviction, appeal/post-conviction review and the publishing of the respective decisions applying Furman's new rule.

In essence, the study contends that reversals as a result of after-the-fact changes to the United States Supreme Court's views on mandatory death sentences or the nuances of the cabining of the jury's sentencing discretion should be viewed as "serious error." However, this Office believes that these reversals should be seen for what they are: the result of major changes in capital jurisprudence retroactively imposed by the Supreme Court.

Sincerely,

Hugh Kenny
Senior Assistant Attorney General

Testimony of Congressman Ray LaHood
Before the U.S. Senate Judiciary Committee
June 18, 2002

Mr. Chairman, I would like to thank you and the members of the Senate Judiciary Committee for holding a hearing on the Innocence Protection Act and allowing me the opportunity to testify today on behalf of the 236 members of the House of Representatives who have cosponsored this important piece of legislation. Additionally, Mr. Chairman, I would like to thank you for the tremendous work you have done with this legislation in the Senate.

As you know, in January of 2000, Illinois Governor George Ryan declared a moratorium on executions in Illinois after raising concerns about the state's death penalty system. The state executing an innocent person is the ultimate nightmare. My great state has nearly done this 13 times since 1977 when the death penalty was reinstated in Illinois. This number is astonishing. As the recent 101st exoneration has exhibited, this problem is not limited to Illinois. As you know, Maryland Governor Parris Glendening declared a moratorium on executions in his state on May 9th until a study could be conducted to examine Maryland's death penalty system.

Mr. Chairman, I support the death penalty, and as a supporter, I strongly believe the system must be fair. As you can see by the figures I just gave you, our system is fatally flawed.

To help fix the system, Governor Ryan appointed a Commission, in March of 2000, to study what had gone so terribly wrong. His Commission was chaired by a former judge, senator, and U.S. attorney, and was also made up of former prosecutors, defense lawyers, and non-lawyers. After nearly 2 years of study and discussion, the Commission put together an invaluable document developing 85 recommendations to improve our justice system. I commend Governor Ryan on his efforts.

Several of the main components of these findings are mirrored in H.R. 912, the Innocence Protection Act of 2001, which I have reintroduced, in the 107th Congress, with my colleague Congressman Bill Delahunt. I introduced this bill because I believe that those of us who support the death penalty have a special responsibility to ensure it is applied fairly. As I mentioned before, I am pleased to report that we have 236 cosponsors of this legislation

with 62 of them Republicans. This is enough to pass this legislation should we be given the opportunity to bring it to the floor for a vote. To me, this means people are beginning to recognize the importance of this bipartisan legislation.

As long as innocent Americans are on death row, the guilty are on our streets. As shown by countless cases, many defendants lack competent counsel and are unable to obtain and present evidence that will establish their innocence. The Innocence Protection Act seeks to address both of these concerns by giving those accused of murder access to new DNA technology that may not have been available at the time of their trial and by ensuring that the attorneys, in whose hands these lives are places, are qualified. In Illinois alone, 22 defendants have been sentenced to death while being represented by attorneys who have either been disbarred or suspended at some time during their legal careers. In some cases, attorneys have even been found sleeping or under the influence of alcohol during the trial. I believe ensuring competent counsel is a vitally important step in the right direction toward fixing our capital punishment system.

This legislation would increase public confidence in our nation's judicial system specifically as it relates to the death penalty. People have spent years on death row for crimes they did not commit. Some have come within hours of execution. A death sentence is the ultimate punishment. Its absolute finality demands that we be 100% certain that we've got the right person. For in protecting the innocent, we also ensure that the guilty do not go free.

Again, Mr. Chairman, thank you and the Committee for the opportunity to testify today.

U.S. SENATOR PATRICK LEAHY

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STATEMENT OF SENATOR PATRICK LEAHY, CHAIRMAN,
SENATE JUDICIARY COMMITTEE
HEARING ON
"PROTECTING THE INNOCENT:
PROPOSALS TO REFORM THE DEATH PENALTY"
JUNE 18, 2002

It has been a year since our full committee held a hearing to examine the need for reform of the capital punishment system. Since then, like waves piling sand on the shore, more and more evidence has accumulated, exposing a death penalty system that is broken. A year's time also has exposed more of the toll that this broken system is taking in the lives of the wrongfully convicted.

A year ago, I spoke of 96 exonerated capital prisoners. Now we have reached 101. Ray Krone, the 100th capital prisoner to be exonerated, is here today. After serving ten years in prison, three of them spent on death row, Ray Krone was proven innocent. DNA evidence pointed squarely to the real killer in that case, a man who went on to sexually assault another woman while Ray Krone served time for the murder he committed. On its front page today, USA Today tells Ray Krone's story and reports on how shabbily our federal and state laws often treat exonerees like Ray for their time lost behind bars. After more than a decade in state prison, Ray Krone got an apology from the prosecutor and fifty dollars, and he was sent on his way. Now, the official reporter transcribing this hearing and those watching on C-SPAN might not believe what they just heard, so I will repeat it. After wrongfully spending ten years, three months and nine and a half days in prison, Ray Krone was given the sum of fifty dollars to start his life over.

Governor Ryan of Illinois, who showed great courage two years ago by announcing a moratorium on executions in his state, recently announced the results of the commission he appointed to study problems in the Illinois system of capital punishment. The commission recommended 85 changes and improvements, a significant number of which have been embraced by even those who steadfastly support the death penalty. Senator Feingold chaired a hearing on the Ryan Commission Report just last week in the Constitution Subcommittee, and I commend him for the excellent work he has done to explore and illuminate the findings of that report.

In May, the State of Maryland announced a moratorium on executions to investigate concerns about racial and geographic disparities in that state's capital punishment system.

Just two weeks ago, the Supreme Court let stand the Fifth Circuit Court of Appeals' decision in the "sleeping lawyer" case. The Fifth Circuit correctly held that "unconscious counsel equates to no counsel at all."

These events reflect and reinforce the momentum building in Congress for legislative action. For more

than two years, I have been working to pass a bill called the Innocence Protection Act. I introduced this bipartisan bill in February 2000.

A few months later, Congressman Bill Delahunt of Massachusetts and Congressman Ray LaHood of Illinois introduced the Innocence Protection Act in the House of Representatives. Today we have 26 cosponsors in the Senate and 233 in the House, including a wide array of Democrats and Republicans, supporters and opponents of the death penalty. It is not easy to get 233 cosponsors on a National Love Your Puppy Day resolution, let alone on a third-rail issue like death penalty reform, and once again I want to publicly commend and thank Congressman Delahunt and Congressman LaHood for their commitment to this work and for the masterful way they have handled it. Reflecting the strong and growing interest in these reforms, House Judiciary Committee Chairman Sensenbrenner and Crime Subcommittee Chairman Smith have scheduled a hearing on the bill, which will take place this afternoon.

The incredible momentum generated in support of reform does not guarantee that all reformers speak with the same voice. Among the members of this committee, four of us – Senators Specter, Feinstein, Feingold, and myself – have drafted legislation proposing different types of changes to the system. What is most significant is not the differences between these bills, but the fact that each of us know, and all of our cosponsors agree, that reform is needed before more innocent defendants are wrongfully convicted and sentenced to death.

In addition to Ray Krone, we are joined today by Kirk Bloodsworth, who was wrongfully convicted of the rape and murder of a young girl. This was a heinous crime, but Kirk Bloodsworth did not commit it. It took him nine years to prove his innocence. Both of these cases were ultimately solved by DNA evidence, showing the need to provide access to testing where available to those who have a credible claim of innocence. What causes innocent men to be convicted in the first place? In June 2000, Professor Jim Liebman, who will testify today, and his colleagues at the Columbia Law School released the most comprehensive statistical study ever undertaken of modern American capital appeals. They found that serious errors were made in two-thirds of all capital cases. The most common problem they found was grossly incompetent defense lawyering. That study was recently updated but, unfortunately, the results show no improvement.

And so the waves continue to pile new evidence at our feet. They also call us to duty. We owe it to exonerees like Kirk Bloodsworth and Ray Krone to ensure that more innocent defendants are not convicted and sentenced to death for crimes they did not commit. We owe it to the American people to find the real killers and keep them off the streets before the real criminals find new victims. And we owe it to our democratic system of government and to the way of life we cherish to prevent the erosion of public confidence in our criminal justice system.

We welcome our witnesses today and look forward to their testimony.

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Testimony of Professor James S. Liebman, Columbia University, before the Judiciary Committee of the United States Senate, in Regard to S.233, S.486, S.800 and S.2446

June 18, 2002

Thank you Mr. Chairman and members of the Committee for inviting me to testify on the important bills before the Committee today. My testimony focuses on the need to improve the quality of legal representation in state capital trials. My remarks are based in part on a comprehensive study by a team of Columbia University researchers on the *amount* of serious, reversible error that is found in state capital verdicts, the demonstrable *causes* of serious capital error, and *ways to avoid* that error.[1] We began our study eleven years ago, in order to answer a question posed to us by then Chairman Biden of this Committee. I am pleased once again to make study findings available to the Committee.

Five findings are especially pertinent to the bills before the Committee.

First, *state death penalty verdicts are fraught with reversible error.* During the 23-year period from 1973 to 1995, American states imposed 5826 state capital verdicts. Among those verdicts that were finally inspected for error by state and federal courts during that period, 68% were found to contain reversible error and had to be sent back for retrial. The 68% figure is conservative; the actual rate maybe higher. And there is evidence that in some states, at least — Pennsylvania and Virginia being good examples — the rate of reversible error has climbed since 1995.

Second, *reversible error is **serious** error.* About 90% of the reversals were by state judges who risk being voted out of office if they reverse without a very good reason. Over half of the remaining judges voting to reverse were appointed by Republican Presidents with strong law-and-

[1] Executive summaries of our two reports are attached as an Appendix.

order agendas. At the two of three review stages where we have data,[2] nearly 80% of the reversals were because of four clearly serious violations: egregiously incompetent defense lawyers, prosecutorial suppression of evidence of innocence or mitigation, misinstruction of juries, and biased judges and jurors. Half the reversals at those stages were for errors that undermined the reliability of the verdict that the defendant committed capitally aggravated murder. The other half undermined the accuracy of the decision to take the defendant's life. On retrial where we have data,[3] curing the errors that led to reversal produced a different, non-capital outcome 82% of the time. In 9% of the retrials, curing the error led to an acquittal.

Third, *the review process is so overwhelmed by the number of serious capital mistakes that it cannot catch them all.* We conducted four cases studies of innocent men who were sentenced to die, and whose capital verdicts were *approved* for execution by all three sets of state and federal reviewing courts — leaving it to college students in one case and a posthumous DNA test in another to demonstrate the defendants' innocence. In each case, reviewing state and federal courts recognized the weakness of the evidence against the defendant, and also identified error in the case, but affirmed the verdict nonetheless based on strict waiver rules and prejudice standards that courts have been forced to adopt to enable them to cope with the large amount of error they find.

Fourth, and more important than any particular number or percent, *the result of so many errors and reversals is that the death penalty system cannot achieve its law enforcement goals.* Even

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[2] These are the state post-conviction and federal habeas review stages.

[3] For state post-conviction reversals.

people who calculate error rates different from ours using highly dubious assumptions,[4] still conclude that the capital reversal rate is over 50%. On average over decades, the states only manage each year to execute about 1.5% of the thousands of prisoners on their death rows. Even over our entire 23-year study period, only 5% of imposed capital verdicts were carried out. Indeed, the typical, usual outcome of a death penalty verdict in this nation is that it will be *reversed*, and that it will be *replaced* on retrial with a non-capital verdict or an acquittal. That fruitless process will take from 5 to 15 years to occur. And, after accounting for the money spent on the vast majority of death verdicts that are reversed and never carried out, the best available estimate — for Florida — of the system's cost per each execution that does occur is $23 million above and beyond the cost of life without parole.[5] The cost in frustration and anguish for crime victims and survivors is immeasurable.

Fifth, *at the very core of all of these costs — in unreliability, delay, frustration and dollars — is a single problem: the absence at many state capital trials of adequately trained and compensated defense lawyers*. The single most common reason for capital reversals at the state post-conviction and federal habeas stages of review—accounting for over a third of the reversals at those stages—is egregiously incompetent defense lawyering. Based on a comprehensive set of statistical analyses of the conditions in states and counties that lead to reversible capital error, we found that states that spend the least on their capital trial courts — and compensation of defense lawyers is an important part of the funding picture — have higher rates of capital reversals at the direct appeal

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[4] Typically, they assume that all imposed verdicts that courts have not yet finally reviewed are *error-free* — notwithstanding that 68% of the simultaneously imposed verdicts that *were* reviewed had reversible error. See, e.g., Barry Latzer & James N.G. Cauthen, *Another Recount: Appeals in Capital Cases*, PROSECUTOR, Jan./Feb. 2001, at 25.

[5] See S. V. Date, The High Price of Killing Killers, The Palm Beach Post, Jan. 4, 2000, at 1A.

stage than states that spend more on capital trial courts. We also found that, everything else equal, death row inmates with the best compensated lawyers are about 60% more likely than other prisoners to win habeas corpus relief.

But more important than all these results is our finding that the single most important predictor of high capital reversal rates is how frequently states and counties impose the death penalty per 1000 homicides. The more frequently states and counties impose death sentences per 1000 homicides, the more likely it is that any given death verdict they impose will be reversed due to serious error *and* (at the county level) that the verdict will turn out to have been imposed on an innocent person. In other words, states and counties with a scattershot approach to capital sentencing — ones that impose the penalty in weak as well as strong cases — have much higher error and innocence rates than jurisdictions that reserve the death penalty for the very worst of the worst offenders. This finding is important because the single most effective way to weed out weak cases, and leave only the worst of the worst to for death sentences, is through a well-trained and well-compensated defense lawyer's adversarial testing of the reliability of the state's case for conviction and a death sentence.

Put simply, investing in highly competent and well-compensated defense lawyers, who adequately perform their crucial screening job at the front-end of the capital system, will very likely pay for itself several times over in decreased reversals, retrials, delays, frustrations and expense at the back end of the process.

These findings provide support for important aspects of each of the bills before the Committee: the study provisions in Senator Feingold's, Senator Feinstein's and Chairman Leahy's bills; the compensation provisions of Senator Specter's bill; the ongoing monitoring of the quality

of defense work in Senator Feinstein's bill; the enforceability provisions in Senator Specter's and Senator Leahy's bill; and the independent appointing authority in the Chairman's bill. Whatever the precise provisions, however, the overriding goal should be clear. Following the lead of the federal death penalty system and of states such as Colorado, Kentucky, Indiana, and New York, the goal should be to develop and provide adequate compensation for a stable, competent capital defense bar that is available to every capital-sentencing county in every capital-sentencing state in the nation.

The Indiana experience is particularly telling in this regard. After facing the same kinds of capital error problems that have plagued the rest of the nation, Indiana adopted high standards for capital defense lawyers, and compensation and support service-provisions very like those, for example, in Senator Specter's bill. The results are the ones our study findings would predict: Fewer capital prosecutions have been brought; the prosecutions that have succeeded have more often been reserved for the worst of the worst offenses; confidence in the reliability of the resulting capital verdicts has increased; and the overall cost of the system appears to have declined.[6]

I very much appreciate the Committee's efforts to address this crucial cause of the breakdown of the nation's death penalty system, and for inviting me to testify.

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[6] See Norman Lefstein, Reform of Defense Representation in Capital Cases: The Indiana Experience and its Implications for the Nation, 29 Ind. L. Rev. 495 (1996) .

APPENDIX

A Broken System:

Error Rates in Capital Cases,

1973-1995

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Columbia University School of Law

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June 12, 2000

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Executive Summary

There is a growing bipartisan consensus that flaws in America's death-penalty system have reached crisis proportions. Many fear that capital trials put people on death row who don't belong there. Others say capital appeals take too long. This report—the first statistical study ever undertaken of modern American capital appeals (4,578 of them in state capital cases between 1973 and 1995)—suggests that *both* claims are correct.

Capital sentences do spend a long time under judicial review. As this study documents, however, **judicial review takes so long precisely *because* American capital sentences are so persistently and systematically fraught with error that seriously undermines their reliability**.

Our 23 years worth of results reveal a death penalty system collapsing under the weight of its own mistakes. They reveal a system in which lives and public order are at stake, yet for decades has made more mistakes than we would tolerate in far less important activities. They reveal a system that is wasteful and broken and needs to be addressed.

Our central findings are as follows:

- Nationally, during the 23-year study period, **the overall rate of prejudicial error in the American capital punishment system was *68*%**. In other words, courts found **serious, reversible error in nearly 7 of every 10 of the thousands of capital sentences that were fully reviewed during the period**.
- Capital trials produce **so many mistakes** that it takes three judicial inspections to catch them —leaving **grave doubt whether we *do* catch them all**. After state courts threw out

47% of death sentences due to serious flaws, a later federal review found "serious error"—error undermining the reliability of the outcome—in **40%** of the *remaining* sentences.

- Because state courts come first and see *all* the cases, they do most the work of correcting erroneous death sentences. Of the **2,370 death sentences** thrown out due to serious error, **90%** were overturned by **state judges**—many of whom were the very judges who imposed the death sentence in the first place; nearly all of whom were directly beholden to the electorate; and none of whom, consequently, were disposed to overturn death sentences except for very good reason. This does not mean that federal review is unnecessary. Precisely *because* of the huge amounts of serious capital error that state appellate judges are called upon to catch, it is not surprising that **a substantial number of the capital judgments they let through to the federal stage are still seriously flawed**.
- To lead to reversal, error must be serious, indeed. The most common errors—prompting a **majority of reversals** at the state post-conviction stage—are **(1) egregiously incompetent defense lawyers who didn't even look for—*and demonstrably missed*—important evidence that the defendant was innocent or did not deserve to die; and (2) police or prosecutors who *did* discover that kind of evidence but *suppressed* it, again keeping it from the jury**. [Hundreds of examples of these and other serious errors are collected in Appendix C and D to this Report.]
- High error rates put many individuals at risk of wrongful execution: ***82%*** of the people whose capital judgments were overturned by state post-conviction courts due to serious

error were found to deserve a sentence **less than death** when the errors were cured on retrial; ***7% were found to be innocent of the capital crime.***

- High error rates persist over time. More than **50%** of all cases reviewed were found seriously flawed in **20 of the 23 study years**, including 17 of the last 19. In **half** the years, including the **most recent one**, the error rate was **over 60%**.
- High error rates exist across the country. **Over 90%** of American death-sentencing states have overall error rates of **52% or higher**. **85%** have error rates of **60% or higher**. **Three-fifths** have error rates of **70% or higher**.
- Illinois (whose governor recently declared a moratorium on executions after a spate of death-row exonerations) does not produce atypically faulty death sentences. **The overall rate of serious error found in Illinois capital sentences (66%) is very close to—and slightly *lower* than—the national average (68%).**
- Catching so much error takes time—a national average of **9 years** from death sentence to the last inspection and execution. By the end of the study period, that average had risen to **10.6 years. In *most* cases, death row inmates wait for years for the lengthy review procedures needed to uncover all this error. Then, their death sentences are *reversed*.**
- This much error, and the time needed to cure it, impose **terrible costs on taxpayers, victims' families, the judicial system, and the wrongly condemned. And it renders unattainable the finality, retribution and deterrence that are the reasons usually given for having a death penalty**.

Erroneously trying capital defendants the first time around, operating the multi-tiered

inspection process needed to catch the mistakes, warehousing thousands under costly death row conditions in the meantime, **and having to try two out of three cases *again*** is irrational.

This report describes the extent of the problem. A subsequent report will examine its causes and their implications for resolving the death penalty crisis.

A Broken System, **Part II:**

Why There Is So Much Error in Capital Cases, and What Can Be Done About It

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February 11, 2002

©2002 James S. Liebman, Jeffrey Fagan, Andrew Gelman, Valerie West, Garth Davies, Alexander Kiss

Executive Summary

There is growing awareness that serious, reversible error permeates America's death penalty system, putting innocent lives at risk, heightening the suffering of victims, leaving killers at large, wasting tax dollars, and failing citizens, the courts and the justice system.

Our June 2000 Report shows how often mistakes occur and how serious it is: 68% of all death verdicts imposed and fully reviewed during the 1973-1995 study period were reversed by courts due to serious errors.

Analyses presented for the first time here reveal that 76% of the reversals at the two appeal stages where data are available for study were because defense lawyers had been egregiously incompetent, police and prosecutors had suppressed exculpatory evidence or committed other professional misconduct, jurors had been misinformed about the law, or judges and jurors had been biased. Half of those reversals tainted the verdict finding the defendant guilty of a capital crime as well as the verdict imposing the death penalty. *82%* of the cases sent back for retrial at the second appeal phase ended in sentences less than death, including *9%* that ended in *not guilty verdicts*.

Part II of our study addresses two critical questions: Why does our death penalty system make so many mistakes? How can these mistakes be prevented, if at all? Our findings are based on the most comprehensive set of data ever assembled on factors related to capital error—or other trial error.

Our main finding indicates that if we are going to have the death penalty, it should be reserved for the worst of the worst: **Heavy and indiscriminate use of the death penalty creates a high risk that mistakes will occur.** The more often officials use the death penalty, the wider the range of crimes to which it is applied, and the more it is imposed for offenses that are not highly aggravated, the greater the risk that capital convictions and sentences will be seriously flawed.

Most disturbing of all, we find that **the conditions evidently pressuring counties and states to overuse the death penalty and thus increase the risk of unreliability and error include *race*, *politics*** and ***poorly performing law enforcement systems***. Error also is linked to overburdened and underfunded state courts.

MAIN FINDING

The higher the rate at which a state or county imposes death verdicts, the greater the probability that each death verdict will have to be reversed because of serious error.

- The overproduction of death penalty verdicts has a powerful effect in increasing the risk of error. Our best analysis predicts that:

  → Capital error rates more than *triple* when the death-sentencing rate increases from a quarter of the national average to the national average, holding other factors constant.

→ When death sentencing increases from a quarter of the national average to the highest rate for a state in our study, the predicted increase in reversal rates is *six-fold*—to *about 80%*.

In particular, the more often states impose death sentences in cases that are not highly aggravated, the higher the risk of serious error.

- At the federal habeas stage, the probability of reversal grows substantially as the crimes resulting in capital verdicts are less aggravated. For each additional aggravating factor, the probability of reversal drops by about 15%, when other conditions are held constant at their averages. Imposing the death penalty in cases that are not the worst of the worst is a recipe for unreliability and error.

Comparisons of particular counties' and states' capital-sentencing and capital-error rates illustrate the strong relationship between frequent death sentencing and error. For example:

- Among counties with 600 or more homicides and five or more death sentences during the study period, ten had the highest death-sentencing rates: Pima County (Tucson), Arizona; suburban Baltimore County, Maryland; Clark County (Las Vegas), Nevada; Pinellas County (St. Petersburg), Florida; Oklahoma (City), Oklahoma; Maricopa County (Phoenix), Arizona; Hamilton County (Cincinnati), Ohio; Hillsborough County (Tampa), Florida; Polk County, Florida; and Muscogee County, Georgia. These counties had an average capital error rate of 71% at the first and last appeal stages, and eight of them put a total of 16 people on death row who were later found not guilty. The ten comparable capital counties with the lowest death-sentencing rates are San Francisco, California; Richmond, Virginia; Fulton County (Atlanta), Georgia; Essex County (Newark), New Jersey; St. Louis City, Missouri; Pulaski County (Little Rock), Arkansas; Bernalillo County (Albuquerque), New Mexico; Davidson County (Nashville), Tennessee; Jackson County (Kansas City), Missouri; and Prince George's County (suburban Washington), Maryland. These counties had an average error rate of 41%, and none sentenced anyone to death during the study period or since who was later found not guilty.*******

- All but one of the 10 states with the highest death-sentencing rates during the 23-year study period had overall capital reversal rates at or above the average rate of 68%.

PRESSURES ASSOCIATED WITH OVERUSE OF THE DEATH PENALTY

******* Table 16, Page 304.

Four disturbing conditions are strongly associated with high rates of serious capital error. Their common capacity to pressure officials to use the death penalty aggressively in response to fears about crime and regardless of how weak any particular case for a death verdict is, may explain their relationship to high capital error rates.

- **The closer the homicide risk to whites in a state comes to equaling or surpassing the risk to blacks, the higher the error rate.** Other things equal, reversal rates are ***twice as high*** where homicides are most heavily concentrated on whites compared to blacks, than where they are the most heavily concentrated on blacks.

- **The higher the proportion of African-Americans in a state—and in one analysis, the more welfare recipients in a state—the higher the rate of serious capital error.** Because this effect has to do with traits of the population at large, not those of particular trial participants, it appears to be an indicator of crime fears driven by racial and economic conditions.

- **The lower the rate at which states apprehend, convict and imprison serious criminals, the higher their capital error rates.** Predicted capital error rates for states with only 1 prisoner per 100 FBI Index Crimes are about 75%, holding other factors constant. Error rates drop to 36% for states with 4 prisoners per 100 crimes, and to 13% for those with the highest rate of prisoners to crimes. Evidently, officials who do a poor job fighting crime also conduct poor capital investigations and trials. Well-founded doubts about a state's ability to catch criminals may lead officials to extend the death penalty to a wider array of weaker cases—at huge cost in error and delay.

- **The more often and directly state trial judges are subject to popular election, and the more partisan those elections are, the higher the state's rate of serious capital error.**

ADDITIONAL FINDINGS

Heavy use of the death penalty causes delay, increases cost, and keeps the system from doing its job. High numbers of death verdicts waiting to be reviewed paralyze appeals. Holding other factors constant, the process of moving capital verdicts from trial to a final result seems to come to a halt in states with more than 20 verdicts under review at one time.

Poor quality trial proceedings increase the risk of serious, reversible error. Poorly funded courts, high capital and non-capital caseloads, and unreliable procedures for finding the facts all increase the chance that serious error will be found. In contrast, high quality, well-funded private lawyers from out of state significantly increase a defendant's chance of showing a federal court that his death verdict is seriously flawed and has to be retried.

Chronic capital error rates have persisted over time. Overall reversal rates were high and fairly steady throughout the second half of the 23-year study period, averaging 60%. When all significant

factors are considered, state high courts on direct appeal—where 79% of the 2349 reversals occurred—found significantly more reversible error in recent death verdicts than in verdicts imposed earlier in the study period. Other things equal, direct appeal reversal rates were increasing 9% a year during the study period.

State and federal appeals judges cannot be relied upon to catch all serious trial errors in capital cases. Like trial judges, appeals judges are susceptible to political pressure and make mistakes. And the rules appeals judges use to decide whether errors are serious enough to require death verdicts to be reversed are so strict that egregious errors slip through. We study four illustrative cases in which *the courts approved the convictions and death sentences of innocent men* despite *a full set of appeals.*[*] These case studies show that judges repeatedly recognized that the proceedings were marred by error but affirmed anyway because of stringent rules limiting reversals.

SUMMARY EXPLANATION

The lower the rate at which a state imposes death sentences—and the more it confines those verdicts to the worst of the worst—the less likely it is that serious error will be found. The fewer death verdicts a state imposes, the less overburdened its capital appeal system is, and the more likely it is to carry out the verdicts it imposes. The more often states succumb to pressures to inflict capital sentences in marginal cases, the higher is the risk of error and delay, the lower is the chance verdicts will be carried out, and the greater is the temptation to approve flawed verdicts on appeal. Among the disturbing sources of pressure to overuse the death penalty are political pressures on elected judges, well-founded doubts about the state's ability to convict serious criminals, and the race of the state's residents and homicide victims.

METHODS

We employ an array of statistical methods to identify factors that predict where and when death verdicts are more likely to be found to be seriously flawed, and to assure that the analyses are comprehensive, conservative and reliable: We use several statistical methods with different assumptions about the arrangement of capital reversals and reversal rates to ensure that results are driven by relationships in the data, not statistical methods. We analyze reversals at each separate review stage and at all three stages combined. We use multiple regression to analyze the simultaneous effect on reversal rates of important general factors (state, county, year and time trend) and specific conditions that may explain error rates. We examine factors operating at the state, county and case level. And we check for consistency of results across analyses to determine which factors and sets of significant factors are the most robust and warrant the most confidence.

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[*] We study the cases of Lloyd Schlup, Earl Washington, Anthony Porter and Frank Lee Smith. See pp. 25-36.

POLICY OPTIONS

The harms resulting from chronic capital error are costly. Many of its evident causes are not easily addressed head-on (*e.g.*, the complex interaction of a state's racial make-up, its welfare burden and the efficacy of its law enforcement policies). And indirect remedies are unreliable because they demand self-restraint by officials who in the past have succumbed to pressures to extend the death penalty to cases that are not highly aggravated. As a result, some states and counties may conclude that the only answer to chronic capital error is to stop using the death penalty, or to limit it to the very small number of prospective offenses where there is something approaching a social consensus that only the death penalty will do.

In other states and counties, a set of carefully targeted reforms based upon careful study of local conditions might seek to achieve the central goal of limiting the death penalty to "the worst of the worst"—to defendants who can be shown without doubt to have committed an egregiously aggravated murder without extenuating factors. Ten reforms that might help accomplish this goal are:

- Requiring proof beyond *any* doubt that the defendant committed the capital crime.
- Requiring that aggravating factors substantially outweigh mitigating ones before a death sentence may be imposed.
- Barring the death penalty for defendants with inherently extenuating conditions—mentally retarded persons, juveniles, severely mentally ill defendants.
- Making life imprisonment without parole an alternative to the death penalty and clearly informing juries of the option.
- Abolishing judge overrides of jury verdicts imposing life sentences.
- Using comparative review of murder sentences to identify what counts as "the worst of the worst" in the state, and overturning outlying death verdicts.
- Basing charging decisions in potentially capital cases on full and informed deliberations.
- Making all police and prosecution evidence bearing on guilt vs. innocence, and on aggravation vs. mitigation available to the jury at trial.
- Insulating capital-sentencing and appellate judges from political pressure.
- Identifying, appointing and compensating capital defense counsel in ways that attract an adequate number of well-qualified lawyers to do the work.

CONCLUSION

Over decades and across dozens of states, large numbers and proportions of capital verdicts have been reversed because of serious error. The capital system is collapsing under the weight of that error, and the risk of executing the innocent is high. Now that explanations for the problem have been identified and a range of options for responding to it are available, the time is ripe to fix the death penalty, or if it can't be fixed, to end it.

TESTIMONY

OF

HONORABLE PAUL A. LOGLI
STATE'S ATTORNEY
WINNEBAGO COUNTY, ILLINOIS

AND

CHAIR
NATIONAL DISTRICT ATTORNEYS ASSOCIATION
CAPITAL LITIGATION SUBCOMMITTEE

BEFORE A HEARING OF THE

OF THE COMMITTEE ON THE JUDICIARY

ON

THE INNOCENCE PROTECTION ACT

JUNE 18, 2002

My name is Paul Logli and I am the elected state's attorney in Winnebago County, Illinois. I want to thank you, on behalf of the National District Attorneys Association, for the opportunity to present our position on DNA testing in post conviction settings and share some thoughts on the issue of counsel competency. The views that I express today represent the views of that Association and the beliefs of thousands of local prosecutors across this country.

To place my remarks in context – let me briefly tell you about my jurisdiction. Winnebago County is located about 70 miles west of Chicago. It has a population of nearly 280,000 people living in a diverse community. The county seat is Rockford—the second largest city in the state. I have been a prosecutor for 18 years and am honored to have served in my current position for 16 years, having been elected to office 4 times. I previously served as a judge of the local circuit court for nearly 6 years. I currently supervise a staff that includes 38 assistant state's attorneys. Annually, my office handles about 4000 felony cases.

I want to emphasize to the Committee that as a prosecutor I represent the only trial attorneys in the United States whose primary ethical obligation is to seek the truth wherever it takes us. I, as well as all local prosecutors, support the use of DNA technology in catching criminals, convicting the guilty and identifying the truly innocent.

DNA TESTING IN THE CRIMINAL JUSTICE SYSTEM

To augment my remarks I would like to ask that a copy of the National District Attorneys Association's Policy on DNA Technology and the Criminal Justice System be placed in the record. It sets out in greater detail the points that I wish to make today.

Our Association has consistently embraced DNA technology as a scientific breakthrough in the search for truth. Since the mid-1980s, when DNA evidence was first introduced we have fought for its admission in criminal trials and we have been instrumental in providing training to prosecutors on using DNA Evidence in investigations and in the courtroom. With the use of DNA evidence, prosecutors are often able to conclusively establish the guilt of a defendant in cases where identity is at issue. Prosecutors and law enforcement agencies also utilize DNA technologies to eliminate suspects and exonerate the innocent. It is our view that this powerful weapon against the criminal offender is best used when such resources are made fully available in the earliest stages of an investigation and before a conviction.

Forensic DNA typing has had a broad, positive impact on the criminal justice system. In recent years, convictions have been obtained that previously would have been impossible. Countless suspects have been eliminated prior to the filing of charges. Old, unsolved criminal cases, as well as new cases, have been solved. In a very few case, mistakenly accused defendants have been freed both before trial and after incarceration. Increasingly, the unidentified remains of crime victims are being identified.

Advances in DNA technology hold enormous potential to enhance our quality of justice even more dramatically. However, significant increases in resources are needed to enlarge forensic laboratory capacity and expand DNA databases. No other investment in our criminal justice system will do more to protect the innocent, convict the guilty and reduce human suffering.

In keeping with these beliefs, the National District Attorneys Association has supported funding for forensic laboratories to eliminate backlogs in the testing of biological samples from convicted offenders and crime scenes. Funding by the federal government is a critical component in realizing the full potential of DNA testing. Federal funding should not be contingent upon a state's adoption of any specific federally mandated and unfunded legislation such as post conviction relief standards.

We strongly supported the Paul Coverdell National Forensic Science Improvement Act in recognition that we needed to strengthen our ability to exploit DNA technology and we will continue to support legislative efforts to provide funding support for state forensic laboratories, an example of which is our association's support of Senator Biden's efforts to eliminate the unconscionable backlog of untested rape kits in police department evidence rooms across this country.

POST-CONVICTION RELIEF

The National District Attorneys Association has always supported the use of DNA testing where such testing will prove the **actual** innocence of a previously convicted individual and not serve as a diversionary attack on the conviction.

First, we need to clear up several popular misconceptions.

The vast majority of criminal cases do not involve DNA evidence. Just as fingerprint evidence, although available for decades, is seldom a conclusive factor in a prosecution, DNA evidence will likewise, even though it is increasingly available and more determinative, will not be a factor in a large majority of cases.

Secondly, the absence of a biological sample, in and of itself, is not necessarily dispositive of innocence. There can be many reasons why an identifiable biological sample was not available at a crime scene, yet an individual can still be guilty of the commission of a crime. In many cases DNA testing results that exclude an individual as the donor of biological evidence do not exonerate a suspect as innocent. In a sexual assault involving multiple perpetrators, for example, a defendant may have participated in the rape without depositing identified DNA evidence. In such cases, the absence of a sample or a comparative exclusion is not synonymous with exoneration. Moreover, as powerful as DNA evidence is, it tells us nothing about issues such as consent, self-defense or the criminal intent of the perpetrator.

Lastly, the issue of post-conviction DNA testing, such as contemplated by the Innocence Protection Act, involves only cases prosecuted before adequate DNA technology existed. In the future, the need for post-conviction DNA testing should cease because of the availability of pretrial testing with advanced technology. Thus, while the debate is important, we are examining a finite number of cases whose numbers are dwindling.

We believe that post-conviction DNA testing, in most cases, should be afforded only where such testing was not previously available to the defendant. Post-conviction testing should be employed

only in those cases where a result favorable to the defendant establishes proof of the defendant's actual innocence, exonerating the defendant as the perpetrator or accomplice to the crime.

In limited circumstances post-conviction DNA testing may be appropriate where testing previously has been performed. Although DNA testing in criminal cases became available in the mid-1980s, the forms of testing typically used today were not widely available until the mid-1990s. These present-day methodologies allow the testing of much smaller samples in a shorter time and are reliable on degraded samples.

Because of these considerations the National District Attorneys Association has consistently supported state legislation that removes barriers to post-conviction DNA testing in appropriate cases and with appropriate safeguards.

We recognize that in some states, legislative enactment of new legal remedies may be required to provide post-conviction DNA testing. Many states have enacted such legislation, and others are considering such measures. The NDAA supports enabling legislation that addresses concerns of prosecutors and victims, such as avoiding frivolous litigation and preserving necessary finality in the criminal justice system. These statutes should provide for the inclusion in the national CODIS database of DNA profiles obtained as a result of post-conviction DNA testing. This provision will help to solve crimes and deter abuses of the post-conviction relief mechanism.

Having said this, however, I need to emphasize that post-conviction testing should be employed only in those cases in which a result favorable to the defendant establishes proof of the defendant's actual innocence. Requiring only that the results of a DNA test produce material, non-cumulative evidence, and not specifically prove innocence, allows defendants to waste valuable resources, unnecessarily burden the courts and further frustrate victims. Decisions about such issues as the categories of convicted persons to be offered post-conviction relief and the standards to be employed are best made at the state or local level, where decisions can reflect the needs, resources and concerns of states and communities.

The resources for DNA testing are finite. Conducting frivolous or non-conclusive tests could mean that another test freeing an innocent person or apprehending a guilty person would not be done in a timely manner or at all.

The National District Attorneys Association believes that post-conviction relief remedies must protect against potential abuse and that such remedies must respect the importance of finality in the criminal justice system. Thus, such remedies should be subject to limits on the period in which relief may be sought.

Current prohibitions limiting post-conviction relief are grounded in legitimate policy, enhancing the search for the truth and minimizing potential abuse. The defense, for example, should be expected to exercise due diligence in developing and presenting all legally appropriate exonerating or mitigating evidence to the trial jury. Potentially exonerating evidence should be actively pursued. A trial jury's verdict should be accorded great weight and normally should be overturned only where harmful legal error has occurred or an innocent person convicted. The peace of mind of a crime victim or crime victim's family should not be frivolously disturbed by a lack of finality

arising from post-conviction relief remedies. For these reasons, any initiatives to identify and exonerate the innocent should also protect against abuses.

Time limits on the period in which post-conviction relief may be sought provide one of the most important means to ensure finality in the criminal justice system. Post-conviction relief remedies are needed only for a relatively small group of cases prosecuted before present-day DNA technology existed. Reasonable time limits on the consideration of these cases should not interfere with due process for convicted individuals who may seek relief.

Law enforcement should be permitted to destroy biological samples from closed cases, provided that convicted individuals are given adequate notice and opportunity to request testing. Otherwise, police agencies and the courts would be required to retain virtually all evidence for all time.

NDAA also support the decisions of individual prosecution offices to initiate post-conviction DNA testing programs. Such programs can serve to strengthen public confidence in the criminal justice system.

In summary, any post-conviction DNA testing program should focus only on those cases where identity is an issue and where testing would, assuming exculpatory results, establish the actual innocence of an individual. Such programs should recognize the need for finality in criminal justice proceedings by establishing a limited time period in which cases will be considered and then reviewing those cases in an expedited manner.

COMPETENCY OF COUNSEL

No one, especially prosecutors, wants incompetent defense lawyers on the other side of the counsel table, especially in a murder case. This issue is not only confined to the 38 states with capital punishment, but also concerns the 12 states and the District of Columbia that do not have the death penalty. Any prosecutor who has had to retry a case more than once, especially a capital case, is most supportive of good and competent counsel for the defense. It benefits no one, especially victims, to have to retry a major case. Having said that, we do not believe that federally- mandated or coerced competency standards for state court defense counsel are either workable or necessary.

Our system of criminal law is inherently a state system – some 95% of all criminal trials are at the local level of government. A single solution to issues of counsel competency fails to recognize the distinction between the various state systems and the authority of the judiciary in each. The judiciary is trusted with serving as the arbitrator for all facets of the court system and, in real world instances, serve as the final determinator of counsel competency every day.

We can only assume that the judiciary would find it most disturbing that anyone other than they would be tasked to determine the competency of any attorney appearing in a state courtroom. Moreover even if other means are pursued to determine competency the judiciary will still have the final word in the matter.

The president of NDAA, Kevin Meenan, recently directed that a survey be completed of state competency standards and the results are, I believe, significant in terms of the work before this committee.

Of the 38 states that allow a death sentence to be imposed as a criminal penalty, 22 states have either a statute or court rule that establishes standards for competency of counsel at the trial, appellate and/or post-conviction level.. Among these statutes and rules there are certain common elements; while the specifics may vary these include: minimum years of experience; minimum number of trials; minimum number of capital trials; whether the attorney has demonstrated necessary proficiency; the amount of training in capital defense required; whether the attorney is familiar with the practice and procedure of the state criminal court; and whether the attorney is familiar with the utilization of experts, including but not limited to psychiatric and forensic experts.

My point is that the states are fulfilling their obligations to their citizens. I recognize that not all states have adopted competency standards and believe that there are meaningful incentives that the Congress can provide to effectively enhance competency in all jurisdictions.

In many states the criminal justice system is strapped for operating funds and setting up or expanding effective public defender offices becomes an impossible proposition. "Seed" money to set up systems and purchase equipment; assistance in providing training for both prosecutors and defense counsel; and help in bringing the best lawyers to work in the criminal justice system will do more then federally imposed requirements.

The Bureau of Justice Statistics has just released a survey on local prosecutors ("Prosecutors in State Court, 2002, May 2002) that has some telling insights into counsel competency. While the report refers only to prosecutor offices I would suspect that it applies equally to those in public defender offices.

In portraying issues in regard to recruiting and retaining assistant prosecutors the report points out that in 2001 half the entering prosecutors in this country earned less than $35,000 a year, half of our experienced prosecutors earn less than $45,000, and most supervisory attorneys earn less than $60,000 per year.

The assistant state's attorneys in my office start at $38,000 I would note that administrative assistants and paralegals earn more here in Washington then do our young prosecutors and public defenders who provide essential legal representation on a daily basis in the state courts back home.

My point in relating this is that the provisions advanced by the Innocence Protection Act as to counsel competency miss the mark. If we can't recruit and retain the best our law schools and profession have to offer we can never hope to artificially mandate competency standards.

What we need to do, with your assistance, is to shore up the foundation of our criminal justice system to ensure that attorneys who participate in the system receive the training and compensation necessary to be able to stay in the system without compromising choices of getting married or starting a family.

The Federal Government cannot, and is not expected to, pay the salaries of local prosecutors and public defenders. But there is something you can do that would serve as a powerful incentive for many to stay in the state criminal justice system.

A study done of the student loan indebtedness of assistant district attorneys in New York (nine separate offices) found that 70% of them have over $50,000 of loan indebtedness while nearly 20% of them owe in excess of $100,000 on student loans.

The result of these dire financial forces is that, according to the BJS report, over 1/3 of prosecutor offices report difficulty with recruiting and retaining staff lawyers. Another report in the March 21, 2001 New York Law Journal states that in both Queens and Brooklyn, about 2/3 of the assistant district attorneys hired between 1992 and 1996 had already left the prosecutor's offices.

This should not be news to you. The Congress has considered the concept of student loan forgiveness in several forms in recent years.

- Federal agencies had been authorized to pay student loans for attorneys for several years but the programs are just now being funded because of problems retaining attorneys
- To retain military attorneys a "bonus" is being paid after about 10 years of service
- In a bill before you now, to reauthorize the federal court system, there is a provision for loan forgiveness for federal public defenders

Bottom line – we cannot compete with the private sector in recruiting and retaining attorneys. When we have continual turnover it impacts on our ability to serve justice. It adversely affects our entire system, from our most junior prosecutor, or public defender, to our supervisory attorneys and division chiefs.

I would urge that the Congress examine ways to provide student loan forgiveness as a means of allowing us to recruit and retain the "best and the brightest" in both prosecutor and public defender offices.

In addition to providing incentives to young public defenders and prosecutors to stick with their chosen careers, I would suggest that ensuring that adequate training is available will further enhance the "competency" of the system. Congress can best help by providing opportunities for training, including ethics training, at the state level and at national facilities such as the National Advocacy Center for state and federal prosecutors in Columbia, South Carolina.

If we want competent counsel for our system we need to make the effort to give them the opportunity to strive for excellence, not merely seek to get through the next case. With –holding funds from state criminal justice programs in order to enforce federally dictated counsel competency standards, only serves to set back efforts to strengthen our system.

On behalf of America's prosecutors I, and the National District Attorneys Association, urge you to do those things that we believe will truly advance our mutual goals of improving the criminal justice system. We look forward to continuing to work with you on maximizing our use of DNA technology, and ensuring that our criminal justice system is provided the highest degree of legal skills on both sides of counsel table, and in every courthouse in our nation..

NATIONAL DISTRICT ATTORNEYS ASSOCIATION
POLICY POSITION ON DNA TECHNOLOGY
AND
THE CRIMINAL JUSTICE SYSTEM

WHEREAS, the National District Attorneys Association, representing America's local prosecutors, believes in a truth-based justice system; and

WHEREAS, DNA testing is a powerful tool for determining the truth in criminal cases; and

WHEREAS, DNA technology is the most reliable forensic technique for identifying and prosecuting criminals when biological evidence of the crime is available; and

WHEREAS, local prosecutors strongly support DNA testing as a means of identifying and apprehending criminals and proving the guilt or innocence of suspects and defendants;

THEREFORE BE IT RESOLVED, that the National District Attorneys Association adopts the attached "POLICY POSITIONS ON DNA TECHNOLOGY."

Adopted by the Board of Directors, July 22, 2001 (Boston, MA)
2001.04SUM

NATIONAL DISTRICT ATTORNEYS ASSOCIATION

POLICY POSITIONS ON DNA TECHNOLOGY

Adopted: July 22, 2001

National District Attorneys Association, 99 Canal Center Plaza, Suite #510, Alexandria, Virginia; 22314, Telephone# (703) 549-9222, Facsimile #(703) 836-3195

National District Attorneys Association

POLICY POSITIONS ON DNA TECHNOLOGY

INTRODUCTION

The National District Attorneys Association, representing America's local district attorneys, promotes a truth-based justice system. The NDAA recognizes DNA testing as a powerful tool for determining the truth in criminal cases. This technology has emerged as the most reliable forensic technique for identifying criminals when biological evidence of the crime is available. The NDAA strongly supports DNA testing as a means of identifying and apprehending criminals and proving the guilt or innocence of suspects and defendants. The NDAA encourages public investment in this technology to ensure its full development as an instrument of justice.

The prosecutor is the only trial attorney in America whose primary ethical obligation is to seek justice. It is entirely consistent with this duty for the prosecutor to support the use of DNA technology in apprehending criminals, convicting the guilty and identifying the truly innocent.

America's prosecutors consistently have embraced DNA technology as a scientific breakthrough in the search for truth. Starting in the mid-1980s, with the introduction of DNA evidence in America's courtrooms, local prosecutors have fought for its admission in criminal trials. Prosecutors also have advocated vigorously for the expanded use of DNA technology as a highly effective method of solving crimes and identifying criminals before they can commit further offenses.

The accuracy of DNA technology is widely recognized by the scientific community. DNA technologies are used in virtually all areas of science involving molecular biology. DNA profiling has proven its scientific trustworthiness as a forensic tool for identifying the donor of biological evidence left at a crime scene – even years after the crime occurred. Furthermore, forensic DNA testing is no more invasive than fingerprinting, yet produces even more accurate results. These results produce identifying data that are relevant only for evidentiary purposes. The DNA loci used for law enforcement purposes do not code for diseases, birth defects or other private medical information.

Forensic DNA typing has had a broad, positive impact on the criminal justice system. In recent years, convictions have been obtained that previously would have been impossible. Countless suspects have been eliminated prior to the filing of charges. Old, unsolved criminal cases, as well as new cases, have been solved. Mistakenly accused defendants have been freed both before trial and after incarceration. And increasingly, the unidentified remains of crime victims are being identified.

In the years ahead, DNA technology holds enormous promise to enhance our quality of justice even more dramatically. Its potential, however, will not be fully realized unless public policy-makers act boldly in pursuit of this new technology. Significant increases in resources are needed to enlarge forensic laboratory capacity and expand DNA databases. No other investment in our criminal justice system will do more to protect the innocent, convict the guilty and reduce human suffering.

THE USE OF DNA IN CRIMINAL INVESTIGATIONS AND PROSECUTIONS

The National District Attorneys Association supports and endorses the use of DNA technology as a highly reliable tool for the identification and apprehension of criminals and the elimination of innocent suspects.

DNA profiling has proven its trustworthiness as a forensic tool for identifying the donor of biological evidence left at a crime scene. Its reliability for evidentiary purposes in criminal trials is likewise beyond question. The prestigious National Academy of Sciences' National Research Council has twice been called upon to judge the reliability of forensic DNA testing. On both occasions the National Research Council endorsed the use of DNA testing in criminal investigations and prosecutions. The National Research Council concluded that "[t]he technology for DNA profiling and the methods for estimating (population) frequencies and related statistics have progressed to the point where the reliability and validity of properly collected and analyzed DNA data should not be in doubt."

With the use of DNA evidence, prosecutors are often able to conclusively establish the guilt of a defendant in cases where the identity of the perpetrator is at issue. Prosecutors and law enforcement agencies also utilize DNA technologies to exonerate the innocent. It is our view that this powerful weapon against the criminal offender is best used when such resources are made fully available in the earliest stages of an investigation and before a conviction.

DATABASE ISSUES

The National District Attorneys Association supports the further development of a comprehensive, national databank of DNA profiles for criminal justice purposes. Such a databank offers an important investigative and public safety tool and should be fully funded.

In October 1998, the Combined DNA Index System (CODIS) went on line. CODIS is a series of local, state and federal databases which, when combined, creates a national databank of DNA profiles. This system enables state and local law enforcement crime laboratories to exchange and compare DNA information electronically. Through this process, law enforcement agencies have the ability to identify possible suspects when no prior suspect existed. CODIS represents a major advancement in law enforcement. It merits full funding and strong support by policy-makers at all levels.

The National District Attorneys Association supports the testing of all convicted felons for inclusion in the CODIS database.

Our current understanding of crime and criminology indicates that all convicted felons should be tested. Presently, all states permit genetic profiles of certain felony offenders to be entered into the database. States vary on which convicted offenders may be tested for inclusion in the database. Some states permit testing only of felons convicted of certain violent or sexual offenses. Other states allow all convicted felons to be tested.

It is generally recognized that criminal behavior tends to escalate in seriousness. An offender may begin his or her criminal career by committing certain minor or property crimes. As time goes by, that conduct may intensify to violent crimes against persons. Burglary, for example, frequently leads to acts of violence committed against individuals found inside a building or home. Thus, the DNA profile of a property offender may help to identify the perpetrator of a violent offense. For that reason, it is important that all convicted felons be tested and that their DNA profiles be included in the CODIS database.

Great Britain employs a national DNA database system that predates, by several years, the National DNA Index System (NDIS) in the United States. (NDIS is the final level of CODIS and serves as a repository for DNA profiles submitted by participating states.) Great Britain's experience supports the testing of all convicted felons. A significant number of the country's database "hits" have involved individuals entered into the system as a result of property crimes. Prior to the implementation of NDIS, a number of states in this country experienced the same success in their statewide databases.

Virginia's experience coincides with Great Britain's. Eight-five percent of the CODIS "hits" in that state would have gone undetected if property crime felons had not been included in the database. This experience from the oldest and one of the largest DNA

databases in the United States is instructive. It argues strongly for the testing of all convicted felons for inclusion in the CODIS database.

The National District Attorneys Association supports and encourages funding for forensic laboratories to eliminate backlogs in the testing of biological samples from convicted offenders and crime scenes.

The national DNA database system will not achieve maximum effectiveness until convicted offender samples are entered into the database in a timely fashion. Similarly, laboratories must have the testing capacity necessary to input and test samples obtained at crime scenes as early as possible in the course of investigations. Tests conducted during the investigative phase of a case can lead to the identification and arrest of a serial offender before he or she victimizes others in our communities. Insufficient laboratory resources and resulting backlogs hamper such testing. It is important, therefore, that laboratories be provided with necessary resources to eliminate backlogs and perform testing in a timely manner during the investigative phases of cases.

Presently, hundreds of thousands of DNA samples from convicted offenders remain untested. Similarly, testing of biological evidence from many thousands of sexual assaults has not been completed. For the CODIS system to reach its full potential, the backlog in testing of biological samples from convicted offenders and crime scenes must be eliminated. Prompt testing of samples and entry of DNA profiles into the database will enhance our ability to identify and apprehend perpetrators at the earliest possible stage in an investigation. This, in turn, will reduce the unnecessary suffering that otherwise may await potential victims. The prompt comparison of suspect samples and crime scene samples also affords the greatest and most timely opportunity to eliminate innocent suspects.

The National District Attorneys Association fully supports the FBI in its efforts to implement the missing persons database.

As a part of the CODIS system the FBI is implementing a national DNA database of missing persons. Over the years local law enforcement agencies have accumulated a large number of unidentified human remains. The missing persons database is designed to identify those remains.

This effort can bring peace of mind to the families of missing persons whose remains finally can be identified. An additional benefit is that investigations into the circumstances surrounding these unknown individuals' disappearances and deaths may be aided. Where foul play is suspected, these investigations may be energized by discovery of these critical investigative leads.

For this effort to be successful, family members of missing persons will be requested to provide biological samples voluntarily to aid in identification.

ARRESTEE DATA

The National District Attorneys Association supports the testing of all arrestees and inclusion of their samples in the DNA databank.

Due to its exquisite ability to identify individuals by the biological material they may leave at a crime scene, DNA is often analogized to fingerprints. It is standard police practice to collect the fingerprints of individuals arrested for certain offenses. DNA testing provides an unequivocal means of identifying an individual and should be utilized in the same manner that fingerprinting is.

Law enforcement should take full advantage of DNA as a powerful and reliable investigative tool. The results of such testing effectively serve to exclude innocent persons and identify individuals who are committing crimes. Taking DNA samples upon arrest serves the public interest and the cause of justice. It makes sense to keep this legitimately obtained information on file and use it to solve cases.

Fingerprint records already are included in a large database. The FBI has created an automated fingerprint identification system, AFIS; police now can record an electronic thumbprint and determine whether it matches one in the database. The results of DNA testing of arrestees for identification purposes can and should be used in the same manner. With advancements in technology, DNA samples can be obtained from arrestees with minimal invasiveness. Furthermore, the DNA loci used for law enforcement purposes yield purely identifying data. They do not code for cancer, genetic diseases, birth defects or other medical information that could be misused by the medical or insurance communities or serve to stigmatize an individual. Thus, privacy concerns are minimized.

The effective implementation of arrestee testing will require the development of new testing technologies. These technologies already are in development. A failure to develop more efficient technologies will result in increased testing backlogs and additional crime. Therefore, the NDAA supports the development of newer, less invasive

collection techniques, more efficient testing techniques and the allocation of resources necessary for their development and implementation.

Arrestee sampling will be of limited benefit unless forensic laboratories have the resources to analyze the samples. It is important, therefore, that government provide adequate financial support for the collection and testing of arrestee samples.

DISCOVERY AND PRE-TRIAL TESTING

The National District Attorneys Association supports the concept that testing of biological evidence should be conducted as part of the usual pre-trial discovery process. Investigative testing and any defense re-testing should be conducted by properly qualified laboratories.

DNA testing by qualified forensic laboratories produces highly reliable results. Therefore, the need to retest biological evidence during the pre-trial discovery process should be very limited. Such testing should be provided, however, where a defense request is timely and relevant and would provide material assistance to the defense.

Courts should require that the defense be held to the same high standards as the prosecution in the testing or re-testing of DNA evidence. Tests should be conducted by laboratories that meet standards of the DNA Advisory Board and the relevant guidelines of the Scientific Working Group on DNA Analysis Methods. Adherence to such standards by the prosecution and the defense ensures the accuracy and quality of testing results and enhances the truth-finding function.

The defense should be subject to the same discovery standards as the prosecution in providing access to the results of DNA testing or retesting and other related, relevant information.

POST-CONVICTION RELIEF

The National District Attorneys Association supports the use of DNA testing where such testing proves the actual innocence of a previously convicted individual.

In recent years DNA testing has helped to identify and exonerate individuals wrongly convicted of crimes. These exonerations have occurred as a result of law school "innocence projects" and individual defense attorneys, often with the involvement and cooperation of prosecutors. It is not surprising that prosecutors have played a pivotal role in these efforts. The primary ethical duty of a prosecutor is to seek justice. It is consistent with this duty for the prosecutor to support the use of DNA technology in identifying the truly innocent.

The issue of post-conviction DNA testing involves only cases prosecuted before adequate DNA technology existed. In the near future, the need for post-conviction DNA testing should cease because of the availability of pretrial testing with advanced technology.

Post-conviction DNA testing, in most cases, should be afforded only where such testing was not previously available to the defendant. Post-conviction DNA testing, however, may be appropriate in limited instances where testing previously has been performed. Although DNA testing in criminal cases became available in the mid-1980s, the forms of testing typically used today were not widely available until the mid-1990s. These present-day methodologies allow the testing of much smaller samples in a shorter time and are reliable on degraded samples.

As powerful as DNA evidence is, it tells us little if anything about issues such as consent, self-defense or the criminal intent of the perpetrator. In many cases DNA testing results that exclude an individual as the donor of biological evidence do not exonerate a suspect as innocent. In a sexual assault involving multiple perpetrators, for example, a defendant may have participated in the rape without depositing identified DNA evidence. In such a case, a comparative exclusion is not synonymous with an exoneration. Post-conviction testing should be employed only in those cases where a result favorable to the defendant establishes proof of the defendant's actual innocence, exonerating the defendant as the perpetrator or accomplice to the crime.

The National District Attorneys Association supports legislation that removes barriers to post-conviction DNA testing in appropriate cases and with appropriate safeguards.

In some states, legislative enactment of new legal remedies may be required to provide post-conviction DNA testing. Several states have enacted such legislation, and others are considering such measures. The NDAA supports enabling legislation that addresses prosecutors' concerns, such as avoiding frivolous litigation and preserving necessary finality in the criminal justice system. These statutes should provide for the inclusion in the CODIS database of DNA profiles obtained as a result of post-conviction DNA testing. This provision will help to solve crimes and deter abuses of the post-conviction relief mechanism.

As stated earlier, post-conviction testing should be employed only in those cases where a result favorable to the defendant establishes proof of the defendant's actual innocence. Decisions about such issues as the categories of convicted persons to be offered post-conviction relief and the standards to be employed are best made at the state or local level, where decisions can reflect the needs, resources and concerns of states and communities.

The National District Attorneys Association believes that post-conviction relief remedies should protect against potential abuse and that such remedies must respect the importance of finality in the criminal justice system. Thus, such remedies should be subject to limits on the period in which relief may be sought.

Current prohibitions limiting post-conviction relief are grounded in legitimate policy, enhancing the search for the truth and minimizing potential abuse. The defense, for example, should be expected to exercise due diligence in developing and presenting all legally appropriate exonerating or mitigating evidence to the trial jury. Potentially exonerating evidence should be actively pursued. A trial jury's verdict should be accorded great weight and normally should be overturned only where harmful legal error has occurred or an innocent person convicted. The peace of mind of a crime victim or crime victim's family should not be frivolously disturbed by a lack of finality arising from post-conviction relief remedies. For these reasons, any initiatives to identify and exonerate the innocent should also protect against abuses that necessitated recent post-conviction reforms.

Time limits on the period in which post-conviction relief may be sought provide one of the most important means to ensure finality in the criminal justice system. Post-conviction relief remedies are needed only for a relatively small group of cases prosecuted before present-day DNA technology existed. Thus, reasonable time limits on the consideration of these cases should not interfere with due process for convicted individuals who may seek relief.

Law enforcement should be permitted to destroy biological samples from closed cases, provided that convicted individuals are provided with adequate notice and opportunity to request testing.

Statutory provisions may permit testing requests at any time during the incarceration or probation of a convicted offender. Law enforcement, however, should be permitted to request an order from the trial judge to destroy samples upon providing the convicted individual with adequate notice and a reasonable opportunity to request that testing be performed. If a request for testing is made, no evidentiary samples in the case should be destroyed until the request for relief is resolved.

The National District Attorneys Association supports the decisions of individual prosecution offices to initiate post-conviction DNA testing programs.

America's prosecutors have employed DNA technology as a valuable tool in seeking the truth and ensuring that justice is done in every case. Prosecution offices around the country have been at the forefront in using this powerful new tool for justice. One approach by a number of prosecution offices has been to initiate reviews of past convictions to determine if DNA evidence sheds new light on these cases. Such programs can serve to strengthen public confidence in the criminal justice system.

Any post-conviction DNA testing program should focus only on those cases where identity is an issue and where testing would, assuming exculpatory results, establish the actual innocence of an individual. Such programs should recognize the need for finality in criminal justice proceedings by establishing a limited time period in which cases will be considered and reviewing those cases in an expedited manner.

Establishment of a post-conviction prosecution based DNA testing program is only one of the ways in which prosecutors may meet their ethical obligation to seek the truth. Such a program is not the best approach for all offices. The NDAA, however, supports the decisions of individual prosecution offices that determine such programs are needed and appropriate in their communities.

LEGISLATION

Statutes of Limitations

The National District Attorneys Association supports the creation of exceptions to criminal statutes of limitations and other measures to allow the prosecution of a perpetrator who is identified as a result of a DNA profile comparison using evidence collected from a crime scene.

Many states have statutes that limit the time within which a criminal charge may be filed. After the statutory period has run, the prosecution is forever barred from initiating a criminal case against the person responsible. In those states that have statutes of limitations for criminal offenses, an exception is made for the crime of murder. The rationale underlying statutes of limitations is that after the passage of time, the memories of witnesses become less reliable. With the advent of DNA technology, however, the identification of a perpetrator no longer depends entirely upon a witness' memory. Through DNA testing, a perpetrator can be identified many years after a crime was committed. Thus, it is important that statutes of limitations allow exceptions for the charging of perpetrators who are identified as a result of DNA technology. The same enduring nature of DNA evidence that underlies defense arguments for post-conviction relief argues just as persuasively for exceptions to statutes of limitation in cases involving DNA evidence.

The NDAA supports other legislative changes that permit the full development of DNA technology as a tool for justice, including legislation to allow or re-affirm the filing of "John Doe" DNA warrants in cases where a suspect may be identified only by his DNA profile. In such cases, law enforcement agencies know a suspect's DNA profile from biological evidence deposited at the crime scene, but do not know the suspect's name. By filing a criminal complaint against this "John Doe," identified solely by his DNA code, prosecutors prevent the statute of limitations from expiring while the search for the suspect continues.

Privacy Rights

The National District Attorneys Association supports legislation that prohibits the release or use of biological samples held by law enforcement agencies or testing laboratories to any agency, corporation, individual or organization except for legitimate law enforcement purposes.

Advancements in the science of DNA have created the potential for harmful intrusions into individual privacy. For this reason, access to samples in the custody of law enforcement agencies and laboratories by other than criminal justice parties should be strictly limited to avoid the potential for abuse.

FUNDING

The National District Attorneys Association supports full funding at the local, state and federal levels of government for the nation's forensic laboratories.

Few, if any, public investments will have a greater positive impact on public safety than funding of our forensic laboratories. It is imperative that the laboratory system be fully funded to meet the demands for DNA testing. The success of forensic DNA profiling has placed great demands upon testing laboratories. As a result of these varied demands, many forensic laboratories face significant backlogs in the analysis of biological samples. These backlogs threaten to become even larger as states expand the categories of offenders from whom DNA samples are collected. Few legislatures have provided additional funds to support mandated testing of convicted offenders. The laboratory system needs adequate resources to develop its capacity and maintain quality. Without a fully funded laboratory system, the development of a comprehensive, up-to-date national DNA database will be seriously hampered.

Funding by the federal government is a critical component in realizing the full potential of DNA testing. Federal funding should not be contingent upon a state's adoption of any specific federally developed legislation such as post conviction relief standards.

The National District Attorneys Association supports funding to ensure quality in the nation's forensic laboratories.

Besides keeping pace with the volume of cases, laboratories must maintain or improve their quality. An important aspect of the laboratories' ability to perform accurate, consistent analysis and then to have those analyses used and defended in court is the adherence to accepted procedures and guidelines. One indication that a lab successfully follows the forensic community standards is accreditation by a recognized forensic organization. Many publicly operated DNA crime laboratories still lack such accreditation. As the volume of cases increases, the importance of maintaining quality will become even more important. This is a critical component of the use of DNA evidence.

The National District Attorneys Association supports laboratory funding to ensure capacity for post-conviction DNA testing.

Federal, state and local policy-makers increasingly have recognized the importance of post-conviction testing for the criminal justice system. As prosecutors, we are committed to seeking the truth and ensuring that justice is done in every case. DNA technology provides us with a powerful tool for fulfilling that mission. The increasing frequency of post-conviction testing could create an additional capacity issue for the forensic laboratories. Such testing should not delay or reduce testing of current cases, unsolved or otherwise, but neither should it be neglected. There is a clear need to fund the laboratory system across the board so that all of these vital functions can be performed in a timely manner, simultaneously.

The National District Attorneys Association supports and encourages federal funding to establish a system of regional public laboratories to conduct forensic mitochondrial DNA testing.

Additional resources are needed to develop a less well known form of DNA testing that examines DNA found in the mitochondrion of a cell. The properties of mitochondrial DNA permit DNA testing of samples which, as a result of environmental insult or the nature of the biological evidence, might not otherwise be susceptible to the more common forms of DNA testing. Mitochondrial DNA testing is capable of producing reliable testing results in samples such as bones, teeth and hair. This testing is particularly useful in the examination of hairs that might be found at the scene of a crime. Mitochondrial DNA does not provide the same powers of discrimination between individuals that the more common form of nuclear DNA testing offers. It does, however, afford vastly greater levels of discrimination than traditional hair comparison analysis.

At present only a handful of forensic laboratories perform mitochondrial DNA testing in this country. Of that handful only one, the FBI laboratory, is a public laboratory available to state prosecutors. As a result, cases must wait many months before testing is done. Such a waiting period eliminates mitochondrial testing from consideration as an investigative or prosecutorial option.

The NDAA supports the concept of a federal grant program for local or state public laboratories to create mitochondrial DNA testing capabilities. Many state laboratories may not have sufficient caseloads to justify establishment of mitochondrial testing without federal assistance. For that reason the NDAA supports grant funding to create mitochondrial testing in public laboratories on a regional basis. A grant award would be conditioned upon the laboratory agreeing to accept mitochondrial cases from other public laboratories within its region at no charge. Creation of such regional testing sites represents an important final step in realizing the potential of DNA testing for discerning the truth and holding criminals accountable for their crimes.

The National District Attorneys Association supports funding for training in the appropriate use of DNA testing throughout the criminal justice system.

The NDAA also encourages funding from local, state, federal and private sources for the training of the judiciary, law enforcement, prosecutors and the defense bar in the appropriate use of DNA testing. Such training is critical because of the potential complexity and nuance inherent in forensic DNA profiling.

Death Penalty

York Sunday News - June 9, 2002, by Matthew T. Mangino, District Attorney of Lawrence County, Pennsylvania

DEATH PENALTY MORATORIUM

Frustrated by overwhelming and persistent public support for the death penalty, opponents of the death penalty are using a nationwide call for a moratorium as a strategy to stop executions. Capital punishment has inflamed supporters and opponents since the Supreme Court addressed the issue during the Nixon administration.

In 1972, the High Court in Furman vs. Georgia invalidated the death penalty, finding it discriminatory. In the years that followed, thirty-eight states and the federal government rewrote their respective sentencing statutes. The death penalty was not gone for long. Currently, more than three out of four states have the ability to execute convicted murders.

Thirty years after the Furman decision, the state of Illinois imposed a moratorium on the death penalty. Illinois has created the Ryan Commission on Capital Punishment. The committee's eighty-five suggested reforms have just become public. This month, Maryland joined Illinois in imposing a moratorium on the death penalty.

Death penalty opponents and moratorium supporters provide various reasons for promoting a temporary hiatus. They suggest race, cost, execution of innocents and the lack of a deterrent effect. These "concerns" are not founded in reality. A close review of their arguments is telling.

I. RACE

Death penalty opponents argue that 42% of death row inmates are black. Blacks make up 13% of the population. Therefore, they conclude the system is prejudiced.

However, this argument assumes that people are executed by some random selection process like a court jury pool. According to the latest Bureau of Justice statistics, blacks commit 51% of all murders in this country. According to undisputed statistics, white murderers are twice as likely to be executed in the United States, as are black murderers. In addition, white murderers are executed twelve months quicker, on average, than their black counterparts.

In the early 70s, the NAACP sponsored a study of the new death penalty statute in Georgia. The study was lead by Dr. David Baldus, an ardent death penalty opponent. Baldus looked hard for evidence that black killers are more likely to be executed than white killers. He concluded, "What is most striking about these results is the complete absence of any race-of-defendant effect."

II. COST

The savings, if any, that would result from fewer trials and appeals without the death penalty, will certainly be surpassed by the cost of life without parole. The cost of geriatric and medical care will easily surpass the cost we currently expend on the appeals of capital convictions.

The strategy of the anti-death penalty movement is apparent. First, run up the cost of capital

punishment by promoting costly never ending appeals. Then, after engaging in endless, delaying appeals, come back and argue that the whole process is too expensive.

The Ryan Commission has proposed additional training for judges in capital cases. Also, two trained, competent attorneys for each capital defendant and two equally competent prosecutors.

How much will that cost and who is going to bear the burden? Dual "competent" counsel will cost dramatically more. Should we also suppose that a defendant sentenced to life without the possibility of parole would not file endless appeals and requests for post conviction review?

III. DETERRENTS

The assertion that the death penalty doesn't deter killers flies in the face of everyday common sense. Significantly, not even the anti-death penalty studies have been able to say that no one is deterred by the death penalty.

Two independent studies released over the past two years have found to the contrary. The first study by economists at Emory University found that for each murderer executed there were eighteen less murders. The second, the Cloninger and Marchesini study at the University of Houston, concluded that the 1996 de facto moratorium on the death penalty in Texas resulted in 200 more homicides. Why is there no hue and cry for those two-hundred wholly innocent citizens who, unlike their killers, did not deserve to die?

IV. INNOCENTS EXECUTED

Death penalty opponents have argued that 101 innocent people have been released from death row since 1972. The most recent from Lawrence County, Pennsylvania.

A close review of those cases would provide only thirty factually innocent situations. That equates to less than one-half of one percent of the 7,000 defendants sentenced to death.

Barry Scheck, co-founder of the Innocence Project, stated that he had no proof of an innocent being executed in the United States since the Furman decision.

Some commentators have suggested that the death penalty phase of a trial should be tried to some unattainable standard or burden of proof like mathematical perfection. However, the United States Supreme Court has already stated that those subject to the death penalty in the United States receive Super Due Process. From 1973 to 2000, six- thousand nine-hundred and thirty (6,930) people were sent to death row. Two-thousand four-hundred and one (2,401) of those cases, or 35%, were overturned on appeal. Six-hundred eighty-three, or 9.4%, were executed after an average of ten years of review. The United States death penalty process is without doubt the most accurate criminal justice sanction in the world.

In Pennsylvania, since 1976 only three death row inmates were executed, all at their own request. Twelve have died of natural causes. By far the greatest threat today is not the death of an innocent on death row but the death of a true innocent as a result of a moratorium on the death penalty.

Recently, escaped murderers murdered at least three innocent people. That is three more than we

have proof of innocents executed since 1973. According to Capital Punishment 2000, at least 8% of those on death row had committed one or more murders prior to the murder, which put them on death row. This suggests that those sent to death row had murdered six-hundred additional innocent people after the system failed to properly restrain them following their previous murders.

With the Super Due Process afforded to defendants sentenced to death, death penalty defendants are the least likely to be wrongly executed. If we are to focus on the wrongly convicted, the more likely tragedy is that an innocent sentenced to life in prison will die in jail after spending his life behind bars.

A moratorium will do nothing more than put true innocent lives at risk. Will a temporary moratorium turn death penalty opponents into death penalty supporters? It is unlikely. Will a temporary moratorium save innocent lives on death row? There has yet to be an innocent executed since 1973. Will a moratorium cause truly innocent deaths? Yes, eighteen innocent citizens for every murderer not executed. Who will benefit most by a moratorium? The most cold-blooded murderers in America, rightly convicted and scheduled for execution.

The New York Times ON THE WEB

June 18, 2002

Death Penalty Reform in the Spotlight

Amid intensifying national concern about unfairness and errors in administration of the death penalty, momentum is building on Capitol Hill to reduce the risk of executing innocent people. Today both the House and Senate are to hold hearings on the bipartisan Innocence Protection Act, marking the beginning of a concerted drive by its sponsors to achieve concrete reform before the Congressional session ends.

First introduced two years ago, the proposed measure would ensure federal and state death row inmates access to DNA testing, and improve the quality of legal representation provided to indigent capital defendants — a response to atrocities like the "sleeping lawyer" case in Texas. The sponsors of the House version, Ray LaHood, a Republican, and Bill Delahunt, a Democrat, have 236 co-sponsors. That number, more than half the House, should make it tough for the Republican leadership to deny the chamber a chance to vote on the measure.

In the Senate, Arlen Specter, the Pennsylvania Republican, has introduced a separate reform bill opening the door for bipartisan action with Patrick Leahy, chairman of the Judiciary Committee and the main Senate sponsor of the Innocence Protection Act.

Passage of the act would not solve all the problems with the death penalty, or obviate the Supreme Court's duty to recognize the ultimate unconstitutionality of capital punishment. But as a step against unfairness, its passage deserves prompt approval.

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STATEMENT OF WILLIAM G. OTIS
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BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

CONCERNING "PROTECTING THE INNOCENT: PROPOSALS TO REFORM THE DEATH PENALTY"

JUNE 18, 2002

Mr. Chairman, Senator Hatch, and distinguished Members of the Committee, I am grateful for the invitation to speak with you about how we might do more to protect innocent people by making changes in the law of capital punishment. Innocent citizens are being killed because of deficiencies in our law — but not, I am afraid, deficiencies some of the proposals before you will correct. Instead, they risk compounding those deficiencies by creating unnecessary costs to carrying out the punishment our most brutal killers have earned.

No one doubts that every reasonable precaution should be taken to insure that only the guilty are executed. To the extent the movement for reform seeks to advance that goal, all will applaud its intent and welcome the debate it invites. But in its present form, I respectfully suggest that the movement is misdirected. It aims at the occasional problem while ignoring the epidemic danger to the innocent — namely, that thousands of them are murdered every year. The "innocents" who most deserve this Committee's attention are not convicts who want yet another means to string things out and game the system. The real "innocents" are ordinary citizens gunned down by unrepentant killers we should execute but, because of the multitude of hurdles **already** built into the system, so often don't.

Almost one in ten of the roughly 3700 inmates on death row has at least one prior murder conviction. This teaches a startling lesson: that, just in recent years, over 300 innocent people have been killed, not by legal error, **but by criminals we knew had done it before**. This emphatically does not mean that all those repeat killers should have been executed after their first murder. It does suggest, however, that, contrary to what we often hear today, the country is

hardly in a headlong rush to impose the death penalty. More broadly, it highlights that the most glaring deficiency in our system is neither excessive use of capital punishment, with only one execution for every 200 murders; nor insufficient review in death penalty cases, with post-conviction review already averaging more than ten years. It's that we don't carry out the death penalty with the assurance needed to fully realize two of its principal benefits: general deterrence and specific incapacitation of those, like Ted Bundy or John Wayne Gacy, who kill for amusement. As a result of our hesitation, the real "protection of innocence" our government owes its citizens has failed.

There is no excuse for this. What it suggests is scarcely that we are a country of barbarians, but that we must consider whether capital punishment is being underutilized. Although Professor Liebman's study purports to find an error rate of 68% in death penalty cases, that is a misleading number, sometimes used to imply that 68% of those sentenced to death were "exonerated." But nothing approaching that is true. By far the more telling statistic is that 93% of those who faced re-trial after appellate reversal were again convicted. And the **most** telling statistic of the Liebman study is this: zero. Zero is the number of factually innocent persons Professor Liebman, or any other serious scholar, has claimed to be able to demonstrate were executed in at least 40 years. See, James Q. Wilson, "What Death Penalty Errors?" New York Times, July 10, 2000.

Indeed, there are a number of difficulties with the Liebman study that have not received the attention they deserve. First among these is the pitfall of using **any** sort of statistical analysis to assess the accuracy or fairness of the death penalty. In this country, we intentionally avoid

"justice by the numbers." In this area as in others where capital punishment is being questioned — for example, in claims that it invidiously targets minorities — the attack proceeds from what amounts to a "satellite photo" of the system, even as it resolutely avoids getting on the ground and examining what actually happens in individual cases. This produces a picture that seems broad, but whose very breadth obscures the details that so often tell a different story.

The idea that statutory change in our criminal law should take root in a long-distance photo, or can be deduced from a pie-chart, is inconsistent with what is in my view the bedrock notion that each defendant should get his due **based on his own conduct and the inevitably unique circumstances of his own case**. What happened in yesterday's cases with yesterday's defendants, or last year's for that matter, and whether or not classified as "error" (in a classification argot that, as we shall see, may obscure more than it reveals), cannot tell us what **this** defendant has coming to him, whether that be a dismissal of the prosecution or a trip to death row. As the Supreme Court suggested in McCleskey v. Kemp, 481 U.S. 279 (1987), there are too many variables that prosecutors, judges and juries may properly consider in assessing moral culpability to think that we can capture them, or the supposed errors they generate, in a computer model.

Assuming arguendo the dubious proposition that we should substitute statistics for individual inquiry, the statistics in the Liebman study nonetheless seem open to question. One particulary troubling feature is that the study blurs guilt-phase errors with those that may arise at the punishment stage. Most people would agree that the execution of an innocent person is of far

greater concern than the execution of a properly convicted premeditated killer, even if arguably a sentence of life imprisonment would have been "fairer" in his case. But this distinction tends to become lost in the study, creating the false impression that many **verdicts** were infected with error when in fact they were not.

The problem goes further, however, because even where the error **is** in the guilt phase, that does not necessarily mean — indeed it hardly ever means — that the wrong person has been convicted. Let me illustrate with one case that may be known to the Committee, because it occurred in nearby Maryland.

Trevor Horn was born a quadriplegic, owning to negligence in the delivery room. He was given a million dollar settlement by the hospital, but the money could not restore his capacities. When Trevor was eight, his father evidently concluded that caring for him was more than he wanted to continue to do — either that, or that he could have a more leisurely life by pocketing Trevor's settlement funds.

The father decided to take care of this "problem" by hiring a hit man to murder his handicapped son. He spoke with the hit man, James Perry, over the telephone, in conversations that apparently were recorded on an answering machine tape the prosecution would later offer in evidence. Eventually, Mr. Horn and Perry negotiated a fee of $5000 to murder the boy. Perry was as good as his word. He went to the Horn house, where he suffocated Trevor by covering his breathing tube. Unfortunately, Trevor's mother and nurse were at home at the time. To deal with the

difficulties they posed as potential witnesses, he killed them as well — no extra charge. Since they were able-bodied adults, suffocation as the means of death would prove more problematic. So Perry shot both of them dead, through the eyes.

He was convicted and sentenced to death. On appeal, however, his conviction was set aside, because the telephone tape recording, though not challenged on grounds of authenticity or truthfulness, had not been done with the consent of both parties, as required by Maryland law.

At the re-trial, Perry was again convicted, but escaped the death sentence.

This is the type of case that would be counted in the Liebman statistics as a "serious error" resulting in reversal, a reversal that "saved an illegally convicted man from death row." And from satellite photo distance, that way of counting it would be correct. The problem, of course, is that viewing the case in that fashion is grossly misleading. In my view, most people would think that the real "error" in the case was that a technical violation of the state's wiretap statute led to nothing more than a prison term for a man who was guilty not only of multiple homicide, but the calculated, stone-cold, for-profit murder of a crippled child. The reversal in Perry's case turns out to show, in other words, that a finding of legal error, even at the guilt phase, does not equate to innocence. Indeed it shows almost the opposite — that, when examined "up close and personal" such an "error" can mean, not that the defendant was deprived of justice, but that the rest of us were.

Technical "errors" of this sort engorge death penalty critiques, but are only the beginning of the problem. In addition to the inevitable distortion of attempting to assess justice by statistics, there are at least two other problems with the Liebman study. First, it ignores erroneous reversals, i.e., cases in which one reviewing court found the conviction or sentence flawed, but whose reasoning was later rejected by a more authoritative court. Second, the study focuses on a period (from the mid-1970's until 1995) of great turbulence in the Supreme Court's rulings on capital punishment. This means that a number of practices of attorneys and courts, entirely legal and accepted at the time, were only subsequently overturned — but are nonetheless included without differentiation as "error." Not surprisingly, in the (relatively) stable period since 1995, a period not included in the study, the "error" rate has noticeably decreased. In a paper released on February 8, 2002, the Criminal Justice Legal Foundation describes these phenomena in telling detail (http://www.cjlf.org/releases/02-01.htm).

Finally as respects this point, a word should be said about the seven percent of cases in which a death-row inmate was found to have been victimized by error and was **not** convicted at a re-trial. This is often understood to mean that he was innocent, but that is incorrect. An acquittal is not a finding of innocence; it is a finding that the state has not proved every element of the offense beyond a reasonable doubt. Such a finding is **consistent** with innocence, to be sure, but it does not **establish** innocence — as many people thought the acquittal in the O. J. Simpson case illustrated. This phenomenon is all the more manifest in post-appeal re-trials, where the case can be six, eight or ten years old. Witness memories fade; evidence deteriorates. And on occasion, it has help deteriorating. As the Washington Post reported recently, some murder defendants go to

considerable lengths to eliminate evidence of their crimes. One gang in the District of Columbia, the K Street Crew, committed 17 murders over several years, and, when its members faced trial for them, went on to murder at least 7 government witnesses ("Brutal Gang's Demise Leaves Legacy of Fear," Neely Tucker, Washington Post, March 9, 2002, p. A-1) ("When [gang] members were arrested, the others would use defense investigators to get secret court information about witnesses against them, including car tags, phone numbers and addresses. They were so proficient that they once stalked a witness who had been relocated to [a Virginia town] by the FBI's top-secret witness protection program.").

In sum, even in the very small percentage of death penalty cases where there was an acquittal or dismissal of charges after an appellate reversal, that does not necessarily mean that the defendant didn't do it. It may mean, to the contrary, that he did do it but made the crime impossible to prove by doing it again, this time to the government's witnesses.

This is the background we face. The worthy goals of some of the proposals before you, including the Innocence Protection Act, should be viewed in the overall context they seek to address. The great majority of innocent people at risk because of deficiencies in our law are not convicted killers, but ordinary citizens upon whom — for greed or lust or just sheer enjoyment — these killers prey. It is thus no surprise that most of our citizens support capital punishment. It could scarcely be otherwise, what with the K Street Crews and James Perrys of this world, the memory of Timothy McVeigh still fresh, and Osama awaiting the only justice that fits him.

Still, there is a minority seeking to abolish the death penalty. They understand that a straightforward attack cannot work, so a more subtle strategy has been devised. That strategy is to achieve "stealth abolition" — abolition in which capital punishment technically remains on the books, but is never actually imposed, because the practical and procedural barriers to its imposition will be made prohibitive. Like any mechanism in the law, no matter how just or fitting, the death penalty can effectively be repealed simply by putting it in the concrete boots of excessive cost and endless delay. This sort of stealth abolition is the unstated agenda of some groups supporting the legislation before you. If they want outright abolition, let them say so directly and win their case with the public. Until they do, they should not be rewarded with a step towards **effective** abolition that, if called by its true name, the public does not want and would not support.

At the same time, obviously, no fair-minded person wants a judiciary where innocent people are being railroaded or just fumbled into the death chamber. That is the picture the stealth abolitionists paint: defense lawyers with the resources of a church mouse, the brains of a parakeet, and the energy of sloth; and a system in general with the overall reliability of an airline schedule. Having worked in the courts for almost a quarter century, however, I can tell you that it is nothing like that. The truth about defense attorneys, not merely including but especially much-maligned public defenders, is that they are enormously energetic, bright, learned in the law, and very determined. **Of course** it's possible to discover some poster-boy blunderer among the thousands of cases heard each year, but the "sleeping defense lawyer" is essentially an urban myth.

Defense lawyers aren't sleeping through murder trials and our country isn't either. The American people are not on a moral holiday at the expense of the innocent defendant. We have already established death penalty procedures more elaborate, painstaking and time-consuming than exist in society's decision to do anything remotely comparable, including even the decision to go to war. And we have succeeded: as noted, there is no consensus proof that we have executed an innocent person in decades.

This does not mean we can't improve. We can, and in my judgment, more targeted reforms would be welcome. Several come to mind.

First, post-trial DNA testing should be available, but only where the identity of the perpetrator is legitimately in issue. To allow such testing simply on demand would encourage gaming the system and would, moreover, dilute the resources available to defendants with arguably meritorious claims.

Second, post-trial DNA testing should be limited to those cases in which it would conclusively establish innocence. In the current enthusiasm about DNA, we sometimes forget that it is not the magic bullet for every murder case. There are some where testing would be pointless; others where it would produce an item of evidence to be considered along with the bulk of the proof, such as other physical evidence, fingerprints, security camera photographs, accomplice statements, and the like; and still others where it would be conclusive. A defendant **should** be able to show that we have the wrong man; he should not, however, be able to obtain seriatim re-

trials simply because new but inconclusive evidence shows up.

Third, we should encourage the states to develop high standards for counsel in capital cases, and even provide funding for them to do so. We should not, however, hand down yet more one-size-fits-all mandates from Washington, and penalize the states that do not follow, or do not follow quickly enough, the supposedly greater wisdom of the federal government.

Whatever reforms we undertake, we should take care not to become unwitting foot soldiers in the army of stealth abolition. In the most recent Gallup poll, 72% of our citizens supported capital punishment; 81% supported McVeigh's execution, including a majority of those who ordinarily oppose the death penalty. We live in a diverse, tolerant and forgiving country, and we are the better for it. But our citizens know there are some crimes so heartless, calculated and devoid of conscience that we have the right to say **no** and mean it.

Thus, in considering the legislation before you, the Committee should recall that we tried corralling the death penalty once before in this country, in the four-year period after Furman was decided. Because of Furman, a fellow named Kenneth McDuff, who had killed three teenagers for the fun of it, had his death sentence abrogated. Years later, after he would have been executed, he killed at least four more innocent people, including a pregnant mother shortly before Christmas. Too late for them, he was finally executed. Among his last words were, "Killing a woman is like killing a chicken. They both squawk."

The innocent people Kenneth McDuff killed, both in his first murder spree and his second, deserved our protection. They didn't get it, and this bill would have done nothing for them. We **should** legislate to protect the innocent; we just need to remember who they actually are.

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STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

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June 11, 2002

Senator Jeff Sessions
493 Russell Office Building
Washington, D.C. 20510
VIA FACSIMILE

Re: Alabama's DNA Testing Policy

Dear Senator Sessions:

This letter is in response to your recent inquiry about Alabama's policy on DNA testing for inmates convicted of capital murder and sentenced to death. This office will not oppose DNA testing in cases where such testing was not available at the time of the inmate's trial, so long as the testing will be probative and relevant in establishing the inmate's guilt or innocence. Furthermore, we require capital inmates to establish that the testing has been pursued in a timely fashion, using available venues during the appeals process, so that DNA testing is not used as a delay tactic to prevent the execution of sentence. This policy has been fashioned, in a significant manner, in response to our experiences in the case of Alabama death row inmate Danny Joe Bradley and the irresponsible handling of DNA testing in that case by the Innocence Project.

Danny Joe Bradley was convicted of the 1983 rape and murder of his twelve-year old stepdaughter and sentenced to death. Nuclear DNA testing was not available at the time of his conviction. For 15 years Bradley appealed his conviction and death sentence through various Alabama and federal courts. In 1995, while these appeals were still pending, the Innocence Project began writing letters inquiring as to the location of various items of evidence that had been collected during the investigation of the Bradley case. The Innocence Project was informed of the existence of certain evidence and the fact that other evidence, not admitted at Bradley's trial, could not be located. During the first four years of this inquiry, Bradley had a federal *habeas corpus* petition pending before the United States District Court for the Northern District of Alabama. Bradley never asked the federal court to order DNA testing in this case, nor did he pursue a claim of "actual innocence" before that Court. In fact, during his argument to the United States Court of Appeals for the Eleventh Circuit, Bradley's lawyer argued to that Court that the sexual contact between Bradley and the victim did not constitute "rape" as defined by the capital murder statute.

On November 14, 2000, after the *habeas* proceedings in the United States District Court were concluded, my office offered to conduct nuclear DNA testing on any of the available items in the Bradley case. Bradley waited until February 2001, when the State moved in the Alabama Supreme Court for an execution date, to respond to the State's letter. During this time, Bradley's

attorneys objected to the testing of the two items of evidence that were admitted against him at his trial. These bedding items stained with fecal matter and semen were from the bed where the State contended the victim was raped, sodomized, and strangled. Unlike the other items sought for testing by Bradley, these items were considered by the jury as physical evidence of his guilt.

Bradley's attorneys, working with the Innocence Project, waited until after the Alabama Supreme Court set an execution date to file a lawsuit in federal court. That lawsuit successfully sought to delay his execution so that DNA testing could be carried out. My office objected on the ground that Bradley was seeking this testing to delay his execution, as he had waited for six years to request the DNA testing. The Innocence Project, represented by Barry Scheck, became involved in the case and made several representations that delaying Bradley's execution was not the purpose of the request for DNA testing. Mr. Scheck further represented that this testing would be done in a diligent and timely fashion. Later events proved Mr. Scheck to have been less than candid in making these representations.

The State of Alabama obtained the bedding items containing the fecal-semen stains and had them tested within a week. Bradley's expert, on the other hand, took two months to conduct the very same testing. Furthermore, Bradley did not inform my office or the Alabama Supreme Court of his DNA testing results until our office discovered that the testing had been completed and forced the issue by filing a notice with the Alabama Supreme Court. Bradley's nuclear DNA testing established that the fecal stains on the bedding items were consistent with the victim's DNA. Furthermore, Bradley's expert determined that the semen found mixed in with the victim's fecal matter contained DNA with a genotype array consistent with Bradley's. The expert went on to note that "it is unlikely that more than one human being has ever possessed this particular genotype array."

Despite this report, Bradley continued to represent to state and federal courts the need to conduct the less useful and less discriminating mitochondrial DNA testing on other evidence. Despite Barry Scheck's representations that the Innocence Project was not seeking to delay Bradley's execution, Bradley's lawyers and the Innocence Project misled the Alabama Supreme Court for six months by representing to the Court that mitochondrial DNA testing was on-going, being conducted in a timely manner, and that the results were going to be forwarded to the Court as soon as they became available. On the contrary, in January of this year, my office discovered that this mitochondrial DNA testing had never been started. Bradley's response to the Alabama Supreme Court was that his counsel did not think this fact was important enough to warrant correction of the misleading statements and that notifying the Court of this delay was not his highest priority.

Finally, my office recently discovered that the mitochondrial DNA testing, which was finally conducted, was completed in late March. Since that time, neither the Innocence Project nor Bradley's attorneys have contacted this office or the Court to inform them of the results. The Innocence Project has failed to respond to numerous attempts by this office to contact someone about these results. Most recently, the Innocence Project has failed to respond to a letter from me seeking disclosure of the testing results.

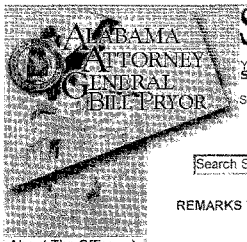
It is not surprising, then, that in dismissing his federal lawsuit, the magistrate judge wrote in response to Bradley's claim—that he could not pursue DNA in a timely fashion during the five years of his federal *habeas* proceedings—that such a contention was "at best misleading." The magistrate judge, too, was concerned about the fact that Bradley waited until less than thirty days before his execution date to file the lawsuit. The magistrate judge also noted that Bradley had *two* options for obtaining this testing before the Alabama Supreme Court set his execution date and he did neither. All of these findings demonstrate the federal court's concerns about Bradley's use of DNA testing as a delaying tactic.

Because of these events, Alabama's DNA policy is very restrictive and particular. We will never again allow an inmate to use this process to delay an execution. Bradley has delayed his execution for almost a year by arguing for DNA testing of the very same items he rejected prior to the setting of his execution date. In addition, my office will be very careful and leery when working with the Innocence Project in the future. Although the Innocence Project should be recognized for its work in freeing inmates whose innocence can be proven through DNA testing, Alabama has seen firsthand the Innocence Project suppress evidence of guilt. With the Innocence Project, DNA results that clear an inmate of a crime are cause for a press conference, while DNA results that clearly establish guilt seem to be cause for hiding test results, not responding to requests for information, and for foot-dragging.

I hope that this letter adequately responds to your inquiry. If I can be of any further assistance, please do not hesitate to call me.

Sincerely,

Bill Pryor



Speeches & Articles

REMARKS TO THE ALABAMA STATE BAR BOARD OF BAR COMMISSIONERS REGARDING THE MORATORIUM ISSUE

Address by Bill Pryor, Attorney General of Alabama
October 27, 2000
Alabama State Bar Board of Commissioners

President Rumore, members of the Executive Committee, and Commissioners, I appreciate this opportunity to speak to you today regarding a proposed death penalty moratorium in this State.

The death penalty has the support of a majority of Americans and a large majority of Alabamians. Depending on which poll you view, the death penalty in this State is supported by anywhere from 65 to 80% of our State's citizens.

The public support for the death penalty is for good reason. The statistics kept by the FBI show that there is a strong correlation between murder rates and capital punishment. When these statistics a graphed, a trend is reflected showing that when executions go up, murder rates go down and vice versa. A graph reflecting this trend is included in a handout my office has prepared for you, which w be available after my remarks. Even if you don't believe statistics, because-as the saying goes-figur lie and liars figure, it is still clear that the death penalty has overwhelming public support for good reason. As Professor McAdams of Marquette University put it:

> "If we execute murderers and there is in fact no deterrent effect, we have killed a bunch of murderers. If we fail to execute murderers, and doing so would, in fact, have deterred other murders, we have allowed the killing of a bunch of innocent victims. I would much rather risk the former. This, to me, is not a tough call."

The truth of this statement is irrefutable and opponents of the death penalty know it. That is why the attack on the death penalty no longer focuses on its deterrent effect, but instead focuses on the alleged risk that we will execute an innocent person or that we have executed an innocent person. Make no mistake about it, the death penalty moratorium movement is headed by an activist minority with little concern for what is really going on in our criminal justice system. You need look no further than the origin of this moratorium movement to see that. This movement started in the American Ba Association, from which I resigned eleven years ago. The moratorium issue was placed before the ABA's House of Delegates not by the Criminal Justice Section, but by the ABA's Section on Individu Rights and Responsibilities.

The Criminal Justice Section of the ABA is defense-oriented. A study on the ABA's Criminal Justice views, written by a board composed of former U.S. Attorney General Edwin Meese, former U.S. Attorney General Richard Thornburgh, and the Attorneys General of Idaho, California, and Colorado examined how defense-oriented the ABA's Criminal Justice Section is. They found that between 19 and 1996, 11 of the 15 positions taken before Congress through the CJS's lobbying were defense-oriented. The remaining 4 issues were neutral, such as gun control where prosecutors and defense attorneys can agree without regard to their positions in our legal system. The defense-oriented positions included favoring the de novo review of state court decisions in habeas corpus, and abolishing, through legislation, exceptions to the exclusionary rule established by U.S. Supreme Co precedent. The study also found that of 20 articles between the spring of 1995 and winter of 1997 in the CJS's publication, 11 articles took defense-oriented positions, 3 took a prosecutor's side, and th remaining articles were neutral. The various amicus curiae briefs filed by the CJS with the U.S. Supreme Court on the behalf of the ABA also establish the defense-oriented leanings of the Crimin Justice Section of the ABA.

The revealing factor, however, is that despite its defense-orientation, the Criminal Justice Section d not report the moratorium issue to the House of Delegates. Instead, the even more liberal Section o Individual Rights and Responsibilities did. One need only look at the ABA's proposal to see how

liberal its moratorium proposal is.

The proposal is to adopt a moratorium until certain standards can be imposed to ensure fairness in the system. Insuring fairness in the system would involve the following:

1. The ABA would not allow experienced capital appellate attorneys to represent capita defendants at trial, even as second chair. Attorneys experienced in trying capital cas at the federal habeas corpus level would also be excluded from representing defend in state trials, even as second chair.
2. Even more revealing is that, under the ABA's plan, former prosecutors who have trie capital cases for years would be barred from representing capital defendants in state trials, even as second chair, because they lack the necessary "defense" experience. Again, this is one of the many areas where the ABA is consistently anti-prosecution i views.
3. Under the ABA moratorium proposal, the procedural bars enacted by Congress and legislature would not be recognized in habeas proceedings. Never mind the will of th people as expressed through their elected representatives. The public supported the actions, such as the Anti-terrorism and Effective Death Penalty Act, which made fede habeas corpus proceedings more efficient and reflected the constitutional principles our State courts are able to address constitutional claims as well as, if not better than federal courts, something the Section on Individual Rights and Responsibilities deliberately ignores.
4. The ABA moratorium proposal rejects the presumption of correctness of state court findings of fact under the AEDPA.

Before I return to why the proposed moratorium is not needed in Alabama, allow me to offer you on lesson the ABA is learning the hard way. The ABA has always billed itself as THE representative of the nation's lawyers. In the past 20 years, however, the ABA has started taking more and more politicized views, and as I mentioned earlier, has started supporting more and more criminal defens oriented and liberal positions. Today, there are an estimated 900,000 to 1,000,000 lawyers in the United States. Of that number, the ABA says it represents approximately 400,000, or less than 50% Of that number, many are first-year lawyers taking advantage of the ABA's free year of membership

In 1991-1992 the ABA's retention rate was 92%. By 1995-1996, the retention rate had fallen to 83.9 The ABA's decision to take on political issues that have nothing to do with advancing the legal profession has resulted in its decline. This year, there are reports that the ABA lost money on its annual conference. The ABA is losing members because it is turning into a political action committe Although you might think to yourself that membership in this organization is mandatory, so the Alabama State Bar cannot suffer the same fate, that is not true. The decision that this body makes COULD deprive this organization of its status as an integrated bar, but I will explain that later.

Recently, a report from Columbia University written by a liberal professor named James Liebman ha been touted as proof that our system is broken and that we run the great risk of an innocent person being executed. Overlooking, for the moment, that the study's conclusion is a non sequitur, there ar several problems with this study. First, this study is skewed because it covers the time period in wh Beck v. Alabama was decided by the United States Supreme Court, resulting in 48 reversals in Alabama, without covering the past five, practically flawless, years. The Beck decision, for those of you unfamiliar with Alabama's capital system, invalidated Alabama's entire capital statute in 1980. The study covers the Beck period yet it stops in 1995, although Alabama's error rate in the past 5 years is less than 5%. These are concerns about the validity and motivation of the study, but they a not even the most glaring irregularities.

I am sure all of you are familiar with the United States Supreme Court's Daubert analysis, used for determining the admissibility of scientific evidence at a trial. One of the Daubert factors is whether t expert's methodology has been subjected to peer-review. If you apply that test to the Liebman study you will find that the study does not define "error rate." If you call Liebman, he cannot tell you what h used as the basis for qualifying something as "error." He cannot supply you with a list of the names all of the cases he considered. He cannot prove to you that he examined every case in Alabama where the death penalty was imposed. Liebman cannot give you a baseline of non-capital cases wi which to compare his error rate. Finally, Liebman cannot defend his conclusion that the high error ra he found-even if he could prove it was accurate-means that there is a risk of an innocent person be executed, as opposed to being evidence that the Alabama judiciary is doing a fine job of giving thes cases serious review.

The Liebman study is more evidence of the ideological nature of this issue. If there is a high error rate-presumably meaning a high number of reversals or other corrective actions by appellate courts the State and federal level-the anti-death penalty movement argues that there is a high level of risk that an innocent person will be executed. If there is a low error rate, the argument then becomes th the reviewing courts are simply "rubber stamping" these cases and they are not receiving meaningf review. You cannot have it both ways, however.

In the spirit of "put up or shut up," I am going to put up. I have brought with me today handouts for each of you. In these handouts you will find the procedural histories of the 281 cases in which the death penalty has been imposed since 1975. To the best of my office's knowledge, this represents of the cases. You can review these cases for yourself and decide if the 80% error rate cited by Liebman is illustrative of the fact that his study is propaganda or if you think he was right. In any cas the State of Alabama is doing what the author of this study cannot or will not do; we are giving you t information from which our opinion has been reached.

Our list reveals 281 individuals sentenced to death since 1975. Our first important statistic is that ou error rate, the number of innocent people executed by the State of Alabama is 0%. Because there a no cases of actual innocence, we must turn to the more practical outcome-based analysis. Of the 2 cases, 23 people have been executed. Another 180 of those cases represent active cases that my office is currently involved in. Because they are active, meaning still moving towards an execution date, it cannot be said that there is error in those cases. Of those 180 cases, we are awaiting execution dates from the Alabama Supreme Court on 2 of the cases. Another 10 individuals have died while on death row. One person's sentence was commuted by Governor Fob James. Four people settled their cases for sentences less than death.

Of all of these cases, no court found error resulting in the reversal of the conviction or sentence. Th there can be no legal error cited as to these cases. That leaves, of the original 281 cases, 63 cases Even if the remaining 63 cases were legally flawed, the resulting error rate would still only be 22.4%

But of the remaining 63 cases, we know that 47 of them received a sentence of less than death. Mo of these sentences were life without parole or life, or in the case of Dudley Wayne Kyzer, a 10,000-year sentence. Thus, the error was not with the guilt or innocence of the individual, but involved sentencing. Defining these cases as error would be understandable. The risk of executing an innoc person, however, is not increased by having a death sentence later decreased to 10,000 years, or l without parole, if the inmate is guilty. Thus, these cases should be subtracted from the remaining 63 cases to which I referred earlier. This leaves 16 cases. Our "error rate" when we are left with 16 problematic cases after we started with 281 cases is 6%, if you round the number up. Of those 16 cases, 8 are awaiting new trials. If any of these 8 cases are retried and a new death sentence is imposed, there is arguably no error. If history is any guide, and I will get to this in a moment, at leas of these cases will result in a new death sentence. Using history as a guide, at least 7 of these 8 cases will be retried and will result in death or life in prison without parole.

Thus, the number of cases where it can be said there is error can probably be decreased to about 1 of the original 281 cases. That results in an error rate of 4%, if you round the numbers up.

There are eight cases that are unaccounted for. We do not know what happened after they were reversed. Of these 8 cases, 5 were Beck reversals from the 1980-1981 time period, which is why th are difficult to track. Another case is twenty-one years old and involved a fatal variance between the indictment and the jury's verdict, which is why it was difficult to find any records documenting the ultimate disposition of this case.

Even if you do not look at individual cases and outcomes, and instead rely on reversals by higher courts, the Liebman study is inaccurate. First, it would not be wise to base a study on the number o times an appellate court reverses a particular defendant's case. There are several persons who hav been executed whose cases had been reversed and then were re-sentenced to death. The reversa had nothing to do with the person's guilt or innocence. The risk of executing an innocent person, if y recall, is the reason the Liebman study's error rate was considered so important. Phillip Wayne Tomlin, for example, has been tried and convicted of capital murder and sentenced to death 4 times The total number of reversals, then, is not persuasive evidence of a problem in our system. If we executed Phillip Wayne Tomlin tomorrow after 4 trials, four guilty verdicts, and four death sentences the risk of executing an innocent person would be minimal, though Liebman's study asks you to assume otherwise. To be fair, I will also discuss what my office has discovered in regard to the over number of reversals.

Our findings are that there have been 136 reversals of cases since 1975. Of that number, 24 of tho sentences were later reinstated by a higher appellate court, reducing the total number of actual reversals to 112. Of the 112 reversals, 46 of the cases were re-sentenced to death. Another 47 wer sentenced to a punishment less severe than death, ordinarily life without parole. Another 8 cases a awaiting new trials, so they cannot be included in determining the percentage of cases that are late re-sentenced to death or less than death. That leaves a total of 104 reversals. Of 104 reversals, 89 of the reversals later resulted in new death sentences or sentences of less than death.

Interestingly, of the 136 overall reversals, 48 were the result of the United States Supreme Court's Beck decision. That is 35.3%. That is why the starting date of 1975 and cut-off date of 1995 skewed Liebman's study and reflects the bias behind the study. Another 9 of those reversals were due to Batson violations, which have absolutely nothing to do with the defendant's guilt or innocence. An additional 36 reversals were as to the defendant's sentence only. Again, this shows that the reversa had nothing to do with the defendant's guilt or innocence. These 45 reversals make up 33% of the total number of reversals.

If anyone still believes that the overall number of reversals is relevant, then here is a final statistic to consider. Of the 281 cases mentioned, we have compiled records of 1145 instances of review by courts. This compilation does not include ordered remands where the court does not undertake a review of the case. This compilation also does not count the pending reviews in courts at both the federal and state levels. This compilation includes only reviews where the courts were presented wi an opportunity to reverse the sentence or conviction of an inmate. Finding error in 136 of these 114 reviews would mean our error rate is approximately 11.9%. If you discount the reversals that were later reversed by a higher court, using the 112 actual reversals, our error rate in those 1145 instanc of judicial review falls to 9.8%.

The bottom line is this: If you look at the persons who have been sentenced to death and what has happened in each of their cases, you will see that the system in Alabama is not flawed but is workin In fact, it is getting better.

1. Attorneys at the trial level are paid $60/hour in court and $40/hour out-of-court on these cases, p overhead. With overhead, the hourly rate easily exceeds $100 per hour. There is no cap on these fees.

2. The law in Alabama guarantees you an attorney with five years criminal trial experience if you are appointed an attorney.

3. Death row inmates are routinely represented in post-conviction proceedings by the top law firms the nation, including Wall Street law firms.

Jimmy Davis, for example, is represented by the law firm of Chadbourne and Parke, LLP. This is a firm with offices in New York, Los Angeles, Washington, D.C., Hong Kong, Moscow, and London. T law firm has over 200 attorneys. In addition to Chadbourne and Parke, Davis is also represented by Foley and Lardner, a law firm with offices in Brussels, Chicago, Los Angeles, Washington, D.C. San Francisco, San Diego, Sacramento, Tampa, and West Palm Beach. Foley and Lardner employs ov 750 attorneys. Another inmate, Joseph Hooks is represented by Palmer & Dodge. This law firm in Chicago employs more than 190 lawyers. Another inmate, Christopher Lee Price, is represented by Ropes & Gray. This law firm of over 325 attorneys has offices in Boston, Providence and Washingto D.C.

These are not isolated cases. Huge corporate, high-powered law firms get involved in a majority of these cases. You, the State Bar, review and retain the pro hac vice requests on these case. Look them up and see what is happening in these cases. You can easily see that these inmates are well represented at all levels of review. Most of us in this room could not afford to pay these firms to do work for us, yet our death row inmates get representation from them. The system is working.

4. One large, out-of-state law firm recently spent $100,000 solely to investigate an inmate's claims f a Rule 32 proceeding.

5. A majority of the death row inmates in Alabama are represented by Bryan Stevenson's organization, the Equal Justice Initiative. Stevenson was recently named one of the top 100 lawyers the Nation by the National Law Journal. Additionally, Stevenson has been named the Public Interes Lawyer of the Year, has been awarded the ABA Wisdom Award for Public Service, the Thurgood Marshall Medal of Justice, and the ACLU Medal of Liberty. Those who are not represented by Stevenson or his organization are represented by lawyers, found by Mr. Stevenson, who rely heavil on his expertise. I understand that you have heard already a presentation by Mr. Stevenson, who is an able and articulate supporter of abolishing capital punishment.

6. Many Alabama death row inmates are also represented, at some point, by Stephen Bright and hi organization, the Southern Center for Human Rights. In Williams v. Head, 185 F.3d 1223 (11th Cir. 1999), the Eleventh Circuit had this to say about Stephen Bright, singling him out in the opinion of th court:

> Mr. Bright is a nationally known expert who has been litigating against the death penalty for twenty years. He has taught on that and related subjects at Harvard, Yale, Georgetown, Emory and other universities. has written numerous law review articles on the subject, and has testified extensively about it before committees of Congress and many state legislatures. For his efforts and dedication, Mr. Bright was awarded the Roger Baldwin Medal of Liberty by the American Civil Liberties Union in 1991, the Kutak-Dodds Prize by the National Legal Aid & Defenders Association in 1992, and last year he received both the American Bar Association's Thurgood Marshall award and the Louis Brandeis Medal given by the Brandeis Scholars at Brandeis School of Law at the University of Louisville.

7. Death row inmates are given at least 10 opportunities to present their claims to Alabama and

federal courts after a death sentence is imposed.

8. Governor Siegelman has offered to grant DNA testing for any inmate for whom the test could be determinative of guilt or innocence. My office will not deny DNA testing to any inmate who presents valid claim of innocence, if they present the claim in a timely manner, not on the eve of execution.

9. In cases reviewed by the Alabama Court of Criminal Appeals and the Alabama Supreme Court, o argument is granted usually as a matter of right. I have an attorney in my division who has been in practice for 1 year who has argued in the Alabama Supreme Court 3 times and the Court of Crimina Appeals 11 times. How many of you know lawyers who have had oral arguments granted in non-capital cases that many times in their careers, let alone in one year of practice?

10. Although the trend in Alabama is for Rule 32 petitions in non-capital cases to be dismissed or denied without an evidentiary hearing, capital cases often involve evidentiary hearings that last from days up to a week in length. That is longer than many non-capital trials in this State.

11. Although non-capital cases are bound by the "contemporaneous objection" rule requiring lawye to preserve error for appellate review, in Alabama we allow courts to notice any plain error at any stage of the direct appeal proceedings. By law, we require the Court of Criminal Appeals to search record for error, even if the error was not preserved by the defendant.

12. Earlier this year, the Supreme Court of Alabama unanimously adopted a change in Rule 39 of th Rules of Appellate Procedure that I and Governor Siegelman proposed to streamline appeals of de sentences, which have received more scrutiny in Alabama than in any other state. The Supreme Court obviously believes the system is working.

There is no crisis or problem in our capital system. We do not need a moratorium to fix the system, because the system is not broken. This brings me to my final point.

Keeping in the tradition of saving the best for last, here is the best reason why you should not get involved with the moratorium issue: Keller v. State Bar of California, 496 U.S. 1 (1990).

Should you choose to move this organization away from its purpose of regulating the legal professio and into the realm of taking political and ideological positions on issues, you invite a legal challenge the status of our Alabama State Bar as an integrated bar. The decision to take an ideological positio will invite a federal lawsuit challenging the use of compelled dues to finance this organization, which would be departing from its purpose.

Even to invite an unsuccessful Keller challenge would cause hardship to this group. According to Keller, a challenge would require placing the challenging members' dues into an escrow account wh an accounting is given. If successful, the challenge would result in the loss of those dues.

Consider the question left unresolved by Keller: Can an integrated bar be totally disbanded based o freedom of association grounds? In my office there are 10 attorneys who prosecute the 180 cases currently moving towards execution of their sentences. In addition, there are dozens of district attorneys and their hundreds of assistants who regularly try these capital murder cases. If the Bar adopts the proposed resolution in favor of a moratorium, you will declare that you believe the system is flawed and that we run a grave risk of executing an innocent person. That declaration would impl that you believe that the district attorneys, their assistants, my assistant attorneys general and I wou violate our duty to see justice done if we sought or allowed an execution to proceed. You cannot expect the prosecutors of Alabama to be forced to join an organization that impugns our integrity. Y will invite a challenge by those who wish no longer to be forced to associate and contribute financia to a group that insults our professional work. Such a challenge might very well succeed.

For several reasons, this body should drop this moratorium proposal. First, this body cannot and should not go against the will of a majority of the citizens of this state on this political issue. I again mention public support for capital punishment for this reason: the public holds capital punishment in higher esteem than the members of our profession. I believe the low regard of the public for our profession is too often deserved. If you want death row inmates to obtain better representation, then encourage more members of the Bar to perform that public service. If you desire to enhance the image of our profession, then you should reject the proposed resolution before you.

Second, regardless of what ideologues say in their studies while hiding their underlying data, there no problem in Alabama's capital system as the handout my office has prepared evidences. Our defense attorneys are paid reasonable fees and two of the top lawyers in the nation are continuing represent these death row inmates, along with some of the top law firms in the United States. The appellate courts scrutinize these cases with a fine-toothed comb under the plain error standard. Finally, because we are an integrated bar, forced by law to join together for the regulation of the profession, the Alabama State Bar has absolutely no business taking a position on this political and ideological issue.

Thank you for your time.

RESPONSE OF THE OFFICE OF ATTORNEY GENERAL TO THE PROPOSED RESOLUTION OF THE ALABAMA STATE BAR IN SUPPORT OF A MORATORIUM ON THE DEATH PENALTY

Prepared for the Alabama Board of Bar Commissioners

Meeting of October 27, 2000

Prepared by:

BILL PRYOR
ATTORNEY GENERAL

CAPITAL LITIGATION DIVISION
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INTRODUCTION

The bulk of this handout consists of the procedural history of every case in which the death penalty has been imposed in Alabama.

With this report, the State of Alabama has done what the opponents of capital punishment and supporters of a moratorium have not done or will not do: Publish the underlying data on which we base our arguments.

The case citations are self-explanatory as to where the information was found. Other case history information came from prison records (where available), records from our office (where available), and in some cases the oral self-report from the attorneys who handled these cases. In any event, all of this information is capable of being verified by members of the Board of Bar Commissioners.

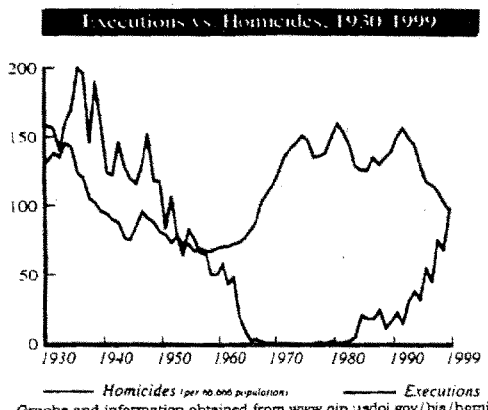
This information is being provided to refute the Columbia University study authored by Professor James Liebman. Whereas Liebman refuses to publish the data underlying his report, we offer this listing. Although we welcome a review of this data, two important considerations greatly outweigh both the Liebman report and the State of Alabama's response.

First, the public supports the death penalty. Even during the height of the media scrutiny surrounding the Texas execution of Gary Graham, polls showed support for the death penalty never fell below 66%. In Texas, most reported polls showed support for the death penalty in Texas between 70 and 80%. In Alabama, polls have showed the same level of support.

Support for the death penalty will probably increase now that several recent highly publicized cases of DNA testing proved that inmates who claimed they were innocent were guilty after all. Preliminary reports on the DNA testing in Georgia on the case of Wayne Felker, made public this week, suggest that DNA will not prove his innocence, either. The

myth that we will execute an innocent person in this system of multiple levels of in-depth review and heightened scrutiny will only continue to unravel.

The public support for the death penalty is for good reason. As the following graph illustrates, there is a strong correlation between execution rates and murder rates. As one goes up, the other goes down. The cause of our nation's murder rates is a complicated issue with many contributing social and economic factors, and we do not contend that the execution rate is the only factor that affects the murder rate. Even so, the correlation is quite striking.



Graphs and information obtained from www.ojp.usdoj.gov/bjs/homicide/homtrnd.htm and www.ojp.usdoj.gov/bjs/glance/exe.txt

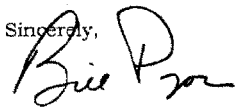
As this graphic illustrates, the murder rate jumped drastically during the period in which the United States Supreme Court struck down capital punishment laws. From 1990 until the present, as the number of executions increased, the murder rate decreased steadily. The assistant attorneys general in the capital litigation division of my office and I agree

that the death penalty, which is reserved for heinous crimes, saves lives.

The second consideration that outweighs both the Liebman study and the following list is that the Alabama State Bar is an integrated bar that should not become involved in issues that are ideological or political. Doing so will invite claims of violations of the first amendment as occurred in California in Keller v. State Bar of California, 496 U.S. 1 (1990).

For these reasons, I hope you use the following information to satisfy your desire to see that justice is being done, while recognizing the need to allow the legislative and judicial branches to review these cases without political or ideological interference from the bar.

Sincerely,



Bill Pryor
Attorney General

A SNAPSHOT OF OUR FINDINGS

Total Number Of Individuals Sentenced To Death In Ala.:	281
Total Number Of Individuals Ultimately Proved To Be Factually Innocent:	0
Total Number Of Executed Inmates Proved To Be Factually Innocent:	0
Total Number Of Individuals Executed:	23
Total Number Of Individuals Who Died On Death Row:	10
Total Number Of Individuals Who Received Commutations Of The Death Sentence:	1
Total Number Of Individuals Whose Cases Are Currently Active Before State And Federal Courts:	180
Total Number Of Individuals Who Are Awaiting New Trials Following Reversals:	8
Total Number Of Individuals Where No Information Could Be Located On The Ultimate Outcome Of Their Cases:	8
Total Number Of Individuals Whose Cases Or Death Sentences	

Were Reversed And Who Later Received Sentences Less Than Death:	47
Total Number Of Individuals Whose Cases Were Settled By Agreement To Forego Further Appeals:	4
Total Number Of Reversals In Alabama Capital Cases:	136
Number Of Reversals Later Reversed By A Superior Court:	24
Number Of Reversals In Which A Sentence Of Death Was Later Imposed:	46
Number Of Reversals In Which A Sentence Of Less Than Death Was Later Imposed:	47
Number Of Reversals Due To The Beck Decision:	48
Number Of Reversals Due To The Batson Decision[1]:	9
Number Of Reversals Restricted To The Death Sentence And Not Involving The Conviction[2]:	36

[1] A finding of a Batson violation is unrelated to the guilt or innocence of the defendant. Thus, a Batson reversal is not grounds for the faulty logic employed by Liebman that an innocent person was placed in harm's way.

WHO IS REPRESENTING ALABAMA'S DEATH ROW INMATES IN POST-CONVICTION PROCEEDINGS?

1. Chadbourne & Parke, LLP (Jimmy Davis, Jr.)
   Attorneys: 200+
   Offices: Washington, D.C.; Hong Kong, China; Moscow, Russian Federation; Los Angeles, CA; New York City, NY; and London, England.

2. Foley and Lardner (Jimmy Davis, Jr.)
   Attorneys: 750+
   Offices: Brussels, Belgium; Chicago, IL; Los Angeles, CA; Washington, D.C.; San Francisco, CA; San Diego, CA; Sacramento, CA; Tampa, FL; and West Palm Beach, FL

3. Palmer & Dodge (Joseph Hooks)
   Attorneys: 190+
   Offices: Chicago

4. Ropes & Gray (Christopher Lee Price)
   Attorneys: 325+
   Offices: Boston, MA; Providence, RI; and Washington, D.C.

5. Schiff, Hardin & Waite (Jason Oric Williams)
   Attorneys: 260+
   Offices: Chicago, IL; Washington, D.C.; New York City, NY; Merrillville, IN; and Dublin, Ireland

6. Windels, Marx, Lane & Mittendorf, LLP (Richard Eugene Gaddy)
   Attorneys: 72
   Offices: New York City, NY; New Brunswick, NJ; Bonita Springs, FL; and Stamford, CT

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[2] The faulty logic employed by Liebman will not allow consideration of these reversals, either. Where the conviction is left intact, the "error rate" cited by Liebman's study cannot involve the guilt or innocence of the condemned.

7. Paul, Weiss, Rifkind, Wharton & Garrison (James Edmund McWilliams)
Attorneys: 425
Offices: New York City, NY; Washington, D.C.; Paris, France; Tokyo, Japan; Hong Kong, China; and Beijing, China

8. Rosenman & Colin, LLP (Danny Joe Bradley)
FEDERAL LEVEL REVIEW
Attorneys: 275
Offices: New York City, NY; Washington, D.C.; Charlotte, N.C.; and Newark, NJ

9. Covington & Burling (Anthony Keith Johnson)
FEDERAL LEVEL REVIEW
Attorneys: 350+
Offices: New York City, NY; Washington, D.C.; San Francisco, CA; Brussels, Belgium; and London, England

10. Sherin and Lodgen, LLP (Anthony Boyd)
Attorneys: 40+
Offices: Boston, MA; and Los Angeles, CA

11. Dewey Ballantine, LLP (Aaron Lee Jones)
Attorneys: 450+
Offices: New York City, NY; Washington, D.C.; Los Angeles, CA; Menlo Park, CA; Budapest, Hungary; Warsaw, Poland; Prague, Czech Republic; and Hong Kong, China

12. Plunkett & Cooney, PC (Christopher Eugene Brooks)
Attorneys: 150+
Offices: Detroit, MI; Kalamazoo, MI; Marquette, MI; Bloomfield Hills, MI; Grand Rapids, MI; Ann Arbor, MI; Flint, MI; Gaylord, MI; Lansing, MI; Petoskey, MI; Mt. Clemens, MI; and Pittsburgh, PA

13. Shearman & Sterling (William Thomas Knotts)
Attorneys: 850+

Offices: New York City, NY; Menlo Park, CA, San Francisco, CA; Toronto, Canada; Washington, D.C.; London, England; Paris, France; Frankfurt, Germany; Dusseldorf, Germany; Beijing, China; Hong Kong, China; Singapore; Abu Dhabi, United Arab Emirates; and Tokyo, Japan

14. Windels, Marx, Lane & Mittendorf, LLP (John W. Peoples)
FEDERAL LEVEL REVIEW
See # 6, above

15. Burr & Forman, LLP (Harry Nicks)
Attorneys: 125+
Offices: Birmingham, AL; and Atlanta, GA

16. Ropes & Gray (Harry Nicks)
See # 4, above

17. Sommers, Scwartz, Silver & Schwartz, PC
Attorneys: 75+
Offices: Southfield, MI

18. Bradley Arant Rose & White LLP (Jimmy Davis, Jr.)
Attorneys: 160+
Offices: Birmingham, AL; Huntsville, AL; and Washington, D.C.

19. Equal Justice Initiative, Bryan Stevenson, Director
This organization, located in Montgomery, AL, currently represents (or has represented) a majority of Alabama's death row inmates. Since graduating from Harvard Law School, Stevenson has been named one of the top 100 lawyers in America by the National Law Journal, the Public Interest Lawyer of the Year, he has been awarded the ABA Wisdom Award for Public Service, the Thurgood Marshall Medal of Justice, and the ACLU Medal of Liberty. The three senior attorneys at EJI graduated from Harvard, Yale, and Georgetown, respectively.

20. The Southern Center for Human Rights, Stephen Bright, Director
This organization, located in Atlanta, GA, currently represents many of Alabama's death row inmates in post-conviction proceedings, second only to the Equal Justice Initiative. According to its website, Bright lectures (or has taught) at Harvard Law School, Yale Law School, Emory Law School, Georgetown Law Center, Northeastern School of Law, and Florida State University College of Law. Bright has argued many cases before the United States Supreme Court. Bright has testified before the United States Senate, the House of Representatives, the Botswana Supreme Court, and the legislatures of Connecticut, Texas, and Georgia. The Eleventh Circuit has also singled Bright out for a glowing footnote in Williams v. Head, 185 F.3d 1223 (11th Cir. 1999). Bright has been awarded the Roger Baldwin Medal of Liberty by the American Civil Liberties Union in 1991, the Kutak-Dodds Prize by the National Legal Aid & Defenders Association in 1992, and in 1998 he received both the American Bar Association's Thurgood Marshall award and the Louis Brandeis Medal given by the Brandeis Scholars at Brandeis School of Law at the University of Louisville.

21. The Southern Poverty Law Center, Joe Levin, Jr., President and Chief Executive Officer; Morris Dees, Chief Trial Counsel (Thomas Warren Whisenhant; Wayne Eugene Ritter; John Louis Evans III)
The Southern Poverty Law Center represents a few inmates on Alabama's death row.

22. Professor Bernard Harcourt, University of Arizona School of Law
Professor Harcourt represents several current Alabama death row inmates and has represented many Alabama death row inmates in the past. Harcourt is a Harvard educated lawyer who worked for the Equal Justice Initiative for five years before becoming an Associate Professor at Arizona. In addition to his Harvard law degree, Harcourt holds a Ph.D and a M.A. from Harvard.

The Atlanta Journal-Constitution: 3/13/02
http://www.accessatlanta.com/ajc/opinion/0302/0314death.html

Study: Death penalty deters scores of killings

By PAUL H. RUBIN

Executions are always controversial, and there are always debates about whether states should use the death penalty. But this debate cannot proceed rationally unless we fully understand the advantages and disadvantages of execution.

The conventional wisdom among criminologists had been that executions do not provide any deterrence. This was challenged by the economist Isaac Ehrlich in two papers in the 1970s. These studies have themselves subsequently been challenged.

Two colleagues and I have recently re-examined this issue. We used statistical techniques and data that were unavailable when Ehrlich and his critics performed their analyses. In particular, we used "panel data" techniques, a form of statistical regression analysis that is more powerful than others. We have also used much more comprehensive and complete data. We have used data on all 3,054 counties in the United States for the 1977-96 period. Others had used state data or national data, but such data is more subject to error.

Use of this data enables us to statistically "control" for the effects of most factors that influence homicide rates. That is, we adjust for the effects of age, race and other demographic characteristics of the population, unemployment, population density, other crime rates, general sentencing "toughness," NRA membership, and police- and prison-related variables. The use of panel techniques also enables us to adjust for factors idiosyncratic to each county and for any national time trends in homicide rates.

We essentially predict for each county for each year the number of homicides, and show the effect of executions on the actual number. Our analysis is thus the most comprehensive in the literature and addresses virtually all of the criticisms aimed at Ehrlich's work.

One important factor in measuring the deterrent effect is the perception by the criminal of the probability of execution. Because there are ambiguities in measuring this variable, and because there are remaining statistical questions, we examine 48 separate variants of our general hypothesis. In 45 of these, we find a statistically significant and important deterrent effect.

One conservative version of our model finds that each execution deters an average of 18 homicides, with a range of between 8 and 28 murders deterred by each execution. Other variants find even larger numbers of prevented murders.

One criticism of capital punishment is that it is applied in a racially biased manner. We do not examine this issue. But it is important to note that, while African-Americans are disproportionately involved in homicides as perpetrators, they are also disproportionately involved as victims. Department of Justice figures show that African-Americans are victims in about one-half of the murders, and in 1999, for example, homicide victimization rates per 100,000 persons were 3.5 for whites and 20.6 for blacks.

Thus, any deterrent effect of capital punishment is likely to provide substantial benefits to members of the African-American community.

We as a society might decide that we want to eliminate capital punishment. But this should be an informed decision, and should consider both the costs and benefits of executions. Our evidence is that there are substantial benefits from executions and, thus, substantial costs of changing this policy.

Paul H. Rubin is professor of economics and law at Emory University. Hashem Dezhbakhsh and Joanna Mehlhop Shepherd were co-authors of the research on which this is based.

SENATE JUDICIARY COMMITTEE

PROTECTING THE INNOCENT: PROPOSALS TO REFORM THE DEATH PENALTY

TESTIMONY OF PROF. BARRY SCHECK, CO-DIRECTOR OF THE INNOCENCE PROJECT, AND MEMBER OF N.Y. STATE'S FORENSIC SCIENCE REVIEW BOARD

Our procedure has always been haunted by the ghost of the innocent man of the innocent man convicted. It is an unreal dream.

Judge Learned Hand, 1923.

Today those ghosts walk the land.

There are now 108 Americans who have been exonerated by post-conviction DNA testing. Thirteen of the exonerated had at one time been sentenced to death. Thirty-two of the exonerated were convicted of murder, and many of them would have almost certainly faced execution if the death penalty had been available in the jurisdictions where they were tried.

The pace of post-conviction DNA exonerations has accelerated because states have begun to pass statutes that permit those claiming innocence a chance to gain their freedom and thirty-five law schools have started a network "innocence projects" on shoe string budgets to prevent, as best they can, these DNA statutes from becoming unfunded, unrealized mandates. There can be no doubt the number of wrongly convicted freed by DNA testing would dramatically increase if the post-conviction DNA legislation were passed by this Congress — the number of

exonerations would at least double within five years — just as apprehension of the real perpetrators of these crimes through DNA databank "hits" would impressively proliferate. This is a "win-win" proposition for law enforcement, innocents who rot in America's prisons and death rows, crime victims, families of all involved, and anyone who loves justice.

Accordingly, we who toil in the trenches trying to harness the enormous power of this technology for the public good are grateful to Senators Specter, Feingold, and Feinstein for convening these hearings and recognizing critical importance of moving this legislation now, just as we owe an enormous debt to Chairman Leahy, Senator Gordon Smith, and all the co-sponsors of the Innocence Protection Act (IPA).

DNA testing is not a panacea for what ails the administration of the death penalty in America or the rest of the criminal justice system. The vast majority (probably 80%) of felony cases do not involve biological evidence that can be subjected to DNA testing. DNA technology is no substitute for competent counsel, and nothing guarantees the conviction of the innocent more than incompetent, ill-trained, or ineffective defense counsel. That is why the counsel provisions of the legislation before you is so critical.

But it would be a terrible mistake to overlook the unique importance of these post-conviction DNA exoneration cases. They have created a great "learning moment" in the history of our criminal justice system and surely constitute the most remarkable and instructive data set criminal justice researchers have ever possessed. It permits us to identify as never before the causes of wrongful convictions and their remedies for the good of the entire system. In our book, *Actual Innocence: When Justice Goes Wrong and How to Make it Right*, by Scheck, Neufeld, and Dwyer (Penguin 2001), we took a first step in this direction, but the 85 recommendations

recently outlined by Governor Ryan's Commission on Capital Punishment, based on a study of wrongful capital convictions in Illinois, take the agenda of "innocence reforms" much further, and help create a blue print for a new kind of civil rights movement in the criminal justice system that benefits both the accused and victims. Every time an innocent person is arrested, convicted, or sent to death row, the real offender is at large, free to commit more crimes.

There is no better illustration of how the legislation you are considering today will produce these benefits than the case of Ray Krone, who is here with us today. Mr. Krone was convicted of murder and sentenced to death in Arizona principally on the basis of bite-mark analysis, one of many longstanding forensic assays that DNA testing is helping reveal to be junk science. Using the new Arizona post-conviction DNA statute, legislation that tracked verbatim the model bill produced by the Commission on the Future of DNA Evidence of the National Institute of Justice (the same model followed by the Innocence Protection Act), Ray Krone was able to get testing of blood and saliva stains, originally thought to have been left by the murderer, that were found on the pant leg and tank top of the victim. An STR (Short Tandem Repeat) DNA test performed on the stains showed Krone was not the source, yet that new evidence alone might not have been enough to vacate his conviction. The stains, it could be argued, might not have come from the murderer after all; unlike semen in a sexual assault (the evidence invariably involved in the first 74 DNA exonerations), where samples can be taken from any possible prior consensual partners, getting "elimination samples" for small blood and saliva stains could prove more difficult. Luckily, however, the STR profile from the stains could be run through the national DNA databank (STR technology is the technique used in forensic DNA databanks throughout the world), and it generated a "hit," a sex offender who had committed similar crimes

(he bit his rape victims) in the Phoenix area.

But we are in a race against time and every day counts. In 75% of the cases where the Innocence Project has determined that a DNA test on some piece of biological evidence would be determinative of guilt of innocence, the evidence is reported either lost or destroyed, and without laws specifically to prevent it, precious DNA evidence is surely being thrown away, wittingly or unwittingly, every day. As these post-conviction cases get older, even when the evidence is found, the likelihood grows that bacterial degradation could make successful testing impossible. On the other hand, reporter Laurie Cohen of the Wall Street Journal has documented that at least 40% of the post-conviction DNA tests performed by private and public laboratories generate evidence favorable to the inmate claiming innocence and demanding the test.

SPECIFIC COMMENTS ON PROPOSED LEGISLATION

A. Making Access to DNA Testing To Prove Actual Innocence Inmates A Constitutional Right For All Inmates Under Section 5 of the Fourteenth Amendment.

Senator Specter's bill represents the best approach to this issue which has extremely significant short and long term implications. Although in Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed. 2d 203 (1993), there undoubtably were six United States Supreme Court Justices who believed that it would violate due process and the Eighth Amendment's prohibition against cruel and unusual punishment to execute or imprison an inmate who could prove that he or she was actually innocent, and there are almost certainly at least six votes on today's Supreme Court for the same proposition, there are still some federal and state courts who resist the proposition that even irrefutable post-conviction proof of actual innocence based on DNA

evidence, standing alone, would raise a federal constitutional claim. Some even believe only inmates on death row are entitled to such relief, not those who are serving life sentences or substantial prison terms. Such reasoning does not make common or constitutional sense and has led to some bizarre and outrageous situations.

For example, this month a law student from the Kentucky Innocence Project located evidence from a blood stain near a broken window that investigators believed came from the assailant in an old murder case. The bloodstain has never been tested and the inmate, Michael Elliott, who is serving a life sentence, claims it will prove him innocent and identify the real offender. Instead of consenting to tests, the local prosecutor moved in the trial court to destroy the evidence — and the motion was granted! An appeal to a Kentucky Court of Appeals was successful in preventing the destruction order from issuing, Michael Elliot v. Hon. Lewis B. Hopper Laurel County Circuit Court, No. 2002-A-OO818-0A (Ky. Ct. App. June 4, 2002), but, due in part to the fact that Kentucky's post-conviction DNA statute only covers inmates on death row, not inmates serving life terms, Michael Elliott has not been able to obtain Kentucky courts an order mandating that the evidence be preserved and a DNA test conducted.

Instead, we have had to file a Section 1983 civil rights law suit in federal court seeking access to the evidence for purposes of post-conviction DNA testing, based on the constitutional theories embodied in Senator Specter's bill, including the argument that Kentucky's statutory scheme violates the Equal Protection Clause by authorizing post-convicting DNA testing that could prove innocence only for death row inmates, not men serving life sentences like Michael Elliott.

In those states which have not passed post-conviction DNA statutes, or in states, like

Kentucky, where statutes do not adequately protect a right of access to prove innocence, the Innocence Project has filed Section 1983 actions with great success -- eventually getting the inmate the requested testing, even if the federal court did not ultimately reach the constitutional issue. See Godschalk v. Montgomery County District Attorney's Office, 177 F. Supp. 2d 366 (E.D. Pa. 2001) (recognizing a due process right to access to evidence for post-conviction DNA testing, which was subsequently tested exonerating Godschalk of two rapes to which he had falsely confessed); Harvey v. Horan, 285 F. 3d 298 (4th Cir. March 28, 2002) (a Fourth Circuit panel reversed the district court's ruling Harvey had a due process right to conduct post-conviction DNA testing, but Judge Luttig rejected the panel's decision in an opinion arising out of a rehearing en banc that became moot when testing was obtained pursuant to Virginia's newly enacted DNA statute and Harvey's guilt was confirmed.); and Charles v. Greenberg, 2000 WL 1838713 (E.D. La. 2000) (after district court denied summary judgment, a settlement resulted in DNA testing which Charles had unsuccessfully sought for nine years in state court; he was exonerated after serving 19 years of a life sentence).

The extraordinarily comprehensive opinion in the Harvey case of Judge Luttig, a well known conservative jurist, is certainly the most forceful judicial analysis addressing the constitutional right of access to DNA testing for all state inmates. It is an excellent indicator that the constitutional view reflected in Senator Specter's bill will be adopted by the Supreme Court, or certainly accepted as a proper remedy to expand civil rights that is not in conflict with prior decisions of the Court.

B. Time Limits

One of the strongest arguments supporting statutes of limitations for post-conviction

motions claiming newly discovered evidence of innocence is skepticism that a re-trial many years after the crime was committed, even with new evidence of innocence, would be a more reliable fact-finding than the original proceeding, given the fading of memories and disappearance of witnesses. Post-conviction DNA testing provides a unique rebuttal to this concern because it invariably results in a more accurate and reliable fact-finding with respect to crucial items of biological evidence. Consequently, the principal "finality" concern behind time limits for new evidence of innocence motions has much less force when it comes to post-conviction DNA testing and is substantially outweighed not just by considerations of justice for the wrongly convicted but also the additional unique capacity of DNA testing to identify the real offender through databank "hits."

But there are even more significant practical problems that make time limits a profoundly bad idea. Based on close to ten years of experience assessing and litigating more post-conviction DNA applications than any other office in the country, the Innocence Project has found that it takes an average of between three to five years to evaluate and perfect a post-conviction application from the time an inmate's letter arrives in our office until the time an adequately documented motion can be filed. The difficulties are legion: The inmates are indigent. They have no lawyers and their lawyers from trial or appeal have often been disbarred, died, or disappeared. They do not have complete copies of their transcripts and neither does anyone else. Important police and laboratory reports relating to key items of biological evidence cannot be found. And most importantly, no one can find the evidence. It might be in the court house as an exhibit, at the crime laboratory, in the prosecutor's safe, with the court reporter, at a hospital or medical examiner's office, or different items could be at a variety of these locations. Since the cases are

very old, inventory records are lost, and long-term storage facilities for each institution change.

The search for these records and the evidence, which are indispensable to non-frivolous post-conviction DNA claims, are painstaking and time consuming. It requires an extremely dedicated and patient group of law students, investigators, support staff and attorneys to do it right, and astonishing staying power from the wrongly convicted, their families, and their friends.

Take the case of Marvin Anderson who is here with us today. A model high school student in Hanover, Virginia and volunteer fireman, he was convicted of a robbery, rape, kidnaping he didn't commit in 1983. He spent extra time in prison because he proclaimed his innocence to the parole board, thereby not showing the "remorse" necessary for early release. Even after being paroled Marvin and his amazing family kept pressing for DNA testing. Just before the Innocence Projects in New York and the Capital Region were about to close his case, the vaginal swabs were accidentally discovered by the Virginia Crime Laboratory when checking lab reports – the analyst had bizarrely stapled the swabs to his written notes! DNA testing has not only proven Marvin innocent, but identified the real assailant.

And what about the inmates who suffer from mental retardation or other disabilities? Jerry Frank Townsend is a mentally retarded man in Florida who pled guilty to eight murders to avoid execution. He was innocent of all these murders. They were committed by Eddie Lee Mosely, a serial offender who is believed to have committed as many as sixty-two rapes and murders in the Broward Country/ Fort Lauderdale, Florida area. Mr. Townsend's innocence only came to light because of some heroic efforts by Fort Lauderdale detectives John Curcio and Doug Evans (they were fought by Broward County detectives) and DNA testing of samples in the Frank Lee Smith case, an inmate who died of cancer on Florida's death row after being denied,

by a two year statute of limitations, post-conviction DNA tests that would exonerate him posthumously.

The decision not to include time limits in the Leahy-Smith bill was the right one. At the Innocence Project, we regard the issue of time limits as the most critical difference between the bills. Out of the twenty-five states that have passed post-conviction DNA statutes, a number have imposed time limits that we *know* will deny testing to inmates claiming innocence who cannot possibly make the deadlines. These include: Idaho (July 1, 2002 deadline); New Mexico (July 1, 2002 deadline); Delaware (September 1, 2002 for all cases where conviction was final prior to 9/1/00; 3 years from date of final conviction for all other cases); Florida (October 1, 2003, or two years from date of final conviction, whichever is later); Louisiana (August 31, 2005, and after that date within two years of conviction, except in death penalty cases where there is no limit); Michigan (January 1, 2006, and only those convicted on or before 1/1/01 can get post-conviction testing); and Washington (December 31, 2004).

C. Procedural Default Problems

In various ways, S. 800 incorporates the concept of procedural default, under which a defendant whose lawyer did not make the right decisions at trial may not obtain DNA testing later. First, the bill requires the inmate to show that DNA testing did not occur earlier "through no fault of the convicted person." Second, the inmate's claim of innocence must be "not inconsistent with previously asserted theories." Third, the identity of the perpetrator must have been "at issue in the trial."

The analytical problem with these obstacles is that they could be construed to deny DNA testing to an innocent mentally retarded inmate, like Jerry Frank Townsend, who had pleaded guilty. The logic of "procedural default" – that a defendant must make a claim at the right time or forever lose the right to make it – simply breaks down when it results in the execution or continued incarceration of an innocent man who failed to obtain DNA testing earlier for *any* reason.

But, again, the practical problems weigh heavily in favor of avoiding procedural default litigation. The cost, time, and energy needed to litigate these issues in the post-conviction DNA testing context is simply not worth it. It costs so much less to simply do the test when it can be shown that the results will result in material, non-cumulative evidence of innocence than to litigate these procedural issues. The provision of the Leahy-Smith bill that requires a showing that the request for post-conviction testing is not being done for purposes of delay provides a remedy for ferreting out those who will inevitably abuse process.

D. A Cost Efficient Model for Evaluating Post-Conviction DNA Claims - Fund Innocence Projects.

The Leahy-Smith bill provides funding for prosecutors to conduct post-conviction DNA testing reviews and nothing for law school innocence projects or innocence projects run by public defender offices. This is a serious error.

Law school innocence projects are a cost-effective way to evaluate these claims and eliminate frivolous requests. Law students work cheap (for credits) and benefit enormously from a well supervised program that requires them to read records from beginning to end, understand theories of prosecution and defense, master the basics of conventional serology and DNA testing, and write

substantial motions for relief. They must get to know their clients and their families. They experience the ultimate professional experience – exoneration of the innocent – as well as the most difficult, dealing with a client who was not truthful. It is a great experience for those who want to prosecute, defend, or practice law in any area.

On the other hand, innocence reviews by prosecutors have some obvious, built in conflict of interest problems if it turns out an inmate was wrongly convicted and police or prosecutorial misconduct led to the conviction. These are, admittedly, not necessarily insuperable conflicts.

The big problem, one cited by a number of prosecutors, such as Norman Gahn of Wisconsin, who has worked hard with us to win the right to post-conviction DNA testing, is that prosecutors should be focusing on old "cold" cases that can now be solved through DNA testing. As a commissioner on New York State's Forensic Science Review Board I have spent a great deal of time training and urging law enforcement to pursue these cases which raise the same challenging investigative issues as post-conviction DNA matters. In New York City alone, we have been able to start a program where more than 16,000 old rape kits will be subjected to DNA typing instead of being thrown away. Through the "Debbie Smith Act," and other legislation being proposed in both the House and Senate, I am sure this problem will be addressed and prosecutors will receive substantial funding, as they should, to re-evaluate cold cases.

In the post-conviction area, law school innocence projects and public defender offices represent the best and most cost-effective way to make post-conviction DNA testing legislation something other than an unfunded mandate. Indeed, California pioneered this approach. When post-conviction DNA legislation was passed two years ago, the state legislature authorized $650,000 to be spread among law schools, public defenders, and prosecutors to evaluate the cases. It has worked well. I strongly urge this Committee to provide for such funding.

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CHIEF DEPUTY ATTORNEY GENERAL

June 25, 2002

Senator Jeff Sessions
Russell Office Bldg. 493
Washington, D.C.

Dear Senator Sessions,

After Columbia University released the "Liebman Study" of death penalty cases from 1973-1995 reportedly showing that Nevada has a 68 percent "overall error rate" in death penalty cases and has the largest death row in America as a percentage of population, the Nevada Attorney General's Office examined the Liebman study and did independent research relative to death penalty cases. Our examination shows that the Liebman study was flat wrong about Nevada, leading us to question his research methodology and the assumptions on which his study was premised.

First, death penalty records are maintained by the Nevada Supreme Court, the Office of the Attorney General, the Department of Corrections, seventeen different district attorneys, and seventeen district court clerks, yet the Liebman researchers got their information from criminal defense attorneys, who apparently reported their wins, but not their losses, and the N.A.A.C.P. Capital Punishment Project, an organization which actively maintains an anti-capital punishment agenda. Secondly, it appears that the Liebman Study picked and chose their cases as a convenience, tailoring the study to get certain results. The researchers took cases from the period 1973-1995 for some results, while it took data from the period 1993-1995 for other results, and data from 1973-2000 for others. He used only published opinions for some results, but used unpublished opinions for others. He used only Nevada Supreme Court or federal appellate decisions to determine some of the study's results, but added lower state court cases at times to increase his claimed reversal rate. The Study failed to include all Nevada cases. He excluded convicted killers who discontinued their appeals, presuming without supporting evidence that they did so due to frustration with the criminal justice system, as opposed to recognizing that killers sometimes accept their own guilt. Incredibly, the Study did not count the eight men executed in Nevada since 1977.

The Study concluded that Nevada seeks capital treatment too often, and asserted that the state has 28.23 death sentences per every 1000 inmates. Such an analysis would equal a death row population of 268 capital inmates, while the State had, as of September, 2000, only 88 inmates on death row, out of 992 convicted murderers and over 9500 inmates in the custody of the Nevada Department of Corrections. Historically, Nevada juries have tended to sentence approximately 9% of convicted murder defendants to death. According to the F.B.I.'s Uniform Crime Reports for the past ten years, Nevada has experienced a higher than average murder rate compared to the national average; we have experienced an average of approximately 135 murders per year over the course of the past ten years, and yet our death sentenced inmates total just 88. Reducing the impact of that number even further is the fact that some of our capital inmates have been on death row for more than twenty years. Our capital numbers are hardly extreme as was claimed in the Study.

The Liebman Study ignored the unique growth that Nevada has experienced over the past twenty years, and the effect that growth has on crime rates, including that of murder. Nevada's population grew by 50.6 percent between 1990 and 1998, more than any other state. The simple 23 year population averaging device does not reflect the realities of our growth, either in population or in crime. Moreover, we stand alone in the impact that tourism and visitors have on the social fabric of a small but growing state. Last year we had 1.85 million inhabitants, and over 40 million visitors. "Per-resident" statistics grossly mischaracterize, and naively so, the reality of crime in Nevada, because of exploding tourist traffic results in greatly increased rate of crime—much, if not most, of the crime perpetrated in the State of Nevada is committed by transients and visitors from outside our borders. The recent killing of Sherrice Iverson in a casino in Stateline by Jeremy Strohmeyer, a murder defendant from Long Beach, California, is a poignant example. Strohmeyer had been in the State of Nevada for less than two hours when he sexually assaulted and killed the child.

The faulty assumptions and definitional errors inherent in the Liebman study give me cause to doubt the validity of the study's results. As you know, even studies that claim to be based on simple demographics still rely on great amounts of interpretive subjectivity, as was demonstrated with the Liebman Study. In many ways, the Study does not reflect

the reality of capital punishment in the State of Nevada. The questionable validity of the Study's conclusions is of concern to those of us here in the Office of the Attorney General.

Cordially,

Frankie Sue Del Papa
Attorney General

By: _____
Victor –Hugo Schulze, II
Deputy Attorney General
Capital Case Coordinator
Victim Advocacy

ADDITIONAL STATEMENT
OF
SENATOR JEFF SESSIONS

At the June 18, 2002, Judiciary Committee hearing entitled, "Protecting the Innocent: Proposals to Reform the Death Penalty," much was said about the alleged 68% error rate in capital cases from 1973 to 1995 asserted by Professor James Liebman's death penalty study, "A Broken System: Error Rates in Capital Cases, 1973-1995." I mentioned that during the period 1973 to 1995 covered by the Liebman study, the Supreme Court announced several new rules of criminal procedure. These new rules applied retroactively and thus caused the reversal of hundreds of capital and other criminal verdicts. I mentioned for example that Batson v. Kentucky, 476 U.S. 79 (1986), which dealt with jury selection procedure and was announced in 1986, was applied retroactively to cases still on appeal and caused the reversal of hundreds of cases. Thus, I concluded that after 1995, when the Supreme Court's issuance of new retroactive rules of criminal procedure slowed, the reversal rates in capital cases should decline as courts and attorneys were on notice of and learned the rules applicable to capital trials.

Subsequently, at the hearing, Professor James Liebman replied that his study excluded reversals of death penalty trials that resulted from the retroactive striking down of death penalty statutes. After all, a fair study would not attribute error to a trial court for not complying with a procedural rule that was not announced until after the conclusion of a trial. Consequently, some may have concluded that the 68% error rate asserted by the Liebman study dealt with serious errors committed at trial, not the retroactive application of new procedural rules.

A review of an admittedly incomplete list of Alabama capital cases featured in Professor Liebman's study reveals, however, that his study failed to exclude all reversals caused by the Supreme Court's announcement of new retroactive procedural rules. For example, Professor Liebman's study counted Ex parte Floyd, 571 So. 2d 1234 (Ala. 1990), as a reversal of a death sentence due to a serious error at trial. See A Broken System: Error Rates in Capital Cases, 1973-1995Appendix C: Incomplete List of Capital Judgments

Reversed on State Post-Conviction and Related Types of Review (visited on June 25, 2002) <htp://www.justice.policy.net/jpreport/liebapp5.pdf pp. C-5 to -6>. A review of the underlying case, however, reveals that the 1983 conviction was indeed overturned due to the retroactive application of Batson v. Kentucky, which was decided three years after the conviction and retroactively applied new jury selection rules to all criminal trials still pending on appeal. While Batson did not strike down a death penalty statute per se, it did result in the retroactive overturning of Floyd's conviction for capital murder and should have been excluded from the study, but was not. Thus, the impression that the Liebman study counted only reversals caused by serious trial error and not reversals caused by the retroactive application of new procedural rules announced by the Supreme Court is false.

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Tuesday, February 6, 2001

Columbia U.: COLUMN: Statistics fail activists

By Jaime Sneider, Columbia Daily Spectator (Columbia U.)

NEW YORK -- In pursuing their ideology at the expense of honest reporting, many journalists and political activists have perpetuated a number of myths about the death penalty, riddling the debate with shoddy statistics.

The most recent perversion came from Columbia University, which published a study titled "A Broken System: Error Rates in Capital Cases, 1973-1995," claiming that there was a 68 percent "error rate" in capital punishment cases. The study concluded that capital punishment is "collapsing under the weight of its own mistakes."

But the media failed to mention that what Columbia Law Professor James Liebman meant by "error rate" was not that 68 percent of people on death row were found to be innocent. On the contrary, Liebman and his co-authors were unable to find a single case in the 23 years they reviewed in which an innocent person had been executed.

Writing in the Wall Street Journal, professor of law Paul G. Cassell revealed that the 68 percent figure "turns out to include any reversal of a capital sentence at any stage by appellate courts -- even if those courts ultimately uphold the capital sentence."

Cassell goes on to explain that if on appeal, an appellate court simply requested additional findings from the trial court, the Columbia study marked an error.

Likewise, the one-in-seven ratio, commonly purported to expose the egregious level of errors made in death penalty cases, is misleading. Disseminators of the statistic say that for every seven people executed, one has his sentence overturned. MIT professor of management science, Arnold Barnett, called the ratio "meaningless" because it does not constitute an error rate as many people had ignorantly assumed.

An error rate is computed by dividing the number of innocent persons executed by the total number executed. Reporting how many people were

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not executed "yields no insight," according to Barnett, simply because it does not necessarily represent a flaw in the system. It instead shows that the system corrected itself, not that any execution was or has been incorrectly performed.

Another common misconception is that the murderers and rapists sitting on death row are in actuality the victims of racism. Unfortunately for anti-death penalty activists, the Bureau of Justice Statistics shows that convicted white murderers are more likely to be sentenced to death than their black counterparts.

Looking for another means of pushing their agenda, capital punishment opponents have argued that black murderers with white victims are more likely to get the death penalty than white murderers with black victims. The numbers are easily distorted because 80 percent of the United States population is white and only 13 percent is black.

As a result, if murderers selected their victims at random, for every 10 murders committed by white people, only one victim would be black, whereas for every 10 murders committed by black people, eight victims would be white.

Rather than confront the ethical questions of retributive justice, many activists instead argue that the death penalty is just too expensive, saying that it costs more than simply giving convicts life sentences. Currently, however, the added expense of executing people is not the result of added due process, but of unnecessary delays in federal courts. Writing in the National Review, former Arizona Assistant Attorney General Andrew Thomas observes, "Between 1977 and 1996, the average time that a condemned prisoner sat on death row almost tripled, from just over four years to over 11 years."

Also, the positive consequences that the death penalty has in reducing crime should not be forgotten. During the last 10 years, as the number of executions has increased, the number of murders has simultaneously dropped. Political Commentator William Tucker, in the National Review Online, remarks that even more interesting is the fact that "the most dramatic decline in murders over the last decade has been precisely in those regions that have had the most executions .... Since 1990, (Texas, Oklahoma, Louisiana and Arkansas) have performed half the nation's executions ... (and) murder rates in these four states have fallen faster than anywhere else in the country."

Obviously reasonable people may disagree as to what burden of proof ought to be required for criminal conviction and what measures, such as DNA testing, may be enlisted, to assess guilt. The ethical debate over whether capital punishment should exist is entirely different and should not be confused so easily with its practical implementation, as all

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criminal cases face such questions. The death penalty is not any different in this respect, except in that once it is carried out, it cannot be reversed.

This does not, however, undermine its legitimacy because in erecting a criminal justice system, one must concede some level of imperfection, as the courts, just like human beings, are fallible. Rather than have an innocent person go to jail, society must be willing to tolerate a certain multiple number of guilty persons escaping punishment. But instead of freeing guilty men in excess of this multiple, society has assessed that the harm to it is less than allowing that multiple to go without punishment, because the victims of these men were innocent too.

---- INDEX REFERENCES ----

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REPORTER

STATEMENT BY SENATOR STROM THURMOND (R-SC) BEFORE THE SENATE JUDICIARY COMMITTEE, REGARDING CAPITAL PUNISHMENT, TUESDAY, JUNE 18, 2002, SD-226, 10:00 AM.

Mr. Chairman:

Thank you for holding this important hearing regarding the use of capital punishment in the United States. During the last few months, public debate on the death penalty has intensified. In April, the Illinois Governor's Commission on Capital Punishment issued a series of recommendations on the administration of the death penalty. Governor George Ryan formed the Commission, after placing a moratorium on all executions, to study the death penalty in Illinois after it was revealed that twelve people sentenced to death had been exonerated. In May, Maryland Governor Parris Glendening also imposed a moratorium on executions in that state until a study on the death penalty is completed.

Critics of the death penalty have pointed to these developments to make the case that innocent people are at risk of execution. This is simply not true. In both state and Federal cases, executions do not occur until several levels of review have taken place. In fact, every death sentence imposed in this country receives heavy and detailed scrutiny. Since the Supreme Court's decision in Furman v.

Georgia, 408 U.S. 238 (1972), resulted in the reform of death penalty statutes, there is not one documented case of the execution of an innocent person.

Last week, the Constitution Subcommittee held a similar hearing, and it is clear that those who would abolish the death penalty have stopped trying to change public opinion regarding the appropriateness of capital punishment. Public support for capital punishment remains strong. Rather, death penalty opponents are attempting to create the impression that a few isolated incidents are indicative of a justice system gone bad. I strongly disagree with those who would say that our system of justice cannot be trusted.

Nevertheless, I agree that the prospect of the execution of an innocent person is unacceptable, and I am committed to preventing it. I want to assure my colleagues that I support due process and fundamental fairness for those facing capital charges. The finality of the death sentence requires extraordinary diligence, so that mistakes do not occur.

However, the fact remains that the administration of the death penalty at both the Federal and state levels is more accurate than ever. Furman and later Supreme Court

decisions have established stable rules that govern death penalty trials. In addition, DNA testing is now widely available to ensure the highest degree of accuracy. Furthermore, funding for appointed defense counsel has increased in recent years, and reports by both Attorneys General Reno and Ashcroft found that there is no racial bias in Federal death penalty cases.

A Columbia University report known as the Leibman study is often cited as proof that capital punishment in this country is deeply flawed. This study, published in 2000, alleged that from 1973 to 1995, 70% of death penalty convictions were reversed on appeal. The implication is that 70% of the time, innocent people were sentenced to death. This study should be viewed carefully because during the time period addressed by this study, the Supreme Court issued a series of rulings with retroactive effect that nullified a number of verdicts. These reversals were not based on the actual innocence of defendants, but rather were based on procedural rules.

I would also like to stress the difference between the terms "exoneration" and "actual innocence." Death penalty critics often use the terms interchangeably. If a defendant

is exonerated based on a procedural misstep, that person has not been proven innocent. Even if one were to accept the assertion that some of the exonerated individuals are actually innocent, this does not prove that innocent people have been executed. On the contrary, it would only prove that the system is working and that in cases where the evidence of guilt is insufficient, executions do not take place.

Several bills have been introduced during the 107th Congress that would either prohibit the use of the death penalty or would severely restrict it. Senator Feingold has introduced S. 233, the National Death Penalty Moratorium Act of 2001, that would follow the Illinois model and place a moratorium on executions by the Federal government, while a National Committee reviews the administration of the death penalty. I do not support these efforts to place a moratorium on the death penalty, and I do not believe that the circumstances in Illinois have any relevance on a Federal moratorium. There is absolutely no evidence to indicate that there is one innocent person awaiting execution for a Federal offense.

Additionally, I am concerned about several provisions

of S. 486, the Innocence Protection Act. Under this legislation, requests for DNA testing could be used as a stalling technique, unnecessarily drawing out and increasing the costs of litigation. I want to stress that I support post-conviction DNA testing where it has the opportunity to prove innocence. In fact, I have supported legislation in the past that would provide for post-conviction DNA testing in cases where a DNA test has the potential to exonerate the defendant. But we should be wary of supposed reforms that would extend an already long and thorough appeals process.

There have also been proposals to mandate national standards of competence for defense lawyers in capital cases. We should be careful in this regard. The needs of jurisdictions differ, and we should not enact a Federal mandate that unreasonably ignores local circumstances. National standards could be set so high that some jurisdictions, such as those that seek the death penalty less often, would be unable to find qualified counsel. It is important to keep in mind that most states with the death penalty have established capital defense standards, and the Federal government should defer to the judgments of the states in this matter.

In any case, the Supreme Court has already established that an attorney must provide effective assistance of counsel, a performance standard that is exactly the same in every state. A Federal mandate on qualifications of defense counsel would do nothing to change the performance that is required of a capital defense attorney.

Mr. Chairman, I fear that some would use "reform" of the death penalty as a means to restrict its use. We must not go down that road. Capital punishment is an important tool for prosecutors and provides appropriate punishment for the most heinous of crimes. The death penalty also serves as an effective deterrent, saving innocent lives. A January, 2002, Emory University study found that each execution prevents an average of 18 murders. This finding demonstrates that if we are really interested in preventing the death of innocent people, capital punishment should be an integral part of our criminal justice system.

- END -

OpinionJournal
from THE WALL STREET JOURNAL Editorial Page

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CRIME AND PUNISHMENT

Yes, the Death Penalty Deters

If activists kill capital punishment, murder rates will rise.

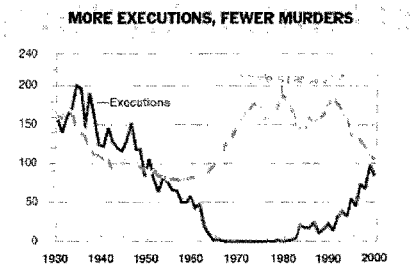
BY WILLIAM TUCKER
Friday, June 21, 2002 12:01 a.m.

The Supreme Court struck the latest blow against the death penalty yesterday, holding that the mentally retarded cannot be executed. This follows in the wake of Illinois's moratorium on the death penalty. The sense is that, for the first time in years, supporters of the death penalty are on the defensive. So this is a good time to review the rationale for capital punishment, which is as compelling today as ever.

Many question whether capital punishment is really a deterrent. How can it not be? Almost no one wants to die. Guilty criminals do everything to avoid being executed. They appeal their cases endlessly, accept plea bargains for life in prison--even, if they are smart enough, avoid committing the crime in the first place.

Ah, but there's the rub. According to death penalty abolitionists, criminals aren't smart enough to think of consequences, they act on impulse--and anyway the whole system is arbitrary, capricious, dysfunctional and racist.

Is there any reason for thinking the death penalty deters murder? Compare the number of executions performed with fluctuations in the murder rate of the past 70 years. As the chart below shows, from 1930 to 1963 murder rates and executions track very closely, both falling. After 1963, they separate, with murders rising rapidly while executions fall to zero. Around 1990, the lines reverse again, only recently returning to early-'60s levels. The original break occurs at the exact moment the Supreme Court began its wholesale intervention into state criminal cases.



*per 66,000 people
Source: Bureau of Criminal Justice

Before 1963, most states had capital punishment and used it. Executions tracked murders fairly consistently. Killings peaked in the '30s during Prohibition, then declined as the gangland era waned. By the late '50s executions were rare but focused public attention on particularly heinous crimes. When Charley Starkweather killed 10 people in Nebraska in 1958, he was sent to the electric chair without regret.

By the early '60s, however, liberals began arguing that because murder rates were so low the death penalty was no longer needed. Simultaneously, the Supreme Court began imposing its "exclusionary rules" on confessions and searches, bringing countless capital convictions under review. Executions ground to a halt until the court abolished them altogether in 1972.

Simultaneously, murders skyrocketed. In 1973, they reached their 1933 peak. The murder rate hit an all-time high in 1980 and nearly reached it again in 1991. Not until executions resumed in earnest after 1991 did rates fall rapidly again to their 1960s levels. Had murder rates remained constant from 1963 until 1997, 100,000 Americans would have escaped homicide.

Is this proof that murder rates and executions are related? Not to determined death penalty opponents. They argue you can't prove cause and effect, or, better yet, they argue the converse--that executions encourage murder by "brutalizing" society. This campaign reached its high-water mark in September 2000, when the New York Times published an in-house study claiming "Homicide Rates Unaffected by Death Penalty." Murder rates, noted the Times, are actually higher in states with capital punishment. While murders fell from 1990 to 1997, there was no distinction between states with and without the death penalty. Ergo, no connection.

The study did exclude New York and Kansas, ostensibly because those states "adopted the death penalty in the 1990s" but also because including New York would have shown murder rates falling faster in death-penalty states. But a bigger shortcoming was the failure to distinguish between states that have a death penalty only on paper and those that are actually executing. When we break the states into three categories--states with no capital punishment, states with a death penalty that have not yet executed anyone, and states that are actually executing people--we get the following results.

States that have performed executions do have historically higher murder rates. That's probably why they adopted capital punishment in the first place. States with no capital punishment have the lowest rates, while those with a death penalty but no executions fall in the middle. But the gap is narrowing. Since executions began in earnest after 1990, the most marked drop in murders has been in states that have the death penalty. Texas, which leads the nation in executions, had the second-highest murder rate in the U.S. in 1991. Today it ranks 15th.

Why would the death penalty deter murder? It's simple. Under most circumstances, when you are already committing a felony such as robbery or rape, it pays to kill your victim, the principle witness to the crime. Killing your victim improves your chances of escape. Some criminals are ruthless, talking of "eliminating the witnesses." But a much greater majority are amateurs who realize only after they have initiated the crime that the victim will be able to identify them to the police, and that there is "no choice" but to murder the victim.

And murder they do. In 1963, when the Supreme Court began setting up roadblocks to capital punishment, 90% of murders were "crimes of passion"--disputes among friends or relatives. Abolitionists argued these crimes could never be deterred and therefore capital punishment was a "barbaric relic." What they missed was the murders that were being deterred. Today almost half of all homicides are "stranger murders," most of which are committed during another crime.

The purpose of the death penalty, then, is to draw a bright line between a felony and felony murder. If the

penalty for robbery or rape is jail time and the penalty for murder a little more time, there is very little deterrent. Only if the penalty is qualitatively different will a criminal think twice about eliminating his victim.

Knowing this distinction, it is blood-chilling to read that Illinois Gov. George Ryan's blue-ribbon commission has recommended eliminating the death penalty for felony murder. New York's Court of Appeals is also reviewing the state's first scheduled execution in 39 years and will almost certainly overrule it. The case involves an armed robber who systematically murdered three victims during a $200 holdup.

What drives such thinking? These naive platonic guardians are always ready to take the criminal at his word. If killing the victim was "just an accident"--if "we didn't really mean to shoot the guy, we was just trying to rob him"--then it seems unfair that to execute someone for such a "tragic mistake." People with bodyguards and limousines are very good at this type of thinking.
Mr. Tucker is a contributing editor of The American Spectator.

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PRINT WINDOW CLOSE WINDOW

Arizona Attorney
November, 2000

Features

***26 THE DEBATE OVER ARIZONA'S DEATH PENALTY**

Steve Twist [FNa1]

Copyright © 2000 by State Bar of Arizona; Steve Twist

***27** The death penalty, in Arizona and nationwide, is under intense scrutiny. The debate has been growing steadily since January when Illinois Governor George Ryan declared a two-year moratorium on capital punishment after 13 death row inmates were exonerated in Illinois.

At issue is the accuracy and fundamental fairness of capital punishment systems. The developments in this debate seem to occur weekly. Here's what's happened recently or is on the horizon:

<<SYM>> At press time, American Bar Association President Martha Barnett was about to send a letter to the governor of each state that has capital punishment to urge him or her to support a moratorium on executions.

<<SYM>> In January 2001, a local commission appointed to study Arizona's death penalty is hoping to issue its report. The Attorney General's Capital Case Commission is examining the fairness of Arizona's system, tackling questions about executions of juveniles and the mentally impaired, and looking at racial and socioeconomic differences of death row inmates. The commission is chaired by Attorney General Janet Napolitano and is comprised of 30 Arizona judges and lawyers.

<<SYM>> Several weeks ago, U.S. District Judge Albert Bryan Jr. issued a ruling that says the 14th Amendment allows state prisoners to file federal civil rights lawsuits to get DNA testing so that they can try to prove they were wrongfully convicted. Many people are weighing in. We asked attorneys Steve Twist and Denise Young to kick off the conversation here. Turn the page to read their thoughts, then let your voice be heard by e-mailing your comments to **soundoff@azbar.org**.

***28** OPPONENTS OF THE death penalty often cite three primary grounds for their advocacy. They argue that the death penalty is cruel and unusual punishment in violation of the Eighth Amendment. They argue that the death penalty is immoral and should not be condoned in a society that calls itself civilized. And, they argue, because there is the possibility a mistake could be made, the state never should be given a power that might result in the taking of an innocent life.

Arizona's Death Penalty Is Not Unconstitutional

Arizona's death penalty law violates neither the United States' nor our state's constitution. [FN1] Its provisions have withstood a variety of legal challenges, [FN2] including that Arizona's structure does not result in the arbitrary and capricious imposition of the death penalty. [FN3]

Of course, the entire notion that the death penalty itself might be unconstitutional under either our federal or state constitution strikes anyone who has read the actual texts of these documents as highly suspect, given the several references in both documents to use of the death penalty. For example, the Fifth Amendment makes specific reference to "capital, or otherwise infamous crime ...," and its Due Process Clause provides that a person may be deprived of "life" with "due process." [FN4]

The Death Penalty Is a Moral Affirmation of the Sanctity of Innocent Life

Of the many paradoxes which confront us in life, of the many things which seem on their surface to be untrue, but

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which at a deeper level and on closer inspection are profoundly true, this might be the most profound. If life is to be valued, if the dignity ***29** of each human being is to be truly safeguarded, then there must be a moral order which calls for the murderer to forfeit his own life. "Life becomes cheaper as we become kinder to those who wantonly take it." [FN5]

Moreover, the death penalty has a deterrent effect and through this deterrence we affirm the sancity of innocent life. A substantial econometric study conducted by Professor Stephen K. Layson of the University of North Carolina at Greensboro concluded that increases in the probability of execution reduced the homicide rate. Layson reported that, on average, each execution deterred eighteen murders. Even if his probabilities were only half right, the death penalty deterred more than 30,000 murders in the last half of the 20 superth century. [FN6]

In Modern History, the Death Penalty Has Not Resulted in the Execution of an Innocent Person

Mistakes in capital cases can fall into two categories: an innocent person might be executed; but it is also possible that a guilty murderer might escape the death penalty only to kill other innocent victims.

No study, to date, has identified a single case in which an "innocent" person was executed. The recent study by James Liebman of the Columbia Law School concluded that nearly two-thirds of all death sentences are overturned because of "serious, reversible error." Liebman concludes that the death penalty system is "collapsing under the weight of its own mistakes." Is it really? Claremont Institute researchers Edward Erler and Brian Janiskee looked at the Liebman study and found, "In fact, Liebman's study doesn't document a single instance where an innocent victim was executed." [FN7]

However, the Bureau of Justice Statistics has found that of 52,000 inmates serving time for homicide, more than 800 had previously ***30** been convicted of murder. As Professor Cassell has noted, "THAT sounds like a system collapsing under the weight of its own mistakes -- and innocent people are dying as a result. A fair assessment of the issue of mistake leads inexorably to the conclusion that the risk to innocent life from failing to carry out capital sentences imposed under contemporary safeguards far outweights the speculative and remote risk that an execution might be error." [FN8]

A Proposed Compromise to Address Real Issues

The trial is the main event. It is at this point that the defendant is presumed innocent and the state must prove his guilt beyond a reasonable doubt to a jury of his peers. This is the point where the most resources should be focused. Once there is a verdict of guilt, then unless the direct appeal determines there has been prejudicial error in the trial, the considerations of finality should prevail unless there are truly extraordinary circumstances. Of course, no one should tolerate a system that might close the doors of its courts to a death row inmate who has a clear claim of factual innocence. If a claim is based on evidence of factual innocence, which satisfies a proper threshold, an inmate should be able to present that claim up to the moment of execution. Arizona's rules governing post-conviction challenges could be clearer on this point and they should be clarified by the Arizona Supreme Court.

At the same time, no one should tolerate the delays that crime victims are forced to endure before our courts can reach a final judgment in post- conviction challenges and appeals. According to a recent study by the Arizona Department of Corrections, for all 214 death sentences cases from 1974 to 2000, the average interval from sentencing to a direct appeal decision is two years and four months, and from sentencing to state post-conviction appeal decision is seven years.

Article 2, § 2.1.(A)(10) of the Arizona Constitution provides, "To preserve and protect victims' rights to justice and due process, a victim of crime has a right: ... 10. To a ... prompt and final conclusion of the case after the conviction and sentence." This is the solemn promise of our state Constitution. Through the manipulation of ambiguities in the language of Rule 32 and the exploitation of delaying tactics at every turn, our courts have been unfairly used as instruments of the lawless deprivation of this right; its promise, on the books since November, 1990, lies hollow and unfulfilled. So here is a proposal:

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1. Provide a DNA test to every person convicted of a crime in which the results of the test would be relevant to the issue of factual innocence.

2. Provide resources adequate to ensure that every capital defendant receives a competent defense.

3. Amend Rule 32 to remove all doubt that clear and convincing evidence of factual innocence, evidence which leads one inexorably to the conclusion that the inmate did not commit the crime, may be raised at any time.

4. Further amend Rule 32 to limit to one the number of post-conviction challenges which a convicted offender may bring and set real time limits for the proceeding and the decision.

It should be our duty as lawyers and judges to improve the administration of justice so that the fundamental rights of both the convicted offenders and their victims are protected.

[FNa1]. **Steve Twist** is a Phoenix attorney and a former Chief Assistant Attorney General for the State of Arizona

[FN1]. State v. Richmond, 114 Ariz. 186 (1976); Walton v. Arizona, 110 S. Ct. 3047 (1990).

[FN2]. See the scores of cases cited at pp. 231-257 in Capital Cases Outline: Arizona Supreme Court, by Gregory A. McCarthy.

[FN3]. State v. Stokley, 182 Ariz. 505 (1995), cert denied, 116 S. Ct. 787 (1996).

[FN4]. U.S. Const. Amend. 5.

[FN5]. Ernest van den Haag, Punishing Criminals (Basic Books 1975), p. 213.

[FN6]. Cited in Statement Concerning Claims of Innocence in Capital Cases, Paul Cassell, Professor of Law, University of Utah, before the Committee on the Judiciary, United States House of Representatives, Subcommittee on Civil and Constitutional Rights, July 23, 1993, p. 12. [Hereinafter, Statement].

[FN7]. "Study Fails to Prove that Death Penalty is Unfair," by Edward J. Erler and Brian P. Janiskee, found at www.claremont.org/publications/erler_janiskee000719.cfm.

[FN8]. Statement, pp. 1-2.

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June 17, 2002

VICTIM and SURVIVOR SUPPORT FOR THE INNOCENCE PROTECTION ACT

Dear Member of Congress:

The undersigned survivors of violent crimes, victims' families, and organizations for persons affected by violent crimes write to voice our support for the Innocence Protection Act of 2001. Neither society nor victims benefit when innocent persons remain imprisoned and the actual perpetrators go free. The Innocence Protection Act's twin objectives — improving access to DNA testing and the quality of defense counsel in capital cases — would benefit crime victims by enhancing the truth-seeking function of our criminal justice system and increasing confidence in its outcomes.

DNA testing — the most powerful identification technique ever developed — should be available if it could produce new evidence material to an inmate's claim of innocence. If such testing produces an inculpatory result, this may remove nagging questions and reassure the victim that the perpetrator has been convicted and incarcerated. If, on the other hand, the result is exculpatory, it can be run against the appropriate database, and the actual perpetrator can be brought to justice.

For those whose lives have been touched by crime, as for society, certainty that the right person is behind bars, when possible, is a more compelling interest than finality. Therefore, we believe that procedural obstacles to adjudicating a claim of innocence must give way when doubts regarding guilt might be resolved by DNA testing.

Finally, we recognize that a vitally important protection against wrongful convictions and unsolved crimes is a strong adversarial system in which both sides have adequate resources and qualifications. Neglecting the defense function not only imperils innocent defendants, it potentially exacerbates the suffering of those who have lost a loved one to violent crime by generating needless appeals and retrials and undermining confidence in outcomes. We therefore urge you to pass the strongest possible measures to ensure the right to effective assistance of counsel in capital cases.

In taking important steps to improve the accuracy of our criminal justice system, the Innocence Protection Act would protect the victims and survivors of crime. It would help bring peace to victims and their loved ones, enhance public safety and increase public confidence in our criminal justice system. We hope that Congress will act swiftly to pass this important legislation. Thank you for considering our views.

Karen R. Pomer
Founder, Rainbow Sisters Project (national organization of rape survivors)
Los Angeles, California
Rape survivor
(310) 463-7025

Aba Gayle
Catherine Blount Foundation, Silverton, Oregon
Mother of Catherine Blount, murdered in California

Kiersten Stewart, Director of Public Policy
Family Violence Prevention Fund
Washington, DC

Bill Pelke, President
Journey of Hope...From Violence to Healing
Grandmother Ruth was murdered in Gary, Indiana

Mary Lee Perry, Staff Attorney
Kentucky Association of Sexual Assault Programs (KASAP)
Survivor of never reported interpersonal violence

Maria Hines, Director
Kentucky Murder Victims Families for Reconciliation
Sister of Virginia State Trooper Jerry Lynn Hines, murdered in the line of duty in 1989.

Judy Benitez, M.Ed., Executive Director
Louisiana Foundation Against Sexual Assault

Jennifer Bishop, National Board Chair
Murder Victims Families for Reconciliation
Sister of Nancy Bishop Langert, murdered along with her husband Richard and their unborn child in 1990 by a teenager in Winnetka, Illinois

Juley Fulcher, Public Policy Director
National Coalition Against Domestic Violence

Rita Lasar
September 11th Families for Peaceful Tomorrows, New York, New York
Sister of Abe Zelmanowitz, World Trade Center bombing victim

Tanya Brannan, Director
Purple Berets Advocacy & Education Project, Santa Rosa, California

Deborah Andrews, Former Executive Director
Rape, Abuse & Incest National Network (RAINN)
Mary L. Smith, Executive Director
REAL Crisis Intervention Inc., Greenville, NC

Ryan Amundson
Springfield, Missouri
Brother of September 11th Pentagon victim Craig Amundson

Joanne Archambault, Training Director
SATI, Inc. Sexual Assault Training and Investigations, El Cajon, California
(Former Sgt., San Diego Police Department)

Arwen Bird, Director
Survivors Advocating For an Effective System
Survivor of DUI crash

Annette Burrhus-Clay, Executive Director
Texas Association Against Sexual Assault

Yvonne Rivera-Huitron, Coordinator
Victims Ministry for the Archdiocese of Los Angeles

Charlotte Pierce-Baker, author of "Surviving the Silence: Black Women's Stories of Rape"
Durham, North Carolina
Rape survivor

Nellie Hester Bailey
New York, New York
Husband tenant organizer Bruce Bailey, brutally murdered over ten years ago

Hector & Susie Black
Parents of Patricia Nuckles, raped and murdered in Atlanta, Georgia Nov 20th, 2000

Dorthy Welch Blackwood
Family member of Oklahoma City bombing victim

Kelly Conway
Sacramento, CA
Rape survivor

Jeri Elster
Member of Rainbow Sisters
Rape survivor and activist, Los Angeles, California (Rapist was identified through DNA testing after the CA statute of limitations had lapsed)

Barbara M. Farr
Survivor of rape, child abuse and domestic violence from 1955-1973
Karalee Fenske
Rape survivor

Michelle Giger
Daughter of Phil Bovee, murdered in Santa Rosa, New Mexico in August of 1984

Kate Lowenstein, National Organizer
Murder Victims Families for Reconciliation

Sue Norton
Daughter of Richard and Virginia Denney, murdered in their rural farmhouse in Tonkawa, Oklahoma

Phyllis Pautrat, MSW
Rape survivor and family member of a rape survivor
Mt. Laurel, New Jersey

Sherry Price
New York, New York
Rape survivor

Jennifer Thompson
North Carolina
Rape survivor (mistakenly identified innocent man of rape, DNA evidence exonerated him after 11 years in prison)

Wanda Valdes
Widow of Frank J. Valdes, murdered in Florida on July 17, 1999

Bud Welch
Oklahoma City, Oklahoma
Father of Oklahoma City bombing victim Julie Welch

Linda L. White
Magnolia, Texas
Mother of Cathy Lyn O'Daniel, 26, raped and murdered in 1986

Earlene Yeazell
California
Rape survivor

Voices of Support
Innocence Protection Act (S486/HR912)

Faith Based Organizations

Central Conference of American Rabbis
Church of the Brethren
Church Women United
Episcopal Church
Evangelical Lutheran Church in America
Friends Committee on National Legislation
General Board of Church and Society of the United Methodist Church
Maryknoll Office for Global Concern
Presbyterian Church (USA), Washington Office
United Church of Christ
Union of American Hebrew Congregations
Union of Orthodox Jewish Congregations
Unitarian Universalist Association of Congregations
United States Catholic Conference

Endorsers

American Association of University Women
American Civil Liberties Union
American Federation of Teachers
Amnesty International USA
Arab American Institute
Common Cause
Equal Justice USA/Quixote Center
Lawyers' Committee for Civil Rights Under Law
Leadership Conference on Civil Rights
MacArthur Justice Center
Mexican American Legal Defense and Education Fund
NAACP Legal Defense and Education Fund
NAACP
National Association of Criminal Defense Lawyers
National Legal Aid & Defender Association
National Urban League
Physicians for Human Rights
Tennessee Coalition to Abolish State Killing

Editorial Support for the Innocence Protection Act

Death Penalty Reform is Overdue

"An Innocence Protection Act for the protection of convicted offenders? Yes. The federal legislation is sadly needed. The morality of having a death penalty can be debated. The morality of having a death penalty that is applied unfairly cannot. It is wrong."

Roanoke Times, 6/17/02

DNA Bill Serves Justice

"A remarkable proposal in Congress aims to assure that no innocent person is executed and that everyone accused of a capital crime has competent legal representation. No wonder the Innocence Protection Act enjoys bipartisan backing from both supporters and opponents of the death penalty."

Arizona Republic, 6/14/02

How We Answer Death Row Doubts

"With lives at stake, federal and state governments must commit to insuring no innocent person is executed. The Innocence Protection Act is a significant step in this worthy process."

-Erie Times-News (PA), 6/9/02

Fatal Mistakes

"Increasingly, politicians and the public are realizing that a system this blunder-prone is unacceptable and immoral. It is an awareness that crosses all party lines, and encompasses those on both sides of the death penalty debate. Even those in favor of capital punishment do not want to see it dispensed in such a haphazard manner that the real culprit goes free and the wrong person ends up taking a gurney ride to the death chamber."

-Arizona Daily Star, 6/7/02

When the Innocent Spend Years in Prison

"Thanks to growing bipartisan support in Congress, the Innocence Protection Act stands a promising chance for passage. Failure to enact this law would be an affront to the nation's criminal justice system and would risk more innocent lives being ruined."

-News & Record (NC), 6/7/02

Death Penalty: Congress Moves to Protect Innocent

"It is becoming ever more apparent that the nation's capital punishment system is deeply flawed. The Innocence Protection Act represents a promising first step toward needed national reform."

-Cumberland Times News (MD), 6/5/02

Death Penalty Act Merits Support

"Rarely have Democrats and Republicans come to a working consensus on the need for change. When a life hangs in the balance, every effort must be made to guarantee fair and just procedures."

- The Desert Sun (CA), 6/5/02

Punish the Guilty

"The Innocence Protection Act is a sensible proposal that unites two groups that usually don't see eye to eye -- those who oppose the death penalty and those who favor it. Why this uncommon alliance? The proposal's goal is to make sure the person who did the crime faces the consequences."

-Charlotte Observer (NC), 6/5/02

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Protecting the Innocent

"As long as capital punishment remains on the books, flaws in the system must be corrected. The Innocence Protection Act is a strong step in the right direction. It deserves to become law."

-Press-Telegram (CA), 5/23/02

Death is Different

"The Supreme Court has long professed the principle that "death is different," that in order to deprive someone of his life, the state must be punctilious about providing him every procedural protection. Because the court has failed to live up to that standard, it is vital that bills currently before both houses on Capitol Hill gain the support they need to become law. The bipartisan Innocence Protection Act would establish national standards for the representation of capital defendants and provide resources to meet them. The act would also require the preservation of biological evidence that may later prove crucial on appeal and ensure death row inmates access to DNA testing."

-The New York Times, 4/10/02

The Death Penalty Re-examined

"On Capitol Hill, meanwhile, promising legislation is pending in both chambers that would reduce the risk of executing innocent people. In the past year many states have enacted death penalty reforms. You do not have to oppose the death penalty to support laws making it fairer."

-The New York Times, 2/23/02

Make More Use of DNA Testing

"Its value cuts both ways; DNA just as precisely exonerates the falsely accused as it seals the case against the guilty. That is why this newspaper has endorsed federal legislation that would prohibit states from denying applications from inmates for DNA testing if the testing has the scientific potential to produce new evidence material to a claim of innocence."

-Seattle Post-Intelligencer, 12/31/01

Using DNA to Prove Innocence

"Backing the **Innocence Protection Act** should have nothing to do with support or opposition to the death penalty. Both sides can agree that it would be a tragedy if a state were to execute a convict, only to learn later through DNA testing that the person was innocent."

-Hartford Courant, 9/24/01

Death Penalty Needs Reform for Fairness' Sake

"While the United States is not ready to abolish the death penalty, there appears to be a rising tide of interest in taking new steps to make sure it never is applied in error. A conservative with credentials no less stalwart than those of U.S. Rep. Pat Toomey, R-Allentown, is supporting legislation intended to eliminate errors and to give capital-crime defendants better legal representation."

- Morning Call, 9/11/01

O'Connor's Evolution

"[Justice] O'Connor also seemed to support broader access to DNA testing in capital cases, a right that would be guaranteed under the Innocence Protection Act currently wending its way through Congress...

O'Connor's thinking, like the nation's, is evolving on the question of capital punishment. We hope it signals a return to a less brutal time.

- The Boston Globe, 7/7/01

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Justice O'Connor on Executions

"Justice O'Connor's speech will resonate in the political arena. Last week the Senate Judiciary Committee held hearings on the Innocence Protection Act, a worthy bill sponsored by Patrick Leahy, the Vermont Democrat who now heads that committee, and two Republicans, Gordon Smith of Oregon and Susan Collins of Maine... Senator Orrin Hatch, the ranking Republican, questioned the need for Congressional action. Justice O'Connor's speech will make it difficult for him to maintain such views...

...This page welcomes the push for competent lawyers and DNA testing in capital cases."

- The New York Times, 7/5/01

A Real Crime Bill

"After years of crime bills that served chiefly to let members of Congress strut their toughness, [the Innocence Protection Act 2001] is one that could actually free innocent people and keep other innocents out of jail."

- The Washington Post, 7/3/01

Protect Against Executing Innocents

"Not even the most avid death penalty defenders want the state to take an innocent life. The Leahy bill will help assure that doesn't happen."

- Atlanta Journal Constitution, 7/3/01

Death Penalty Reform

"Reform efforts have to walk in parallel with a continuing march of lethal injections. That only underlines the importance of taking steps to assure that no innocent death row inmate is executed wrongfully.

It means, first and foremost, getting at the root causes of the uneven and unfair way in which the death penalty is administered.

Legislation before Congress authored by Sen. Patrick J. Leahy (D., Vt.) takes aim at the problem in two important ways... First, it would beef up efforts to provide indigent defendants with competent legal representation... The other major Leahy proposal – on DNA testing – is about saving innocent people whose lives are under immediate threat."

- The Philadelphia Inquirer, 4/23/01

Congress Should Pass The Innocence Protection Act

"We now have a mechanism to reduce the randomness by which some lose their freedom and others regain it. Aptly named, the Innocence Protection Act deserves passage before another person leaves death row, exonerated or not."

- The Seattle Post-Intelligencer, 4/1/01

DA's Repair Shop

"A comprehensive set of reforms, the Innocence Protection Act, has also been filed in Congress. This needed legislation would offer greater access to DNA testing for convicted offenders and provide incentive grants to improve the quality of legal representation."

- The Boston Globe, 3/21/01

Death Penalty Ignominy

"...it is disgraceful for the government in this category of cases to deny an indigent accused at least mediocre defense counsel to bolster what may be the chief safeguard against executing the innocent, which also leaves the guilty free to commit new barbarities... Indeed, nothing even semi-convincing can be said against a statutory

(over)

right to average defense counsel when life hangs in the balance, as championed by Sen. Pat Leahy, Vermont Democrat, and an array of his apostles in the Innocence Protection Act of 2001...

...Some members of Congress, nevertheless, fear that endorsing the Leahy bill would expose them to a 'soft-on-crime' indictment. But the accusation can be persuasively turned on the accuser. The bill would build, not destroy, public confidence in the death penalty, and would raise, not diminish, the chances of apprehending and punishing those truly guilty of capital crimes."

- The Washington Times, 3/20/01
(column by Bruce Fein)

Preventing Execution of the Innocent

"Some of these appointed attorneys [for defendants facing the death penalty] are outright incompetent. So the facts of the case never come forward and the needle gets closer to being pushed into the flesh. A group of Democratic and Republican lawmakers in Congress, including Republican Rep. Ray LaHood of Peoria, are trying to put an end to this frightening prospect...

...This is an encouraging development in Congress, particularly in the sense that these vital death-penalty reforms have bipartisan support...

...these lawmakers in Congress certainly are setting the right example for states to follow."

- Chicago Daily Herald, 3/10/01

Deadly Error

"Even supporters of the death penalty would have to agree that it must be applied with maximum safeguards on fairness. [The Innocence Protection Act] offers practical steps to guard against mistakes that are no less than matters of life and death."

- Detroit Free Press, 6/14/00

Bills to Stop Executing the Innocent

"The battle to reform administration of the nation's deeply flawed death penalty system gained momentum last week with the introduction of legislation in the House that would provide important new safeguards to lessen the chance of executing innocent people. The enlightened measure, the Innocence Protection Act, would require preservation of biological evidence, make DNA testing available to federal and state inmates, and set national standards to ensure competent lawyers for indigent defendants accused of capital crimes."

- The New York Times, 4/4/00

Innocent on Death Row

"Senator Patrick Leahy has introduced a bill that seeks to strengthen safeguards against wrongful executions. Those who support capital punishment should be as determined as its opponents to ensure that innocent people are not executed. By that logic, this legislation should enjoy wide support...

...This is a critical reform, as the absence of competent counsel is a pervasive theme in wrongful convictions...

...by focusing only on protecting the innocent- not on a broader agenda of halting all executions- Mr. Leahy places the spotlight on what should be bedrock principle for all who believe in due process. To support these reforms, one need only believe that people accused of capital crimes should have reasonably able counsel and that -when substantial questions arise about the rightness of their convictions- they should have the ability to prove their innocence."

- The Washington Post, 2/28/00

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REASONABLE PEOPLE AGREE...
REFORM IS NEEDED

U.S Supreme Court Justice Sandra Day O'Connor
July 1, 2001
"If statistics are any indication, the system may well be allowing some innocent defendants to be executed.

Serious questions are being raised about whether the death penalty is being fairly administered in this country.

Perhaps it's time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used."

George F. Will
The Washington Post, April 6, 2000
"Capital punishment, like the rest of the criminal justice system, is a government program, so skepticism is in order."

Gov. Frank Keating (R-OK)
National Press Club, June 22, 2001
"The only way we who believe in [the death penalty] can assure that it will survive is that no innocent person be mistakenly put to death. For us to raise that bar is not only appropriate, I think it is essential."

Sam D. Millsap, Jr., Former Texas District Attorney
San Antonio Express, June 29, 2000
"I am no longer convinced our legal system guarantees the protection of the innocent in capital murder cases...I support the call for a moratorium on executions in Texas."

William Raspberry
The Washington Post, February 25, 2002
"For me, there have always been two death-penalty issues: whether it's ever right for the government to take a life and, if so, whether it can ever be done fairly."

Bruce Fein
Washington Times, April 25, 2000
"Can reasonable people dispute that the government should confine the death penalty to persons guilty of the crime charged? And can reasonable people deny that the climbing number of exonerations of death row inmates on the grounds of actual innocence creates chilling worries on that score?

"Those questions make both urgent and compelling, enactment of the cool-headed bill by Sen. Patrick Leahy, Vermont Democrat, to upgrade the reliability of verdicts in capital cases."

Reasonable People Agree, cont.

Dudley Sharp, Justice for All
Nightline (ABC), May 22, 2000
"I am absolutely for any – any death penalty case where DNA is determinative of guilt or innocence being used post conviction…I don't mind making [the death penalty] more accurate with DNA at all. And I don't mind making defense counsel a little better."

Star Telegram, February 15, 2000
"When we find errors within any social institution, we constantly try to correct and improve them."

Rev. Pat Robertson
The Washington Post, April 8, 2000
"I think a [death penalty] moratorium would indeed be very appropriate."

George F. Will
The Washington Post, April 4, 2000
"The cumulative weight [of *Actual Innocence: Five Days to Execution*] compels the conclusion that many innocent people are in prison, and some innocent people have been executed."

Paddy Lynn Burwell, Texas Board of Pardons and Paroles
New York Times, May 14, 2000
"I worry that we may execute an innocent person. Any person would know that is a possibility, I think our system needs to be improved."

The Wall Street Journal
Editorial supporting the death penalty and criticizing an Illinois Commission report that found flaws in the state's capital punishment system, April 18, 2002
"…it's hard to object to videotaped interrogations or a guarantee of competent counsel."

US Senator Arlen Specter, former Philadelphia District Attorney
Press release announcing legislation to ensure access to DNA testing, competent defense counsel and changes to how courts review death penalty cases, May 2, 2002
"…the death penalty is currently under assault in America as many lose faith in its application. In order to ensure it remains a viable option for those cases in which prosecutors deem it appropriate, we need to ensure that it conforms with elements of fundamental fairness and due process."

washingtonpost.com

Checks on the Death Penalty

Tuesday, June 18, 2002; Page A18

NORMALLY, WHEN members of Congress gather to talk about the death penalty, it is to expand the list of crimes for which executions are imposed or to rein in death row appeals. Today, however, both houses of Congress will hold hearings on a bill that would, if passed, actually limit the use of capital punishment. The Innocence Protection Act, sponsored by Patrick Leahy (D-Vt.) in the Senate and William Delahunt (D-Mass.) and Ray LaHood (R-Ill.) in the House of Representatives, was first introduced more than two years ago. Since then more than half of all House members and 26 senators have signed on as co-sponsors. Many of these support the death penalty. Their backing for a bill that would ensure access to DNA testing for convicts and that would improve the quality of legal representation for capital defendants is evidence of the profound effect on public opinion of the continuing wave of death row exonerations.

Reasonable people disagree about the death penalty, but nobody can disagree that society should take extreme care to avoid executing innocent people. The recent history of the death penalty strongly suggests that many states have not been careful enough. Without question, innocent people have come within hours of being put to death. Substantial questions remain about the guilt of some who did not escape execution. Many states provide such low-quality lawyering to the accused that egregious miscarriages of justice are inevitable. Congressional action on this subject should not be controversial, especially considering the movement for reform at the state level and the wide bipartisan support in Congress for this bill.

Sen. Leahy means to mark up the bill quickly. Its prospects in the House, where Judiciary Committee Chairman James Sensenbrenner (R-Wis.) has reservations, are dimmer. But the bill's proponents should not compromise too much. To make a real difference, any bill will have to make DNA testing available to inmates and give states incentives to improve the fairness of future capital proceedings. The Innocence Protection Act offers some well-designed measures on both these fronts. While it is far from the abolition of capital punishment that we favor, to oppose it as insufficient would be as irresponsible as for death penalty proponents to reject it as unneeded. Congress should pass this bill.

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Nation

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Exonerated prisoners are rarely paid for lost time

By Richard Willing, USA TODAY

By Eileen Blass, USA TODAY
Ray Krone, 45, plays with his 22 month old niece Hannah after being exonerated from murder charges.

Ray Krone walked out of a state prison and into the Arizona sunshine in April, 10 years, three months and 9½ days after his arrest for a murder that DNA tests later showed had been committed by another man. Krone got an apology from the prosecutor and $50, the usual exit payment to the state's convicts. He also got some bad news from his attorney: Despite the Phoenix prosecutor's admission that Krone was wrongly convicted, Arizona laws would make it nearly impossible for him to receive compensation from the state for the decade he lost in prison, including more than two years on death row. "It's in everyone's interest to get a guy (leaving prison) started down the right path," says Krone, who lost his house, a boat, a dune buggy, his retirement savings and a $30,000-a-year job with the U.S. Postal Service after he was convicted of killing a Phoenix barmaid in 1991. "That should go double if the guy didn't deserve to be in prison in the first place, right?"

Read more below

Video • Exonerated prisoner seeks compensation

Chart • Some states offer compensation to wrongly convicted people

Thanks to DNA testing and rising scrutiny of verdicts nationwide, America has more Ray Krones than ever. Since 1973, more than 200 men have been deemed wrongly convicted and released from death sentences or lengthy prison terms, most in the past decade. Like Krone, most have not been compensated because of laws that encourage aggressive law enforcement by shielding cops and prosecutors from

lawsuits.

Many of the men say the policies that prevent compensation should be changed to help them pay legal fees and other debts, and to give them a new start. Detractors argue that lingering questions about the innocence of some of the men should prevent them from winning payback. In some cases, courts have agreed with the detractors.

But after years in which courts and states have taken a hard line on prisoners' rights, there are signs of change, at least when it comes to compensating the wrongly convicted. This year, Congress is likely to consider plans to greatly increase the money available to exonerated federal prisoners.

Meanwhile, attorneys for the wrongly convicted increasingly are finding ways around the legal barriers. In Illinois, seven exonerated men have won nearly $40 million in settlements since 1998.

And in perhaps the surest sign that compensation for the exonerated is a hot legal issue, celebrity lawyer Johnnie Cochran has joined DNA legal specialists Barry Scheck and Peter Neufeld to form a firm that aims to win money for those freed because of DNA evidence. DNA tests compare the unique genetic code carried in body fluids with samples left at crime scenes.

Even so, the obstacles to compensation remain daunting:

In every state court and in the U.S. system, prosecutors and law enforcement officers usually are immune from lawsuits.
Fifteen states, the District of Columbia and the U.S. government have laws that offer compensation. But the laws rarely are used because they typically demand that anyone seeking compensation first receive an official pardon, or that a court declare them innocent. That means a DNA test that exonerates an inmate by showing "reasonable doubt" that he did not commit a crime often isn't enough, by itself, to qualify him for compensation.
State legislatures occasionally pass special appropriations for those who have been exonerated, but such efforts can take years and are subject to government budget processes and political whims.

Laws rooted in history

But legal analysts say the rising number of inmate exonerations, and DNA technology's rising impact in solving crimes, likely will lead governments to make compensation easier to get.

"It all comes back to three little letters: D-N-A," says Scott Wallace, director of defender services at the National Legal Aid and Defender Association in Washington, D.C. "Science has convinced the public and prosecutors that the criminal justice system is far more fallible than they

had ever expected. ... That is beginning to show up in (compensation) court cases."

Science was Ray Krone's friend.

He was convicted of murder and sentenced to death in 1992, then won a new trial in 1995 after an appeals court ruled that the prosecution had taken too long to turn over evidence to Krone's attorneys. Krone was convicted again in 1996, largely on the strength of a bite-mark specialist's testimony that Krone's teeth matched the pattern in a wound found on the victim, Kim Ancona. After the second conviction, Krone, now 45, was sentenced to life.

In 2000, Krone's attorney, Christopher Plourd, persuaded a judge to run DNA samples lifted from the victim's body through a federally sponsored database of people convicted of serious crimes. The samples, which had been tested using DNA technology that had been unavailable just a few years earlier, cleared Krone and matched the DNA of a sex offender in an Arizona prison.

The sex offender, Kenneth Phillips, had lived 600 yards from the site of the slaying but had not been a suspect. Instead, police had focused on Krone, who had gone out with Ancona and some friends a few nights before she was killed. Phillips was charged with murder two weeks after Krone was released and is awaiting trial.

For Krone, winning money could be even tougher than winning his freedom.

Under Arizona law, the prosecutors who charged him are virtually immune from lawsuits. Police and expert witnesses are immune, too, and are not liable for any mistakes they make as long as they can show they acted in good faith. Such immunities date back several centuries, when they were put in place to protect prosecutors in England and to keep governments from being bankrupted by officials' errors. Today most states have immunity laws, which have been upheld by the U.S. Supreme Court.

The law leaves Plourd little to work with in trying to get compensation for Krone. Plourd, of San Diego, says he is examining whether Krone could claim rights violations that aren't covered by immunity laws, such as willful misconduct by police.

Still, Krone is relatively lucky. A bachelor, he has moved in with his parents in Dover, Pa., has joined a softball team and has been offered part-time work as a plumber. Krone has thought about trying to get another Postal Service job but says he is unsure what he wants to do. He's considering a return to Phoenix but is worried that despite his exoneration, he will be regarded with suspicion.

Others who have been exonerated have walked into a backlog of problems. Clarence Brandley, who was freed by Texas in 1990 after his 1981 murder conviction was reversed, sued for wrongful imprisonment and soon was hit with $50,000 in child-support bills that built up during his time in prison.

Clyde Charles, released from a life sentence by Louisiana in 1999 when a DNA test cleared him of rape, has been socked with medical bills for a variety of ailments and overdue property taxes. In a painful twist, the DNA test that cleared Charles cast suspicion on his brother, whose DNA eventually was matched to a crime scene sample. Charles' brother, Marlo, was convicted of the crime for which Charles served 19 years. Last month, Marlo Charles was sentenced to life in prison.

A bill to compensate Clyde Charles stalled in Louisiana's Legislature, partly because his brother's silence, not just state actions, helped to keep Charles in prison.

Those who are exonerated and receive compensation often aren't satisfied. Freddie Lee Pitts, convicted in 1963 and cleared in 1975 of a murder at a Florida gas station, had to wait until 1998 for state lawmakers to pass a bill that gave him and co-defendant Wilbert Lee $500,000 each. Pitts, who had sought $1.5 million, refused to appear at a ceremony with the bill's sponsor. "A cheap political cop-out," says Pitts, 58, who was 19 when he was convicted.

Kirk Bloodsworth, a commercial fisherman cleared in 1993 of a rape-murder conviction in Baltimore, got $300,000 tax-free from Maryland's Legislature. After paying legal bills and student loans, Bloodsworth had about $100,000, which he says he spent in two years.

"You have a lot of suddenly appearing friends, and you want to be accepted ... so you spend like crazy," says Bloodsworth, 41. "You realize when (the money's) gone that you were ... looking to get rid of this shadow that follows you. Even if you're exonerated, some people still treat you like you're guilty."

Most states require pardon

State and U.S. compensation statutes date to Wisconsin's 1913 law, which gives up to $25,000 to ex-convicts who can convince a state board they were innocent.

Most other states with compensation laws offer lesser payouts, and several require a pardon from the governor as a first step in a lengthy process. When she studied the issue in 1998, law professor Adele Bernhard found that only a few states had paid such claims. The exception was New York, which has no compensation limits and where $2.81 million was paid to nine claimants from 1994 through 1998.

The laws were intended to be used rarely, and "never contemplated the exposure of wrongful convictions and the explosion in exonerations we're experiencing," says Bernhard of Pace University in White Plains, N.Y.

For those exonerated because of a technicality, proving innocence can be difficult, especially if evidence suggests that they, in fact, were guilty.

Jay Smith, a high school principal in Upper Merion, Pa., was released from a death term in 1992. He had served six years after being convicted of killing a teacher and her two children to help her husband collect an insurance payment. The conviction was reversed in part because police did not disclose that two grains of quartz were found on the victim's toes, which might have strengthened Smith's claim that the teacher was killed by her husband on a beach.

Two years ago, a U.S. appeals court shot down Smith's lawsuit against the police and a prosecutor. The court cited "overwhelming" evidence against Smith: a pin belonging to the victim that was found in his car, carpet fibers on her body that were similar to those from a rug in his house and a comb that likely was Smith's and was found under the body.

Lawyers for those seeking compensation have begun to shift tactics. In Illinois, where 13 men have been released from death row since 1987, lawyers no longer seek to file suits in federal court, where dismissals had become common. Instead, they file in state court and allege police misconduct, such as coerced confessions and fabricated evidence. Police are not immune from such misconduct lawsuits.

The strategy is paying off. In 1999, Cook County, Ill., paid $36 million to settle a suit brought by four men convicted in a 1978 murder. The men, who had served 11 to 17 years in prison, alleged that police ignored or hid evidence that pointed to the real killers. Since then, four other ex-convicts in Illinois have won smaller settlements. Another was awarded $15 million by a Chicago jury in December; that award is being appealed.

Lawyers in other states have begun to adopt the Illinois tactics. But that doesn't help the many freed prisoners who, like Ray Krone, were convicted because police, prosecutors and juries apparently acted in good faith but were mistaken. For them, the best hope appears to be special awards from state lawmakers, or changes in compensation rules.

Krone isn't holding his breath.

"Most people think, 'Hey, this could never happen to me,' " he says. "I thought the same way. I was a middle-class kid from mainstream America, never in trouble, and things like going to prison for murder ... just didn't happen. Until it did."

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Innocents being executed? Let's calm down, look at the facts
By James Q. Wilson New York Times

MALIBU, Calif. -- For those who support capital punishment, as I do, the possibility that innocent people could be executed is profoundly disturbing. No human arrangement can guarantee perfection, but if perfection is not possible, then the number of errors ought to be kept as low as possible. For that reason it is worth studying "Broken System: Error Rates in Capital Cases," the recent report by professor James Liebman and others at the Columbia University Law School, especially since that document has stimulated an outpouring of media coverage.

Its essential finding is that, for the past two decades or so, courts have found "serious, reversible error" in a large fraction of the cases they reviewed. These errors, the report claimed, often involved weak or incompetent defense attorneys and the withholding of important evidence from the juries.

But notice what the report did not say. Its authors did not attempt to discover whether any innocent person had been executed, and they made no claim that this has happened. Instead, they said that the large number of appeals leaves "grave doubt whether we do catch" all of the errors. The clear implication is that, were the truth known, we might well be killing many innocent people.

But that truth is not known. The Death Penalty Information Center, a rallying point for opponents of execution, reports that since 1973, when the Supreme Court reinstated the death penalty, 69 people have been released from death row after they were found to be innocent. But the center does not say that any innocent person has been put to death, though if it had found such a case it surely would have proclaimed it.

The Columbia University report shows that death sentences are intensively reviewed by appeals courts. Some critics of these reviews think they take too long and involve too many unnecessary bites at the apple, and that may be true. But if we are to err, it is best that we err on the side of safety.

Nine or 10 years usually pass between the imposition of the death

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penalty and its being carried out. It took 19 years and appeals heard by more than 30 judges before Gary Graham was executed last month in Texas. It is hard to imagine that this much time is necessary for an adequate appeal, but offsetting the cost and delay is the assurance of only a small chance that an innocent person will be killed. The 5,760 death sentences handed out since 1973 had, by 1995, led to only 313 executions.

Liebman suggests that the high rate of appeals means that serious errors are often made by the trial courts. But before we can accept that conclusion, we must first know whether the errors were serious enough to affect the outcomes of the cases when they were sent back for new trials. Did an "error" cause a new trial that set aside the death penalty? Unfortunately, Liebman was able to learn this for only a small number of the reversals.

Because of Supreme Court decisions, every death-penalty conviction leads to an appeal to the state's highest court. About two-fifths of the cases were reversed. As I read the report, we have no information about what happened in the new trials.

Then there are state appeals after convictions. These also led to many reversals, but we don't know what happened to the great majority of these cases when they were retried because trial courts ordinarily do not publish their findings. Liebman and his colleagues managed to find 301 cases that had been retried, but we have no idea whether these were representative of all of those appealed or were only a few dramatic ones that somehow came to the attention of outsiders.

Of these 301 new actions by trial courts, 22 found that the defendant was not guilty of a capital crime, 54 reimposed the death sentence and 247 imposed prison sentences.

Then there were appeals to the federal courts that also led to reversals in about two-fifths of the cases, but again we are not certain what happened in all the new trials.

The report also lumps together cases going back to 1973 with those decided more recently, even though the Supreme Court in 1976 created new procedural guarantees that automatically overturned many of the death-penalty decisions made between 1973 and 1976. It is not clear from the Columbia report what fraction of its reversals date back to these big changes in the rules.

In short, in the vast majority of death-penalty cases we have no idea whether the finding of error that led to a reversal was based on a legal technicality, a changing high-court standard about how a capital crime ought to be tried or a judgment that the defendants might be innocent.

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All we know for certain is that a lot of death-penalty cases are reviewed over a long period of time -- a fact that dramatically reduces the chances of innocent people having been executed.

More procedural reforms may be coming. Congress is now considering a bill that would require federal courts to order DNA testing, at government expense if the defendant is indigent, whenever DNA evidence from the crime is available. It also would require states seeking federal crime-control funds to certify that they have effective systems for providing competent legal services to indigent defendants in death-penalty cases.

But more might be done at the state level. States ought to have laws that create imprisonment without possibility of parole for first-degree murder convictions, and the judge in every such case should instruct the jurors in the sentencing phase that they can choose that or the death penalty. This allows jurors who may have some doubts about the strength of the evidence or some other plausible worry to hedge their bets if they are so inclined.

Not every state now has such laws. In Texas, the alternative to the death sentence is life in prison but without an absolute guarantee that the offender will actually spend his life there. Jurors rightly suspect that the perpetrator will find some way to get back on the street, and so they often vote for death.

The American Law Institute, a group of legal scholars that designs uniform state legal codes, has recommended that even when a jury decides that capital punishment is appropriate, the judge should be allowed to bar the death penalty if the evidence "does not foreclose all doubt respecting the defendant's guilt." The states have not adopted this rule, but perhaps they should, especially if this change could be coupled with procedures designed to reduce the seemingly endless number of post-trial appeals.

In the meantime, we ought to calm down. No one has shown that innocent people are being executed. The argument against the death penalty cannot, on the evidence we now have, rest on the likelihood of serious error. It can only rest, I think, on moral grounds. Is death an excessive penalty for any offense?

I think not, but those who disagree should make their views on the morality of execution clear and not rely on arguments about appeals, costs and the tiny chance that someday somebody innocent will be killed.

James Q. Wilson is the author of "Moral Judgment" and "The Moral Sense."

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Statement of Larry Yackle

Professor of Law
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United States Senate
Committee on the Judiciary

June 18, 2002

I am happy to be here at the Committee's invitation to testify regarding Title I of Senator Specter's bill, S. 2446. Of course, I speak only for myself, not for Boston University or any other institution or organization.

I claim no special expertise regarding all the proposals in all the bills before the Committee. Other members of this panel do have that expertise. I will say, however, that I have followed reforms in this area for years, and I have never before seen such an impressive list of measures that promise genuine results. I am pleased, then, to be here today to witness the Committee's consideration of the bills offered by the Chairman, by Senator Feinstein, and by Senator Feingold.

I applaud the objectives that Title I seeks to achieve. State and federal prisoners under sentence of death often wish to challenge their convictions or sentences by filing habeas corpus or §2255 motions. It only makes sense that their executions should be stayed while the courts adjudicate their claims. Under current law, it is possible that prisoners may be executed before the courts determine whether their convictions and sentences are valid. The primary purpose of Title I is to ensure that does not happen.

In addition, as I understand it, Title I hopes to eliminate or reduce the hectic litigation over stays of execution that now vexes the judicial system. By ensuring that stays are issued seasonably, Title I would make it unnecessary for lawyers and judges, including Supreme Court justices, to labor through the night in order to avert executions that would frustrate judicial consideration of prisoners' constitutional claims.

Under current law, stays are ultimately issued in most death penalty cases. But that scarcely means that current law is well and good as it stands. I would want to make three points.

First, if litigation of stays of execution almost always results in the issuance of stays, then the enormous time and effort expended by lawyers and judges is unjustified. Scarce resources are squandered to no purpose. Litigation over stays does not genuinely and efficiently sort cases in which prisoners have potentially valid claims from cases in which prisoners do not. If some prisoners fail to obtain stays, it is almost certainly because they are not represented by lawyers with the professionalism and skills required for effective capital representation. The doors to our courts should not be open or closed arbitrarily on the basis of the quality of representation that litigants receive.

Second, the stays of execution that current law produces are typically short-lived. In many instances, they serve only for a matter of days while some current judicial proceeding is under way. As a practical matter, then, they do not relieve the courts involved from distorting time pressure. They have the opposite effect. As courts consider constitutional claims, they must constantly keep their eyes on the clock and mark the time remaining under a stay for the completion of their work. That is not the way to achieve thorough, careful adjudication.

Third, the distortions created by time pressure, in turn, invite judicial errors that must be redressed still later in the process. Herein the sad irony of the limits that current law places on stays of execution. By requiring lawyers and judges to do work hastily, current law virtually guarantees that litigation in capital cases will be inefficient. Initially, time and resources are wasted on the question whether stays should issue. Next, the consideration of claims under short-term stays produces errors. Then, additional litigation is required to catch and correct those very errors. The goal should be to achieve sound adjudication of constitutional claims as soon and as efficiently as possible. By allowing stays of execution only intermittently, current law defeats that purpose.

More than a decade ago, a special ad hoc committee of the Judicial Conference of the United States, chaired by Justice Powell, recognized these very problems and proposed a plan for resolving them. The Powell Committee plan contemplated that stays of execution would be mandatory in all capital cases, thus requiring no frenzied litigation to determine whether they should issue, and that those stays would remain in place until all judicial proceedings regarding prisoners' claims were completed.

As it happened, the Powell Committee built that plan for stays of execution into a larger proposal addressing a host of other issues. The working idea for that larger proposal was that if states agreed to provide effective lawyers to represent prisoners in state postconviction proceedings, they should be rewarded with various adjustments in the statutes and rules governing federal habeas proceedings. Those adjustments, in turn, worked to the advantage of states responding to habeas corpus petitions. For example, in cases to which the larger scheme applied, prisoners would have to file their petition within six months.

The particular plan for stays of execution did not fit that description; it was not an adjustment in federal habeas law that would favor the states. Instead, it was simply a sensible reform offering benefits to all concerned. Nevertheless, in order to frame its larger proposal as a symmetrical whole, the Powell Committee made the plan for stays of execution optional along with the adjustments that would favor the states. In retrospect, I dare say that the Powell Committee thought it made no difference that the plan for stays of execution was optional. The Committee probably assumed that states would routinely do what was necessary to trigger the larger proposal in its entirety.

In 1996, the Congress incorporated a variant of the Powell Committee's general proposal into what is now Chapter 154 of Title 28 of the United States Code. The provisions in that chapter are optional. They are applicable only in cases arising from states that establish effective systems for ensuring that prisoners in capital cases are properly represented in state postconviction proceedings. That, of course, was the Powell Committee's idea. Chapter 154, like the Powell Committee proposal, includes a provision on stays of execution: 28 U.S.C. §2262. Six years later, only one state has done what is necessary to trigger the application of Chapter 154. Accordingly, §2262 has virtually no practical effect.

It may be that, as time goes on, more states will establish qualifying programs for counsel in state postconviction proceedings and thus make §2262 more generally applicable. Even if that happens, however, the problems with stays of execution will remain. Section 2262 does not make stays mandatory even in cases to which it applies. Stays *issue* automatically upon application, but they *expire* unless prisoners promptly makes a "substantial showing of the denial of a Federal right." The Powell Committee

plan for stays deliberately avoided fixing any such standard in order to eliminate the need for litigation over both the issuance and the maintenance of stays. By establishing the "substantial showing" standard (or any standard), §2262 invites the very kind of wasteful, distorting litigation over stays that the Powell Committee meant to avoid.

There are, then, serious problems that need attention. The mechanics of an appropriate reform measure can be debated. Title I of Senator Specter's bill provides an excellent start. I have some ideas for amendments that, in my view, would improve the product. I would be glad to discuss those ideas with the Committee, now or in the future. At this point, however, I want only to say again that the objectives of Title I are sound. I hope this Committee will approve a measure that finally attends to the many problems associated with stays of execution in death penalty cases.

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