The modern view of capital punishment
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THE MODERN VIEW OF CAPITAL PUNISHMENT

The Honorable Alex Kozinski vs. Professor Stephen Bright
Moderated by Professor Samuel Dash
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CHRIS LONGMORE: Good afternoon. My name is Chris Longmore. I'm the editor-in-chief of the *American Criminal Law Review*, and I'd like to welcome you all to our annual debate: The Modern View of Capital Punishment.

It's my honor today to introduce our moderator for today's debate, Professor Samuel Dash. One of the reasons why it's such a great honor is that without Professor Dash we would not be here today, because a little over twenty-five years ago Professor Dash was the one who brought the *American Criminal Law Review* to Georgetown University. So we're very thankful that he brought us here and gave us this opportunity today. He's been with us at the Law Center since 1965. He's had a long and distinguished career in the criminal law field, which will allow him to really be a great moderator today, because he knows the issues from all sides. He's been a trial attorney with the appellate section of the criminal division of the U.S. Department of Justice. He was Chief of the Appeals Division of the D.A.'s office in Philadelphia, and he was later D.A. of Philadelphia. He specialized in trial practice work for eight years at a couple of different private law firms. He's also served as the Executive Director of the Philadelphia Council for Community Advancement, which was a pioneer program in poverty. He also is probably most well-known for his time as Chief Counsel with the U.S. Senate Select Committee on Presidential Campaign Committees, also known as the Watergate Committee. And he has made a lifetime of contributions to the improvement of the law, including chairing the ABA Criminal Justice Section. He's been President of the National Association of Criminal Defense Lawyers, he's chaired a special committee on criminal justice in the free society, and he is a member of the ABA Standing Committee on Ethics and Professional Responsibility.

I would now like to ask all of you to give a warm welcome to Professor Samuel Dash.

PROFESSOR DASH: Thank you. Welcome to this wonderful, continuing debate series for the *American Criminal Law Review*. The debate we are going to hear today on the death penalty began many years ago, actually in Biblical times. Probably there was no more severe penal code in the history of the world than the capital offenses in the Old Testament. Almost every crime defined in the Old Testament carried with it the death penalty. And yet the Sanhedrin, which was the supreme court that

ultimately had to pass upon the capital death penalty, set aside certain procedural rules that made it almost impossible to ever convict somebody so many years ago. So much so that the Talmud had a saying that it is a cruel Sanhedrin that would execute one person in seventy years. And that has been the problem of the death penalty where the sovereign has been asking to execute a human being, and that debate is still here today. It's very alive in America. The death penalty is very much with us today and we are very, very fortunate to have our two speakers.

Judge Alex Kozinski—we are so fortunate to have him here from the Ninth Circuit, somebody who has actually had and has the awesome experience of having to pass on, to judge the validity of, an imposed death penalty. For the past twelve years he's been a judge, a circuit judge of the U.S. Court of Appeals in the Ninth Circuit. Before that, he was Chief Judge of the U.S. Claims Court. He was Special Counsel to the Merit System Protection Board. He was Assistant Counsel to the Office of Counsel to the President. And in his private practice he was a lawyer at Covington & Burling and in Forrey, Colbert, Singer and Gellis. He also served as law clerk to Chief Justice Burger and to Circuit Judge Anthony M. Kennedy, now Justice Kennedy. Judge Kozinski supports the death penalty and he has stirred up quite a controversy by his essay in *The New Yorker* entitled "Tinkering With Death."[1] He also is the only federal judge who owns up to the fact that he showed up on the Dating Game. He was bachelor number two, he was chosen, and he won a trip to the world-renowned Guadalajara Bowling Tournament. So, welcome, Judge Kozinski.

Our other participant is well-known now here at Georgetown. He's a visiting professor at Georgetown and teaches a seminar in capital punishment. He's eminently qualified to speak on the death penalty. Since 1982 he's been director of the Southern Center for Human Rights in Atlanta, representing persons facing the death penalty and prisoners challenging unconstitutional conditions in prisons and jails. He has argued a number of cases against the death penalty before the Supreme Court and also has presented positions and arguments at the United States House of Representatives and the United States Senate. And he has written a number of law review articles on the death penalty. But even before his fifteen years as director of the Southern Center for Human Rights, Professor Bright has devoted his professional career to public interest law and service. He was a trial attorney here in the District of Columbia in the Public Defender Service, one of the most outstanding public defender services in the country. He was a legal service attorney for the Appalachian Research and Defense Fund in Kentucky, and he directed clinical programs for the five law schools in the D.C. area. And for his outstanding public service he has been awarded the National Legal Aid and Defender Association Kutak-Dodds prize, the ACLU Roger Baldwin Medal of Liberty, and the ABA Litigation Section—John Minor Wisdom Professionalism and Public Service Award. We are delighted to have you with us, Professor Bright.

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1. Judge Alex Kozinski, *Tinkering With Death*, THE NEW YORKER, Feb. 10, 1997, at 48.

Now, the format that we are following is somewhat like the presidential debates. Judge Kozinski, would you please take the rostrum there and Professor Bright, will you take the rostrum there. I will pose questions to our wonderful participants, and I will begin with a question to Judge Kozinski.

Judge Kozinski, civilized societies have always found it necessary to provide some justification for various forms of punishment, such as rehabilitation, deterrence, and retribution. Which goal or goals do you say the death penalty serves?

JUDGE KOZINSKI: The death penalty probably serves some deterrent effects. It's always difficult to tell exactly what deterrent effect the criminal law has. Some of it is very difficult to measure. We don't know for a fact that any criminal law we have actually has a deterrent effect. We know that large numbers of crimes are committed despite vigorous law enforcement, but we also are confident that the more severe the punishment, the less crime we have. The most severe punishment being death. We have some confidence that results in some deterrence.

Retribution is a good one. I think there is a function for the society to perform in expressing moral outrage, and it is entirely appropriate for society to deem some acts so evil, to be so demeaning of human life, that we can say the perpetrator has forfeited his own life by committing them.

Also, there is specific deterrence. Whatever you may say about the death penalty, no one who has ever suffered it has come back and killed again. Every other form of punishment is not nearly as secure. People who get life sentences escape, regularly, and kill. They kill and maim and perform other unspeakable acts in prison. So, certainly from the point of view of your specific deterrence, the death penalty is 100% effective.

PROFESSOR DASH: Professor Bright?

PROFESSOR BRIGHT: I don't think in today's world that probably any of these justifications measure up. I think there are really two questions about the death penalty. One is where are we as a society today compared to where we were, as Professor Dash said, in Biblical times when the death penalty was provided for so many different crimes? Does there come a time when a society gets beyond some of the more primitive forms of punishment, such as killing people, cutting off their fingers, boiling them in oil, the stocks, some of those things?

Now, at one time there was a necessity argument. There weren't any prisons, there wasn't any place to put people, and therefore in a frontier society, the death penalty or the stocks or some of these other more primitive forms of punishment, were appropriate. That necessity is not there any more today. Today we have maximum security prisons, we can give people life imprisonment without any possibility of parole to protect the community. I'd have to say that I tend to

disagree with my distinguished colleague, and I do want to thank Judge Kozinski for being here because he's written so many thoughtful things on these issues and honors us by his presence here today, but I do disagree that the more severe the punishment, the more deterrence. You look at our society today—the United States has the highest rate of incarceration of any country in the world. We sentence an awful lot of people to death; we provide for over fifty death penalties in the federal system. Most of the states now have it. Recently we executed over fifty people. We are going to soon be executing in the hundreds, but I don't think that you can deny people education, opportunity, and even hope and think that you're going to deter them by scaring them into behaving themselves. I don't think history will support that.

Quite apart from that, I think a second issue and a second part of this question, even if in the abstract—and there's no question that 70% or more of the people in the United States in the abstract support the death penalty—the question remains though, would they support it if they saw the actual people. If they saw Pedro Medina,[2] the man who was executed last week in Florida, who came over in the Mariel Boat Lift, who was mentally ill, schizophrenic, and also brain damaged? When it comes to strapping that man down in the electric chair and putting 2,000 volts of electricity through his body, when you look at that, how do you feel about the death penalty there?

The American Bar Association pointed out recently a number of problems with the death penalty as it's practiced in the United States today. One of those being the quality of counsel; that people are sentenced to death not for committing the worst crime, but because they have the misfortune to be assigned the worst court-appointed lawyer by the judge who is presiding over their case. That race still plays a major role in who's sentenced to death in the United States today. That we're executing mentally ill people and mentally retarded people and children. And that just recently, in the Anti-Terrorism Act, Congress did away with one of the most critical safety nets, and that is federal habeas corpus protection. That now there is not the opportunity for many of those who are sentenced to death to have their cases reviewed at some point by a life tenure federal judge; that many of the legal decisions now are being made by judges who literally have to look over their shoulder at the next election, and if they enforce the Constitution, they may very well be signing their own political death warrants.

Last Monday, a week ago today, we had Justice Penny White here, who spent eighteen months on the Tennessee Supreme Court. One death penalty case came before that court. All five members of the court agreed: she simply concurred in the disposition of the case, and yet she was voted off the court based on that one single decision. And the Governor of Tennessee said after that, "The other judges on the court, keep a look over their shoulder." I certainly hope so, and they're all on the

2. *See* Medina v. State, 690 So.2d 1241, 1250 (Fla. 1997) (Anstead, J. concurring and dissenting).

ballot two years from now.[3] What does that say about the rule of law in the state of Tennessee?

And the last thing I would just say is that I think the death penalty brings out sort of a dark side of the human spirit, and I suppose the American spirit. I was troubled, as I know many of you were, when the Attorney General of Florida, Robert Butterworth, said after the botched execution of Pedro Medina last week that it was actually good that Florida's electric chair malfunctions because a malfunctioning electric chair would have a deterrent effect on people committing crimes.

PROFESSOR DASH: I'm going to have to put a period there, Professor Bright, and ask you the next question. As you just said, most Americans appear to favor the death penalty today as an appropriate and valid punishment in the case of heinous cold-blooded murder or a series of murders. If in such a case the state legislature has authorized the death penalty, and the accused has been fairly tried and fully and effectively represented by counsel, is there any valid legal argument against the death penalty being imposed and carried out?

PROFESSOR BRIGHT: Well, I think there is, Professor Dash, and I think the reason is the very first one that I said, and it's one that was recognized recently by the Constitutional Court of South Africa, has been recognized by so many other courts throughout the world, or many countries throughout the world, most industrialized nations, which, as I said a moment ago, I think it decided that in today's world, a civilized society can put this punishment behind them for a variety of reasons. One is that, I think, beyond just the practical ones. And secondly, the fact that I think for the United States it's very hard to lecture China or any other country on human rights violation when we lead the world in the execution of juveniles.

PROFESSOR DASH: Professor, the question is directed, though, to a valid legal argument. I think you've given in your first answer many of the reasons against the death penalty, but in a situation where there's been a fair trial and full and effective representation by counsel, is there a valid legal argument in the United States against the death penalty?

PROFESSOR BRIGHT: Yes, and it goes—I think this is a legal argument. I think the legal argument is: is the punishment necessary? Is it cruel and unusual? The Supreme Court once said that. It was in 1972. And as you know, since then the Court has upheld the death penalty. But I think the Court had it right the first time, Professor Dash. I think that they were right because it is cruel, unnecessarily cruel

3. For further description of the removal of Justice White from office, *see* Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges for Unpopular Decisions?* 72 N.Y.U. L. REV. 308, 310, 313-15 (1997).

in today's time, because it's unusual. It's no different today than it was when Justice Potter Stewart said in 1972 that being sentenced to death was like being struck by lightning. Whether you get the death penalty doesn't depend on the crime you commit, it depends on what lawyer is appointed to defend you.

You know, we talk about the Dream Team. The Dream Team for a poor person accused of a crime in Houston, Texas, may be a lawyer who's literally dreaming during the trial. George McFarland, who was sentenced to death at a trial where his lawyer was asleep during major parts of the trial.[4] Calvin Burdine's lawyer slept during his trial,[5] Carl Johnson's,[6] and all of those were upheld by the courts. Carl Johnson has been put to death even though that evidence was there.

Race. That was one of the reasons Justice Douglas said in 1972 that these statutes are pregnant with the possibility of discrimination. Justice Marshall looked at the history of race discrimination and the infliction of the death penalty and said that under the Cruel and Unusual Punishment Clause that the death penalty was unusual because of the race discrimination. That race discrimination is still going on today. If you look at who's being sentenced, who's being killed in the United States today, half the victims of murders in the United States are black people. If you go down to the Death Belt states, the states that have carried out most of the executions, 65% of the people who were victims of homicides are African-American in Alabama, Georgia, and Mississippi. But if you look at Death Row all over this country, including those states, you'll find that 80% of the people there under death sentence are there for crimes against white people. And part of the reason for that is because our criminal justice system has been the part of our society that's been least affected by the civil rights movement.

And finally, despite efforts to deal with issues like mental illness, we are still seeing people who are mentally ill and mentally retarded, people who don't have the same degree of culpability as the rest of us, who are being sentenced to death in this country. For all of those reasons, I think the death penalty legally is invalid, and one of the tragedies of this punishment has been that we have sacrificed fairness and due process in our goal of carrying out death sentences. Courts are constantly looking the other way to allow an execution to be carried out simply because we want to get on with it, rather than dealing with some of the Constitutional violations that have taken place.

PROFESSOR DASH: Judge Kozinski, assuming—and it's the same question—assuming a fair trial and fully effective legal representation, not a dreaming lawyer, is there any legal invalidity to the death penalty?

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4. McFarland v. State, 928 S.W.2d 482 (Tex. Crim. App. 1996), *cert denied*, 117 S.Ct. 966 (1997).

5. Ex Parte Burdine, 901 S.W.2d 456, 457 (Tex. Crim. App. 1995) (Maloney, J. dissenting), *cert. denied*, 515 U.S. 1107 (1995).

6. See David R. Dow, *The State, the Death Penalty, and Carl Johnson*, 37 B.C. L. REV. 691, 694-95 (1996) (describing defense lawyer's falling asleep during murder trial).

JUDGE KOZINSKI: Professor Dash, I heard the question and I, unlike Professor Bright, am anxious to answer it. And the answer, of course, is no. I do want to reciprocate the compliment Professor Bright paid me. We do enjoy a great deal of mutual respect, at least certainly from my side and I'm glad to hear it's true from his side. He is a tireless advocate on behalf of those who need advocacy the most, and it is people like him who make it possible to reach anything like fair justice in this country. So I think his work is really to be commended.

But, when we get to the question that you've asked, Professor Dash, the answer is obviously not. The Supreme Court has told us that the Eighth Amendment does not prohibit the death penalty, and that's not surprising after all. We've had the death penalty in this country since the early days of the Republic, except for the time when the Supreme Court stopped all death cases in 1972 in *Furman*,[7] and ordered or invalidated all state sentences and gave guidance for how new death penalty statutes are to be structured. And thirty-eight states have now gone back and re-instituted the death penalty.

We've also had several references in the Constitution to the death penalty. The Constitution talks about taking of life, liberty and our property. Obviously contemplating that life can be taken by the state. There's also, I believe, some reference to standing for a capital crime. So, obviously our founding fathers did contemplate the death penalty as being constitutional. So it's not at all surprising that the Supreme Court held it was, given the right set of safeguards and procedures.

Now, Professor Bright's argument is that well, if you don't accept Professor Dash's assumption, assuming you don't have a fairly imposed death penalty, assume the death penalty lawyer was asleep, assume a death penalty where there's a racist judge or a racist jury or a racist prosecutor, assume this, assume that. But, you know, if you assume any of those things, it seems to me we ought not to put anybody in jail even for two days. There's nothing special about the death penalty. We ought not to have any criminal punishment, indeed any judicial process in this country that is not done to certain Constitutional standards, standards of due process, standards of representation. So I'm not here to defend cases where there is malpractice on the part of the lawyer. I'm not here to defend cases where there is racism on the part of the prosecutor or the judge or the jury. Those cases are easy. Those cases don't bring us a challenge. A challenge is the one that Professor Dash has presented. Assume you have a fair trial, and, you know, let's be straight about this, if we don't think we can have a fair trial in this country, then we ought to open our prisons and let the million and a half people that are in prison now all out, because none of them deserves to be there. If we don't think we can provide a fair trial, than we have no business having a criminal law. Assume you have a process

7. Furman v. Georgia, 408 U.S. 238 (1972).

that's fair. The answer is obvious. It's a punishment authorized by the Constitution. It's a punishment that thirty-eight state legislatures have approved. It is lawful.

PROFESSOR DASH: Judge Kozinski, given that our criminal justice system is a human one which makes mistakes, and innocent persons are sometimes convicted, how can the death penalty, with all its finality, be justified?

JUDGE KOZINSKI: Well, there are arguments made about the death penalty being different from other punishments, but, you know, it's really not that different. One argument is made as well, you can't correct errors once you execute somebody. But the truth of the matter is, all judicial processes are fallible. As I said before, if you don't think you can have a judicial process that can fairly mete out punishment, we ought not to have a criminal law. One of the risks of a criminal law, just as one of the risks of every other dangerous instrumentality, is that you will make a mistake. Now there's something special about the death penalty, there's something special about executing somebody and then finding out later, gee, we punished the wrong man. Well, you know, you can't give somebody back thirty years in prison. You can't give somebody back twenty years in prison. Unjust punishments of any kind, it seems to me, are to that extent irredeemable, and the fact that you find out fifteen or twenty years later that somebody is innocent, doesn't give them back the time they have spent being punished. Say, well, but at least you have a chance, at least, you know, you might be able to find out there is—that somebody is innocent. The truth is we seldom find out about these things at all, and when we do find out, it is usually in the next—in the few years following their initial conviction. Easily within the time that it takes to execute somebody in this country. I have been a circuit judge now for—did you say twelve years?

PROFESSOR DASH: Yes, twelve years.

JUDGE KOZINSKI: I don't think so. It was twelve months. I think you made a mistake. (Laughter.)

PROFESSOR DASH: Nineteen eighty-five was the year I have as a—1995 was the year?

JUDGE KOZINSKI: Yes, I know. It just doesn't seem that way, but in that time I have had perhaps 3,000 criminal cases. I don't remember—putting death cases aside, I don't remember a single one where somebody came back later and said, you know, twenty years later somebody was proven innocent. It just doesn't happen. In fact, if you were a truly innocent defendant, the best thing you can do for them is to charge them with death, because then they get twice the lawyers, at least in California; you get an investigator, you get psychiatrists, you get a whole panoply of rights of

appeal and review that you don't get in other cases. And the chances that you are going to actually find somebody who is innocent, find out the evidence of innocence, is much greater in death cases than any other.

PROFESSOR DASH: Professor Bright? How can the death penalty be justified because it's so final?

PROFESSOR BRIGHT: I think, Professor Dash, we've fleshed out some strong disagreements here between Judge Kozinski and I. One of them is the notion that there's nothing special about the death penalty. There's something very special about putting another human being to death, very tragic about it. I've known people who have been wrongly convicted. You may not see those cases, Judge, up at the Court of Appeals, the Ninth Circuit, they may not get there; and one of the reasons is because, of course, as you know, innocence is generally not a cognizable claim. But I've seen a lot of innocent people who've been sentenced to all kinds of crimes, including death. We've had sixty-three people released from death row, where everybody agreed they were innocent, where the DNA evidence, or the evidence in some other way, was conclusive enough that people were released. In fact, Justice Stevens said before the American Bar Association last August when he was there, that a disturbing number of people [have been found innocent].[8] This is just in the last twenty years. I'm not talking about all the way back; this is under our "new, modern, improved" death penalty that was upheld in 1976. Sixty-three innocent people. And the amazing thing is how many of those people were freed not by the court system, but by the sheer luck that somebody got interested in their case. The last group of innocent people was released from Illinois because a journalism professor at Northwestern University and his class proved their innocence.[9] That's how they got out; it didn't have anything to do with the legal system.

60 Minutes, and Clarence Earl Brantley and Walter McMillan.[10] They weren't released because of anything going on in the courts; they were released because Ed Bradley got them off. Randall Dale Adams, freed because of a movie called *The Thin Blue Line*.[11] There's a man in Missouri named Lloyd Schlup who was freed only because there was—at least got a new hearing, only because the Supreme Court said that the videotape that showed that he was somewhere else in the prison

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8. Justice John Paul Stevens, Opening Assembly Address, American Bar Association Annual Meeting, Aug. 3, 1996, at 13 ("[R]ecent development of reliable scientific evidentiary methods has made it possible to establish conclusively that a disturbing number of persons who had been sentenced to death were actually innocent").

9. Don Terry, *3 Innocent of Killing Go Free, Thanks to Students and DNA*, N.Y. TIMES, June 15, 1996, at 1.

10. *See* Nick Davies, WHITE LIES: RAPE, MURDER, AND JUSTICE TEXAS STYLE 307-09 (1991) (describing *60 Minutes* report on case of Clarence Earl Brantley); Pete Earley, CIRCUMSTANTIAL EVIDENCE: DEATH, LIFE AND JUSTICE IN A SOUTHERN TOWN 335-41, 347, 389-91 (1995) (describing *60 Minutes* report and the eventual release of McMillan).

11. See RANDALL ADAMS, ADAMS V. TEXAS, 242-64, 280-333 (1991).

at the time the murder took place, at least met a standard of showing that he was probably innocent of the crime.[12] The case went back and the United States District Court said, after reviewing the videotape, this man is probably innocent.[13] What's interesting is that Congress, last April, changed the statute to now say that a person in Lloyd Schlup's position wouldn't get that evidentiary hearing. So there are going to be innocent people executed if we keep up the route we're going.

The other reason that I have probably a different perspective on this is because my comments about the lawyers is not based upon assumptions, let me make that crystal clear. If you read my article in 103 *Yale Law Journal*,[14] you'll see a footnote to every one of those cases. And you'll see that every sleeping lawyer case is documented. If you want to read about Carl Johnson's case, because it's not reported by either the Texas Court of Criminal Appeals or by the Fifth Circuit—and I don't blame them; I'd be ashamed to publish an opinion saying that I upheld the death sentence for a man whose lawyer was sleeping during his trial. But if you get the most recent issue of the *Boston College Law Review*,[15] you can read about how Joe Cannon slept during that death penalty trial and how both the state and federal courts upheld it. That's not an assumption, that's reality. That's what's going on in our courts today. Poor people are being represented by lawyers that are often paid as little as twenty dollars an hour, $1,000 a case. Lawyers that Judge Kozinski and most people wouldn't have represent them on a minor traffic accident. That's who's representing people facing the death penalty. I'm not basing this on assumptions, I'm basing it on the fact that the last time I was examining a lawyer who defended a man sentenced to death in Georgia in a two-day trial, a man who had no prior convictions, a man who was certainly not among the worst of the worst, that when we got to talking about *Gregg v. Georgia*,[16] that lawyer had never heard of *Gregg v. Georgia*, and yet he was defending a capital case in Georgia. And when I asked him about *Furman v. Georgia*,[17] that lawyer, who's been appointed over and over again—this wasn't just one case, this lawyer had been appointed over and over again to represent poor people charged with crimes—had never heard of *Furman v. Georgia*, had never heard of *Lockett v. Ohio*.[18] And finally, when I said, "Mr. Brown, can you name any case from any court," he couldn't name a single one. I thought for sure he'd say *Miranda v. Arizona*,[19] you know, surely come up with that one. (Laughter).

That's the quality of legal representation that poor people are getting in these

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12. Schlup v. Delo, 513 U.S. 298 (1995).
13. Schlup v. Bowersox, No. 4:92CV433-JCH, 1996 U.S. Dist. LEXIS 8887 (E.D.Mo. May 12, 1996).
14. Stephen P. Bright, *Counsel for the Poor: The Death Sentence not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).
15. David R. Dow, *The State, The Death Penalty, and Carl Johnson*, 37 B.C. L. REV. 691 (1996).
16. 428 U.S. 153 (1976).
17. 408 U.S. 238 (1972).
18. 438 U.S. 586 (1978).
19. 384 U.S. 436 (1966).

cases, and that's why innocent people do get sentenced to death. That's why people that should not be sentenced to death are. Like Horace Dunkins, who was mentally retarded. A juror wrote the governor and said we would have never sentenced him to death if we had known he was mentally retarded.[20] But the lawyer never bothered to get the evidence, so the jury never heard that he had an IQ of fifty-six. So, for that reason, the jury couldn't possibly make a decision as the conscience of the community with regard to whether he should live or die. Those are not assumptions; that's the reality of what's going on with the death penalty in the states that are sentencing most people to death and are carrying out most of the executions.

PROFESSOR DASH: Professor Bright, listening to what both Judge Kozinski and you have said with regard to this past question, I take it there's no dispute between you that where there has been ineffective, poor representation of counsel, incompetent counsel, the validity of a death penalty would be completely wrong, it wouldn't stand up. There's no dispute between the two of you on this?

JUDGE KOZINSKI: Oh, I'm sure there's a dispute.

PROFESSOR BRIGHT: There's a dispute, yes. (Laughter.)

PROFESSOR DASH: No, I'm not asking you now to judge whether a particular lawyer was adequate or competent. Assume both are—

JUDGE KOZINSKI: Let me phrase—

PROFESSOR DASH: Let me finish, okay? Assume you would conclude, as a judge, that the representation was inadequate and poor and incompetent, would you then be willing to hold a death penalty resulting in that case to be valid?

JUDGE KOZINSKI: You forgot to use the word "harmful error."

PROFESSOR DASH: Well, okay.

JUDGE KOZINSKI: No, no, I'm not—this is not a detail. Error that can be—it has to be error affecting—

PROFESSOR DASH: Can I leave that one thing as in dispute? The harmful error one? Because I'm directing the question initially to Professor Bright—

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20. Peter Applebome, *Two Electric Jolts in Alabama Execution*, N.Y.TIMES, July 15, 1989, at A6.

JUDGE KOZINSKI: Oh, yes. I'm sorry. Yes.

PROFESSOR DASH: No, you'll be—please, remember what you had just said.

JUDGE KOZINSKI: Okay. (Laughter.)

PROFESSOR DASH: Assuming that on generally the issue, and I've listened to Judge Kozinski who said even on any criminal case somebody shouldn't be convicted if he doesn't have adequate representation—Therefore, what I'd like each of you to direct, and you first Professor Bright, is what are the standards, or, what should be the standards, for effective, adequate representation by counsel in a death penalty case? Should it be different than in any other criminal conviction?

PROFESSOR BRIGHT: Well, it gets back to the question of whether death is different or not, and of course the Supreme Court has said no in the case of *Strickland v. Washington*.[21] I disagree. I think Justice Marshall in the lone dissent in that case had it right when he said that this would stunt the growth of the Sixth Amendment. The fact of the matter is that the standard of representation is—for people that don't have a good understanding of it, I explain it to them by using—in Georgia we use the mirror test. We just simply put a mirror under the lawyer's nose, and if it clouds up, that's effective assistance of counsel. That's the easiest way I can describe the *Strickland* test to you. And let me tell you why I say that, because I just got an order the other day in this case with a lawyer who didn't know *Miranda*, didn't know *Dred Scott*, excuse me, didn't know *Furman*, didn't know *Gregg v. Georgia*, no problem. Not even under the performance prong. *Strickland* has two prongs to it, that the representation has to be unreasonable; and secondly, that, Judge Kozinski's point, that there has to be an error which has a substantial probability on the outcome. And basically what has happened is that standard has been so malleable that these cases pass the test.

Another case I can think of is a battered woman, Judy Haney, sentenced to death at a trial where her lawyer comes to court so drunk that the judge has to stop the trial for a day, send the jury out, send the lawyer to the county jail, and then produces the next morning both lawyer and client. This is not an assumption, this really happened. She's still on death row in Alabama right now. That passes muster. There's a case out of California—which I guess will come before the Ninth Circuit soon if it hasn't already—in which the lawyer is stopped on his way to court in the morning, and his breath, his blood alcohol is so high that he's arrested for driving under the influence of alcohol. And yet the California Supreme Court, having recently been cleansed of three of its justices, held that even though the lawyer was too intoxicated to operate a motor vehicle on the streets of California, he was not incompetent to try a death penalty case.

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21. 466 U.S. 668 (1984).

That's the standard of legal representation, and it's a standard which—and it's appropriate to talk about this here because it's a standard which law students and members of the legal profession should be ashamed of. It's a standard we wouldn't tolerate with doctors or with any other profession, to have that kind of representation, and it does make a difference. It's very hard for judges who don't go to the trials and see these people live to make an assessment of how harmful [the lawyer's performance was]. Take Judy Haney's case, for example.[22] The reason—it wasn't just that the lawyer was drunk—he didn't get the medical records that verified the fact that she had broken bones and that her daughter had had broken bones at the hands of this abusive husband. Now, if the jury had heard that evidence, they may very well might not have given this battered woman the death penalty. But again, like in Horace Dunkin's case, the jury didn't have the information. And I might say Mr. Dunkin's case is not a hypothetical case either. He was put to death as a result of what happened in his case.

The other place where this standard is so malleable and where it fails so miserably to correct injustice is with our failure to require lawyers that even know what the rules are. Most jurisdictions in this country still don't have public defender systems comparable to what we have on the prosecution side. So, your court-appointed lawyers often don't know the law. John Smith was the first person put to death in Georgia.[23] Again, it's not a hypothetical case. John Eldon Smith, he and his co-defendant both sentenced to death by unconstitutionally composed juries. Co-defendant gets a new trial because she challenged the unconstitutionally composed juries, and, at a trial that later was held that fairly represented the community, life sentence imposed.[24] John Smith goes to the same federal court, the United States Court of Appeals for the Eleventh Circuit, that gave relief in the co-defendant's case, says I'm sentenced to death in the same jurisdiction, the same unconstitutional jury pool, patently unconstitutional. "Oh yeah. But your lawyer didn't raise it pre-trial. You waived the issue." And so, he's put to death.[25] And if the day the judge had been appointing the lawyers there in Macon, Georgia, if he had just switched the two lawyers and John Smith had gotten the other lawyer and the co-defendant had gotten John Smith's lawyer, the co-defendant would be dead today and John Eldon Smith would be alive today.

That's how we're deciding whether or not people live or die. It's not a principled basis for it. In the Supreme Court, unfortunately at the same time that Judge Kozinski's boss, Warren Burger—not to speak ill of him, but I had noticed that at the same time that Justice Burger was going around, Chief Justice Burger was going around the country giving speeches, which I agreed with, about how

22. State v. Haney, 603 So.2d 368 (Ala. Crim. App. 1991).

23. Smith v. Zant, 301 S.E.2d 32 (Ga. 1983).

24. Machetti v. Linahan, 679 F.2d 236, 241 (11th Cir. 1982).

25. Smith v. Kemp, 715 F.2d 1459, 1476 (11th Cir. 1983) (Hatchett, J., concurring in part and dissenting in part).

incompetent the trial bar was and what poor representation was being provided people in trials in this country[26]—at the same time those speeches were being made, the court handed down *Strickland v. Washington*, a case that basically rendered meaningless the Sixth Amendment right to counsel in capital cases and other kinds of criminal cases as well.

PROFESSOR DASH: Judge Kozinski, now, your turn.

JUDGE KOZINSKI: Well, Professor Bright seizes on a handful of examples, and you can see them all in his *Santa Clara Law Review* article last year.[27]

PROFESSOR BRIGHT: Actually, the Yale one is better. (Laughter.) It's got more examples.

JUDGE KOZINSKI: Well, I cited the Yale one as you know, with approval, in my own law review article on the subject.[28] (Laughter.)

PROFESSOR BRIGHT: That was the highlight—that footnote. (Laughter.)

JUDGE KOZINSKI: And what can one say about these things? I think Professor Bright is right. I think we all as a profession ought to be embarrassed by the examples he gives. But you have to remember, since *Furman* came down, since the new death penalty statutes have been enacted, there have been close to 6,000 death penalties imposed—5,500, something of that order. And there are mistakes made, there are incompetencies of counsel, there are errors committed of a variety of sorts; and I'm not going to be here to defend every single judgment. I'm certainly not here to defend the worst examples of the system.

PROFESSOR DASH: But would you address what standard you would impose on effective assistance?

JUDGE KOZINSKI: I think that the *Strickland* standard is adequate, but of course it has to be applied in the context of death cases. Death cases are inherently more complex. They involve not simply the penalty phase, but they also involve the sentencing phase, they involve a variety of procedural and substantive questions

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26. *See, e.g.*, Warren E. Burger, *Remarks on Trial Advocacy: A Proposition*, 7 WASHBURN L.J. 15 (1967); Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice*, 42 FORDHAM L. REV. 227 (1973).

27. Stephen P. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433 (1995).

28. Judge Alex Kozinski and Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1 (1995).

that don't arise in the context of other criminal cases. And I clearly am of the view that only people who are competent to handle these cases and who have experience and who know what they're doing ought to handle these cases. But I feel the same way about all serious criminal cases. I don't think that there's anything special about death cases, except for the fact that the Supreme Court has overlaid a large body of law in death cases that doesn't apply anywhere else. So, clearly, just as if you were in surgery you wouldn't want to have your gall bladder operated on by somebody who knows nothing about gall bladders, you would expect that somebody handling a death penalty trial would know a great deal about that area. If properly applied, applied with an eye towards the kind of case and the kind of issues, I think the *Strickland* standard does do the job. Now what can one say about the case of the lawyer that falls asleep? You know, it sounds terrible. It's, you know, I'm not familiar with the case, I read about it in Professor Bright's article, but I haven't gone back and looked it up. I certainly wasn't involved in the case, but I can certainly imagine a situation where the lawyer does in fact fall asleep in the middle of a long trial and it turns out that error is caught by the judge, that there is a—precautions are taken to make sure that whatever problem there was is corrected, that if he missed anything he reread the transcript, and so on. And whatever prejudice flows from the falling asleep is cured. Now in that circumstance I don't think we simply ought to throw out the work of the jury and say well, because a lawyer fell asleep, that something terrible that we know for sure didn't have an affect on the verdict, we're as sure as we can ever be about things, that we ought to throw away the conviction.

Now let's talk a little bit about judicial review, which Professor Bright has mentioned several times as being one of the weak points of our system. Now, he's mentioned cases where people have been freed as innocent. In fact, not all the cases he cites, not all the sixty-three cases he cites involve people who have been declared innocent. A number of them—and I'm familiar with the list; there was a House Report that included most of that list in 1994[29]—and some of the cases are simply cases where there was found to be insufficient evidence and then there was no retrial, or there was a retrial and the defendant was found not guilty or guilty of a lesser offense. Now that's a far claim from saying the defendant was innocent. These things happen in the criminal law. Somebody gets convicted, and there's an error committed, and there's a reversal. That does not prove necessarily that a person is innocent. What it does prove is that our system is pretty good at catching mistakes, that even though we have some egregious examples of trial error, they tend to get caught somewhere in the elaborate process we have.

Well, Professor Bright hasn't come up with a single example of somebody who actually got executed who later was shown to be, in fact, innocent. Not one

29. STAFF OF HOUSE OF REPRESENTATIVES SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE COMM. OF THE JUDICIARY, 103D CONG., RACIAL DISPARITIES IN FEDERAL DEATH PENALTY PROSECUTIONS 1988-1994 (Comm. Print 1994).

example. Certainly not since *Furman.* There's a debate in the pre-*Furman* body of cases, which I can take up if Professor Bright wants to engage me there. But, I think we're talking post-*Furman* just for the purposes of the debate, and we have had 6,000 cases where the death penalty has been imposed, and it seems to me even if we assume the sixty cases that he offers as people having been convicted who are innocent, that's one percent. That's not a bad batting average to find that you actually have a wrongful conviction, that then the criminal process, the appeal process, finds the errors and corrects them.

PROFESSOR DASH: Judge Kozinski, do you agree that prosecutors and congressional leaders are right when they complain that prisoners on death row have too many procedural opportunities to challenge their convictions and thereby can needlessly frustrate or delay the imposition of the death penalty, and that what is needed are restrictions on habeas corpus and other collateral attacks?

JUDGE KOZINSKI: Well, I have to be a little careful where I step here, because Congress did in fact pass a law which I am in the midst of interpreting, so I have to be somewhat general in my comments, but I will try to do my best. I am definitely of the view that we ought to be very careful in imposing serious criminal punishments of all sorts and the most careful with the death penalty, because I do agree that the death penalty is the most serious punishment we have. I have never expressed the view, and I'm not of the view now, that we ought to have less careful scrutiny, and I do not speak to what Congress has done, and I don't want to express any view on that point. I think it is a good thing that we are very careful in carrying out executions.

Now, here is the problem: I think there is a perception out there, and it's a perception shared by some of my colleagues, a perception I sometimes get, that the process was manipulated by death penalty advocates, lawyers for death penalty defendants. And well they should, if their clients' lives are at stake, so I'm not pointing any fingers or saying they're doing anything improper or immoral or unethical. On the contrary, they're doing the thing they must do to keep their client alive, and that is to string out the process, to bring procedure after procedure and appeal after appeal. And Professor Bright has used some examples; let me use some examples. Robert Alton Harris—the case is now moot so I can talk about it.[30] The *Harris* case had been in the California courts and in the federal courts for the better part of twenty years. At the last minute, short of his execution, he brought a claim that, lo and behold, the gas chamber is cruel and unusual. It's an unconstitutional way to execute him.

Now this was in 1992. The claim that methods of execution are unconstitutional—

30. Vasquez v. Harris, 503 U.S. 1000 (1992) (vacating stay of execution granted by the Ninth Circuit). For a procedural history of the case and a ruling on the merits, *see* Fierro v. Gomez, 77 F.3d 301 (9th Cir. 1996).

gas, electric chair, hanging, I believe lethal injection as well—had all been challenged in the early 80's in cases coming out of, I believe, the Fifth Circuit, or maybe the Eleventh Circuit, or both, and there were dissents from Justice Brennan and Justice Marshall arguing that each of these methods of punishment was cruel and unusual. So the issue was known, it was out there, it was waiting. Harris knew he was facing an execution, and he'd faced four or five execution days before. It's only when he ran out of every other claim that he decided, "Ah, today, with an execution pending, a few days away, I'm going to raise the claim that that's cruel and unusual." And we smelled manipulation, and the Supreme Court smelled manipulation. This is a claim that could have been raised earlier, and eventually Harris was executed. And eventually the Ninth Circuit held that this was an unconstitutional method of punishment. Had Harris raised the claim early, he might well have had the benefit of it.

Now the consequence of this, the consequence of this perception that there's manipulation going on, there's stringing going on, stringing out going on, there's an impatience on the part of the public, an impatience on the part of Congress and state legislatures with the process. And there's a feeling that we're not really looking at guilt or innocence, we're not really trying to separate those who deserve the death penalty and those who don't. What we're really trying to do is use the judicial process as a means of avoiding or postponing the inevitable, that game-playing is going on. And that is not good. It's not good for the judicial process. It's certainly not good for people on death row. It's not good for us as a society. Because then what we have are death cases that talk about things that have nothing to do with guilt or innocence. Have nothing to do with the things that really ought to matter—competence, competence of the defendant, questions about the substance of the offense. What they're talking about is off in Never Never Land, talking about procedural bars, and whether something was raised in the third state habeas and the proper timing and so on—things that nobody can understand, and ultimately that nobody cares about, and getting to the questions that should trouble us, the questions that we should worry about, and that is: is this person deserving of execution? Those things get lost in a mist of procedural fog.

PROFESSOR DASH: Professor?

PROFESSOR BRIGHT: Well, I think procedure is important. I think one of the reasons we go to law school is to learn how important due process is, that the Bill of Rights, which, you know, so often today in our political debate is sort of denigrated as a collection of technicalities, but it really is what separates a trial from a lynching in terms of being sure that we do it right. Being sure that we don't let the passions and prejudice of the moment play too great a role. We can't eliminate them from playing a role altogether—the law is not that good—but we try to minimize it.

I've got two or three comments I'd make, both about the question and Judge

Kozinski's answer. First of all, we've got to worry about what happens during these delays. The arguing over procedural questions. Some of the people in my class and I were down at the Supreme Court just a couple of weeks ago to watch Joseph O'Dell's case being argued.[31] No question in that case that there was a clear-cut Constitutional violation. The jury was not advised. The prosecutor intimated that he was eligible for parole, and if they didn't give him the death penalty, he'd be back out on the street. No question that that's a Constitutional violation. We've got a case out of South Carolina right on point.[32] The whole argument was spent on the procedural issue. The whole argument was spent on whether the rule of law would apply retroactively to his case or not.

My case that was up there, Tony Amadeo's case, no question that the prosecutor had told the jury commissioners to under-represent black people in the jury pool.[33] No question that they had rigged the juries in this case. But we spent four years, and it was the State that was trying to manipulate the system, because they didn't want to reach the merits of that issue. If they reached the merits, we won, because for a prosecutor to rig the juries on the basis of race obviously violates the Constitution. It was a secret memorandum; it wasn't discovered until a year after the trial. And that's the other point that I think is so important: people think so much about all this going to guilt or innocence, and you hear the debates so much about guilt or innocence. Tony Amadeo, the young man in that case, was sentenced to death when he was eighteen years old, in a trial that took two days. The case was later set aside because the jury rigging—the Supreme Court, when it finally got past all the procedural questions, concluded nine to nothing that there was a Constitutional violation. Tony ultimately got a life sentence, and as I was telling some of the students last Friday, just a year ago graduated *summa cum laude* from Mercer University. Now, the fact that this young man was found to be so beyond redemption at age eighteen that he ought to be eliminated from the human community, and that at age thirty-five he graduated *summa cum laude* from Mercer University, at least suggests to me that the procedural problems and the denial of a fair trial was not just a technicality. It went to whether or not we are indeed sentencing the right people to death.

The other thing that concerns me about the delays is what happens during the delays. There were three African-American men that were tried by an all-white jury in Utah for a crime against three white people, and during the trial the jurors got this note. A note that said "hang the niggers" and has a picture of a person hanging from a scaffold. And despite the fact that those cases were reviewed for a number of years, would you believe it that no state or federal court ever held an evidentiary hearing to find out who wrote this note, how it got to the jurors, what the jurors did with the note, what they said about it, what impact it had on them,

31. O'Dell v. Netherland, 117 S.Ct. 1969 (1997).
32. Simmons v. South Carolina, 512 U.S. 154 (1994).
33. Amadeo v. Zant, 486 U.S. 214 (1988).

and that both of those, the two men sentenced to death, were both executed without any of those questions being answered?[34]

So, we need to be concerned about delay of these cases, but we need to be more concerned about achieving justice. Just recently in Georgia they had a habeas hearing in state court. One of the things Congress did was not only change the law, but it took away lawyers. It defunded the programs that had provided lawyers in post-conviction representation. The Supreme Court has said there is no right to counsel in those proceedings.[35] And a man with an IQ of less than eighty, Exzavious Gibson, has a hearing in which he's trying to represent himself in a death penalty case.[36] Can you imagine that? I mean, here's a man that the judge says, "Mr. Gibson, got any evidence to put on?" He said, "I don't know how to put on any evidence. I'm not a lawyer. I want a lawyer." The judge said, "Well, you're not entitled to a lawyer." When the state puts on its evidence, they're represented by an expert, an attorney general who specializes in representing the state in death penalty habeas corpus cases. And after the state put on its witness, the judge would say to Mr. Gibson "do you want to cross-examine?" And Mr. Gibson, "I don't know how to cross-examine. I need a lawyer, Judge." And the judge says, "You're not entitled to a lawyer. If you want to cross-examine, go ahead." And then finally the judge says, "Mr. Gibson, do you want to put on any evidence?" And Mr. Gibson says, "I don't know how to put on evidence." Now, this judge went ahead; he entered an order just last week denying relief in that case, even though there was no lawyer for Exzavious Gibson. This is the first time he had been through—this is not a second or third petition—this is the very first chance to have his case reviewed.

But some judges aren't—Let's hope that some judges won't go forward with cases of people that don't have lawyers. And if there's some delay there until we get lawyers for those people, I think it's justified.

PROFESSOR DASH: Professor Bright, what relevance, if any, to the effect of this, or validity of the death penalty is the fact that death penalty cases take substantially longer and are substantially more expensive than regular criminal prosecutions; and frequently the conviction and the jury verdict of death isn't really implemented over time? Is there any relevance? Is that relevant to the question of effectiveness or legality of the death penalty?

PROFESSOR BRIGHT: I think it is for a variety of reasons, Professor Dash and those who are here. I think that it is for—for one thing, it's remarkable. This is an interesting way in which governmental decisions are made here. A prosecutor decides whether or not to seek the death penalty in a case, often with no input from

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

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

36. Gibson v. Turpin, No. 95-V-648 (Super. Ct. Butts Co., Ga., hearing on Sept. 12, 1996).

the community at all—almost always, at least in the part of the country I practice in, the Death Belt, the deep South, where 90% of the executions have taken place. That decision is made by a single white man, without any input from the community. Very often it's made for political reasons—whether he's going to run for judge in the next election, or attorney general, or whatever. And each state, Mississippi, Alabama, Georgia, all the states we practice in, there are some prosecutors who habitually go for the death penalty; they're always putting that notch on their belt. There are others that almost never go for it. And yet that prosecutor is making those decisions, often for personal reasons, that are going to cost the community literally millions of dollars in terms of costs. Those are millions of dollars that could be spent on schools and drug prevention programs and victim restitution and a lot of other things that those communities desperately need. And yet the county commission, none of those folk are involved in making that decision. We have cases that could be resolved in a guilty plea in thirty minutes, that go on for years, as we were talking about with regard to the last question.

And I think one of the other points that Judge Kozinski's made in some of his writing on this, which I think is right on point, is that we often deny the victim's family closure, because rather—there's an interesting book, if you haven't read it, by David Von Drehle of the *Washington Post*, on the death penalty in Florida, *Among the Lowest of the Dead*.[37] He starts by telling about Ray Markey, Assistant Attorney General, working to get Florida's present death penalty law passed. And he ends many many pages later, after describing Florida's experience, with Ray Markey advising a victim's family to agree to a plea disposition, get the case behind them, bury your son, and go on. Go on with your life. So, that's a cost, not just a financial cost, but another cost.

The other cost of the death penalty, in my opinion, that at least ought to be thought about, is what I touched on earlier, and that's just the cost in terms of the integrity of our courts. The sacrifice of fairness for results. The best example I can give you of this, a case in Georgia, *Stephens v. State*,[38] came before the Georgia Supreme Court. Georgia is always a little ahead of the curve on things—we have two strikes and you're out. You know, in a lot of places you have three strikes you're out, but in Georgia we have two strikes you're out. And there's a law in Georgia that provides that for your second conviction for a drug offense, you get life imprisonment. It's just like the death penalty, though. It's not automatic; the prosecutor has to file a notice in order to put a defendant on notice about that. Ninety-eight percent of the people serving those life sentences are black. In a state that's only 27% African-American, 98% are black. And the Georgia Supreme Court, in what I thought was not a terribly radical opinion, said in the *Stephens*

37. DAVE VON DREHLE, AMONG THE LOWEST OF THE DEAD: THE CULTURE OF DEATH ROW (1995).

38. Stephens v. State, 456 S.E.2d 560 (Ga. 1995).

case, "You know, we think there's a problem here, we think that maybe race has something to do with this rather remarkable disparity." And they held that a prima facie case of race discrimination had been made out, and the prosecution had to justify the reason for it. What's remarkable is what happened next. Michael Bowers, the Attorney General of Georgia, accompanied by all forty-six white district attorneys, filed a petition for rehearing. It didn't make a legal argument. The argument it made was if you allow this decision to stand, it's the end of the death penalty in Georgia. That simple. And the court changed its opinion, and by four to three held that a 98% disparity—I said, "What do we need, 100%?"—a 98% disparity does not make out a case of race discrimination.[39]

The other price we're paying is judges being voted off the courts. Judge Mansfield recently got elected to the Texas Court of Criminal Appeals, even though it was shown that he had practiced law without a license and had a fine for it in Florida, that he had lied about his background. He ran on a platform of more death penalty, more harmless error. It came out that he had lied about even where he was born. He said he was born in Texas. He was born in Massachusetts. He said he had never run for office before; he had run for the legislature in New Hampshire. He got 54% of the vote.[40] He's now a judge. The *Texas Lawyer* said after he got elected that he was an unqualified success.[41] And all of that because Judge Campbell, a conservative former prosecutor, had ruled in a death penalty case that was used to vote him off the court.

The price we're paying in our courts. And you look at the California Supreme Court. One of the great—when I went to law school, it was one of the great courts in the land, and now it's an undistinguished death mill. It's known only for its refinements of the harmless error doctrine. After Governor Deukmejian got three members of the court voted off. And it became clear that if you wanted to be on the California Supreme Court, you'd better uphold death sentences. And the court actually, one time, upheld 100 in a row.

PROFESSOR DASH: Judge Kozinski, on that same issue of interminable delays, extraordinary expense, and sometimes and maybe often, frustration of the verdict of the jury itself, what is the relevance of that to the validity of the death penalty?

JUDGE KOZINSKI: Well, as Professor Bright mentioned, I have written on the subject, and I do think cost is a factor. The death penalty is something we consume in our society, I suppose like every other good, and it costs something, and cost

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39. Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in the Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 475-76 (1995).

40. Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 762 (1995).

41. Jane Elliott, *Unqualified Success: Mansfield's Mandate; Vote Makes a Case for Merit Selection*, TEX. LAW., Nov. 14, 1994, at 1.

needs to be taken into account. Monetary cost is certainly one of them, and I estimate in my article that probably every death case costs an extra million dollars to bring all the way to completion. And that doesn't just mean the cases where somebody gets the death penalty. I actually included cases where the death penalty is asked for and not given, because you still have to load in a lot of costs up front in terms of—to stage a trial, and lawyer time, and, at least in my part of the world, they give additional resources to the defense. I do think this is money that we ought to think about. And I do think that, insofar as decisions like that are made by a single elected official, I think that's something that the state ought to look at very carefully. I agree with Professor Bright about the question about the victims' families. I think that sometimes they look for closure in imposition of the death penalty. And I think the fact that our process is so protracted, denies them closure. Maybe they'd be better off if they knew there was a life sentence that would stay in effect and would not be subject to buffeting for twenty years. I don't know. I think it's something that we need to think about seriously.

I agree about judicial integrity, but, you know, that is a glass house that we ought to be very careful about throwing rocks in, because there's no one more committed to disregarding the rule of law than judges who are opposed to the death penalty. How many times did Justices Brennan and Marshall vote in favor of the death penalty? Never. They were pretty up front about it, because as Supreme Court justices they could just say "We grant cert" and would vacate a death sentence. Did not accept the judgment of the Court. Not simply did not vote in favor, but always voted to grant certiorari, to take the case up. So there's always two votes in favor of the death penalty.

Lower court judges are not able to be quite so straightforward. But I have colleagues, they know who they are, you know who they are, who have never ever voted to uphold the death penalty and never will. Not ever. We talk about removing judges from the bench. We talk about judges casting votes in death cases on account of the death penalty. Who started that practice? Who started the idea that death is different and therefore we can lay aside normal rules of judicial conduct and normal rules of judicial ethics, and any way to get somebody off of death row is a good way? Judges who oppose the death penalty, because death is different. The three justices that were removed from the California Supreme Court—and I agree with Professor Bright—it's a tragedy. It's a tragedy that stuff like that happens. But Chief Justice Bird had—I forget now what the number is—but fifty-five, seventy-five, I think 100 death cases came before her. How many times did she ever vote for the death penalty, did she ever find a death case that was tried in California in which she thought it was constitutional? Hmm? How many? Zero. Not ever one. Bird? I don't think so.

PROFESSOR DASH: Not one.

JUDGE KOZINSKI: Not one. I don't remember. I was not living in California at the time. I do remember the other two justices, but I think the other two justices—in fact, I think Grodin voted for two cases. And I don't know about Reynoso. Now, I love Justice Grodin. I think he's a terrific guy, should not have been removed. I don't know Justice Reynoso. I know Justice Bird. But I do agree it's a tragedy. But let me tell you, I deal with these judges every day, and they don't come out and say, "We will vote against the death penalty because we're opposed to it." But there is an ethic out there that death is different and that rules and normal rules of law can be suspended, so long as it is to vacate a death sentence. And you know what? When you suspend the rule of law, like Thomas Moore is said to have said, "When the devil comes around to get you, you have no place to hide." And when you start with a rule that somehow it is okay, in death cases, to apply a different set of principles, a different set of judicial rules, ultimately those who will suffer are those who are on death row. And we as a society, because that impairs, that cheapens, the judicial integrity.

PROFESSOR DASH: Judge Kozinski, what do you say to Professor Bright's statistics? Not his 98% African-Americans, but his statistics of 50% of those on death row are African-Americans when they make up only 12% of the general public.

JUDGE KOZINSKI: Well, Professor Bright has been very fair and very candid in statistics. Artful yes, but candid. He has never said anything that isn't absolutely right.

PROFESSOR BRIGHT: Thank you, Judge.

JUDGE KOZINSKI: He has said and he has explained that although blacks make up 12% of the population, the number of people who commit willful homicides who are blacks, tend to be something in the 50%-55% range. Let's take 1993 as an example, just a sample year, I don't think it's in any way unusual, it just happened to be the year in which I have statistics. In that year, of the willful homicides committed, 55% were committed by blacks. On death row the incidence of black defendants is 42%. Much less than the incidence of willful homicide in the population. And people actually that are executed as of 1993 are 39%, even less than the percentage on death row.

Now another thing to keep in mind when you talk about statistics is that by and large, murder tends to be an intra-racial crime. Intra-racial. Blacks tend to kill blacks. Whites tend to kill whites. So, if we look at 1993 as an example, and I don't think again it's in any way unusual, there were 5,400, roundly, black-on-black killings. There were something like 4,700 white-on-white killings. The number of black-on-white killings were 850—850 as opposed to in the thousands, and white-on-black killings something in the 400 range; 300 or 400 range. So we have

to be very careful when we talk about statistics and the punishment and the defendant's race, because usually these crimes are a scourge on the community which is the same race as the perpetrator.

And the reason there are—and I don't think Professor Bright has disputed this, because he gave us the statistic himself—the reason blacks are disproportionately represented on death row is that they're unfortunately disproportionately represented among those who commit willful homicide. In fact, they're less represented on death row than their proportion of willful homicides. Now, what does that tell us? There's a flip side to all of these statistics, of course, that Professor Bright has mentioned. Well, you've got to look at the race of the victim. It turns out that people who kill whites tend to be punished with the death penalty more often than people who kill blacks. But if you keep in mind that people who kill whites are whites, and people who kill blacks are blacks, what we're then saying is that prosecutors tend to go after whites who kill whites a lot more often maybe than after blacks who kill blacks. Well, maybe that's troubling. I don't know; I'd have to think about it. But if you are a perpetrator, if you are somebody who killed another black—let's say you are a black defendant who killed another black and were convicted properly, and destroyed the victim's family, perhaps sodomized a child, perhaps raped and sodomized and destroyed an entire family—if you are the same race as the victim, you are put away by a jury picked from your community that represents both whites and blacks, you have a competent counsel—and contrary to Professor Bright's suggestions, such things do happen with some regularity, although there are unfortunate exceptions. If you get put away and you get the death penalty under those circumstances, why should it lie in us to say oh, somebody else over there got treated better because their victim is somehow—people who kill that kind of victim get prosecuted for the death penalty more often. It seems to me that if you deserve it and if there is no racial bias in imposing the sentence, it seems to me that the argument that the race of the victim—some people who kill certain kinds of victims are more likely to get the death penalty than people who kill certain other kinds of victims—that strikes me as a fairly weak argument.

PROFESSOR DASH: Professor Bright?

PROFESSOR BRIGHT: Maybe I've had too many of these conversations that it doesn't seem that weak to me that when I have to sit down as I did just two weeks ago with Carzell Moore, one of my clients, and explain to him that because his skin was black, he was eleven times more likely to get the death penalty; that because the victim in his case was white, he was twenty-two more times likely. I don't know if he fully understands the Baldus study[42] and multiple regression analysis and all of

42. Two studies by Professor David Baldus and his associates on racial disparities in capital sentencing were

those things; but that after controlling for all the variables in the most sophisticated and careful study that's ever been done of sentencing, that a person is still four times more likely to be sentenced to death where the victim is white than black. When you sit across from a man and you tell him that his life may be taken because of those racial factors, and that those matter more than any other thing in the case—it matters more than the witnesses, it matters more than the strength of the evidence—then you have a feeling these things are important. I don't know. I think the fact of the matter is—Judge Kozinski is right; I don't disagree about the statistics. Most crime in this country is intra-racial. And yet you look again at that very study, and it showed that although only 8% of the murders in Georgia are inter-racial—that is, black-on-white—prosecutors seek the death penalty in 70% of those cases, less than 35% of any other racial combination. What makes a death case is an African-American charged with a crime against a white person. There's no question. One of the reasons that there are so many white people as well on death row are the percentages, because as often has been shown, murder in the black community by other black people doesn't register a lot at all.

One of my clients, William Brooks—I'll never forget.[43] We were examining the prosecutor in that case about why he sought the death penalty. And very candid, he said, "I invited the victim's family in as I always do and asked the victim's family whether they wanted the death penalty, and they said yes, and I said fine, we'll get it, and we did." And I asked the prosecutor if he knew that William's father, John Brooks, a man who had served this country for some twenty years in the military, if he had known that John Brooks had been shot in the back and killed on the streets of Columbus, Georgia. The same place. And he didn't even know his name, didn't even register with him.

And as we were going out for a break, a young black man who was in the audience came up to me and tugged at my shoulder, and he said, "You know, Mr. Bright,"—he was actually a state's witness, Mr. Comber—he came up to me and he said, "You know, Mr. Bright, the guy that killed my sister is already out on the street today." And that was because the prosecutors never called the people in the black community to find out whether they wanted the death penalty. In fact, what we found when we went through the black community and talked to people there, was they couldn't even get the police to respond to their calls. In fact, there was a very thorough piece just written in the *Los Angeles Times* about the failure of the Los Angeles Police Department to investigate crime in the black community, including murders—in fact, it focused on murders.[44] This testimony we had in Columbus, Georgia, which is the jurisdiction which sentences by far the most

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the basis for the challenge in McClesky v. Kemp, 481 U.S. 279, 286-87 (1987); *id.* at 325-28 (Brennan, J., dissenting). *See also* DAVID C. BALDUS, ET AL., EQUAL JUSTICE AND THE DEATH PENALTY (1990).

43. Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985) (en banc), *vacated and remanded*, 478 U.S. 1016 (1986), *adhered to on remand*, 809 F.2d 700 (11th Cir. 1987) (en banc); Brooks v. State, 292 S.E.2d 694 (1982).

44. Ted Rohrlich & Frederic N. Tulsky, *Not All L.A. Murder Cases Are Equal*, L.A. TIMES, Dec. 3, 1996, at A1.

people to death and has carried out the most executions just because the prosecutors there are big on death, what we found there was that [in Georgia] in the black community, as one person said, "In order to get a police officer over here, you've got to call 911 and say there's an African-American man holding a gun on a police officer, because the police just don't respond to crimes here, and the prosecutors don't prosecute them, and they don't tell us about them."

You know, we know race plays a big role. Just last week there was this disclosure in Philadelphia about the training tape where the fellow is now running for—the District Attorney there had given a training tape to the younger prosecutors and told them, "Strike black people from juries, particularly in death penalty cases, but in criminal cases generally."[45] Now the only reason it came out was because the present District Attorney is running against him and she—

PROFESSOR DASH: Found the tape.

PROFESSOR BRIGHT: Excuse me?

PROFESSOR DASH: She found the tape.

PROFESSOR BRIGHT: She found the tape suddenly. That's right. You have some experience with that, Professor Dash. (Laughter.)

And you know, it's one of the problems my class and I talk about, which is proving intent. There were cases litigated where you couldn't prove racial discrimination. The prosecutor would strike them. This was a training tape on how to deal with *Batson v. Kentucky*,[46] and how to give "race neutral reasons," so of course there were a lot of people convicted, and a lot of convictions upheld. The prosecution sitting that whole time on a tape.

Black people are more likely to be arrested, more likely to be put in choke holds, more likely to be denied bail, more likely to be charged with serious crimes. It would be remarkable, wouldn't it, if we didn't have racial prejudice coming into play in the capital sentencing, which is where there is the most discretion provided than any other place in the legal system? And that's why we see these disparities. And the other place that you see it so much is in these doughnut communities, like Baltimore County, Maryland, and around St. Louis, and around Atlanta, where the all-white-flight suburban communities sentence so many people to death, and then you see those same inner city areas where they don't. So race is playing a very major role in this process.

PROFESSOR DASH: Professor Bright, a final question for both you and Judge Kozinski before we have your closing remarks. What impact do you see in the

45. L. Stuart Ditzen, et al., *To Win, Limit Black Jurors, McMahon Said*, PHILA. INQUIRER, Apr. 1, 1997, at A1.
46. 476 U.S. 79 (1986).

future of the death penalty to the House of Delegates recently voting for a moratorium on the death penalty? And I would add by parentheses, having had something to do with the ABA, that it's usually made up of conservative commercial lawyers, not criminal lawyers.

PROFESSOR BRIGHT: I know. You know, it's been remarkable, everywhere I go—I had a discussion with former Attorney General Thornburg recently, and he's talking about the ABA being this radical organization. You know, he's been at a different ABA than I have. You know, last time I went—this was before the first woman president—it was a bunch of white men in blue suits. And pretty well-packed suits, I might say. (Laughter.)

I think, you know, a lot of people have said that the ABA shouldn't be doing this. I don't understand why, unless we just see the ABA as a trade organization that's supposed to make lawyers rich. I can't think of a more fundamental role for the American Bar Association to play. It's issued a number of reports. Professor Dash, of course, has been chairman of some of those committees that looked at things like indigent defense. And I just have to make one point quite clear about this: the reason this indigent defense problem is here, the poor representation—these are not aberrational cases—the reason for this is a lack of a system. The fact that it's virtually impossible to get the state that's trying to carry out executions or convict people to pay to provide a zealous defense for people that might very well frustrate those goals. I mean, that's not just unique to our society, that's unique to any society. But the American Bar Association has pointed out time after time after time that the promise of *Gideon v. Wainright*[47] to provide poor people with adequate representation has not been met. It's pointed out that race is influencing who is sentenced to death. That with this most drastic and ultimate punishment, race often comes into play. It's pointed out that mentally ill people and mentally retarded people and children are being sentenced to death, that there are only four other countries in the world that have executed children in the last—since 1990. Yemen, Saudi Arabia, Iran, United States. I mean, that's the company we're keeping. The American Bar Association has pointed that out. And finally, they pointed out the importance of habeas corpus review, the importance of having judges who do have life tenure sitting on these cases and deciding them. And yet what we've seen, and what the American Bar Association's report points out here, is that in each of these areas, the situation has actually gotten worse. The quality of counsel is deteriorating. We don't have indigent defense systems. The ones we do have and the places that have them are hopelessly overwhelmed with case loads and underfunded.

That's why, for example—and this is not just in the death cases—but that's why

47. 372 U.S. 335 (1963).

a public defender in Atlanta, Georgia, will go in and interview twenty-five guys all chained together. This is their first interview with a lawyer. And then go in a few minutes later and plead seventeen of them guilty in front of the judge and have them sentenced right there on the spot in felony cases. They call it "slaughterhouse justice," and it happens every day. You can go over to the courthouse any day and see it if you want to see it. There's not much of a system of indigent defense. It's a system of fast-food justice, because nobody wants to pay the price to provide adequate representation. And I've said if we don't want to pay the price, then we shouldn't have the death penalty.

I agree with what Judge Kozinski said a moment ago; we ought to have people specializing on these cases. If you needed brain surgery and there wasn't any brain surgeon in town, you wouldn't have a chiropractor do your brain surgery, but that's exactly what we do in the law. That's what we do in all these little rural areas where there's no lawyer there that knows how to try—not even lawyers who specialize in criminal cases, let alone lawyers who specialize in the sub-specialty of death penalty cases. So, we just get some real estate lawyer, some tax lawyer, some divorce lawyer there in town, who's never going to do another death case, because it pays so little.

Race. The Congress did not pass the Racial Justice Act. The courts now just put their head in the sand completely with regard to race. That's why William Andrews was executed. That's why we've seen so many of these other cases. We don't have the resources. Often lawyers don't even investigate things like mental illness, mental retardation. We've talked about those examples before. So the result of that is that we are going to compromise. If we don't heed what the ABA has said, we are going to compromise our system of justice, we're going to denigrate our Bill of Rights, and we're going to be executing the poorest and the most powerless people in our society.

PROFESSOR DASH: Judge Kozinski, what does the ABA resolution mean to you?

JUDGE KOZINSKI: Well, you know, I can't speak for the ABA; I dropped out about ten years ago when they made a party with the Bar Association of the Soviet Union at a time when that bar association was involved in the practice of branding heretics as insane, and I just quit my membership at that time. I think like a lot of other things the ABA puts out, this will be viewed as a political statement, not really a statement about anything that's really going on.

For example, if the ABA is concerned about the state of criminal justice, it's not clear to me why they limit their statement to the death penalty. If they are worried about the fact that we don't provide adequate lawyers in certain parts of the country, they ought to say that. And maybe you don't agree with me about two days in jail. Maybe you think two days in jail is okay to give somebody without an adequate lawyer. But surely when we talk about people who get thirty or forty

years in jail, twenty years in jail, life without parole, those people deserve no better representation, no worse representation, than somebody who gets the death penalty. Those are serious problems. And in fact, it seems to me, we have kind of a misguided sense, looking at the worst people of our society and worrying about whether or not we provide adequate process. Below the small tip of the pyramid of the really, really terrible people who get the death penalty, and almost always have committed some truly heinous crime, are people who don't do very much that's all that bad at all and suffer punishment that's pretty, pretty serious. People who maybe have one or two small drug offenses, possession or something, and then get caught a third time and then get life without parole or twenty years in prison, whose case comes up on appeal. There's no habeas for them, there's no seven, eight, nine levels of review, there's not fifty judges that look at these cases. They usually get affirmed with a memorandum disposition. They don't get three lawyers, they don't get two lawyers, an investigator and psychiatrist and so on, and yet the punishment is kind of like if somebody took a hatchet and cut off your arm. I mean, think about thirty years in prison. Pretty serious stuff. So if the ABA were worried about that, if they were worried about the fact that we don't provide adequate representation to people guilty of crimes, they would say that, rather than making this a statement of the death penalty. Or, if they really were concerned about that, they would realize that there are differences.

Now, Professor Bright practices mostly in the South, and I can't speak very knowledgeably for what goes on there, but things are much different in California, in our circuit. Maybe not every case is tried as well as Professor Bright could try it if he were the trial lawyer, but by and large, most criminal cases and most death cases get pretty decent handling. Yes, you're going to come up with examples, we have reversed our share of death penalties, but by and large we get lawyers that are pretty knowledgeable, they are well paid—they get 150 or odd dollars an hour—there are substantial fees paid out in these cases going into the hundreds of thousands and millions of dollars sometimes. Well-paid money. I'm not here to say this is money we ought not to pay. I agree with Professor Bright, if we are going to do stuff like that to people, we ought to do it right. We ought to make sure they get the surgeon and not the chiropractor. But it seems to me focusing on the death penalty and throwing away all—calling for a moratorium on all death penalties, including states where things are working pretty well, and ignoring bad representation of defendants who suffer punishments almost as bad and are no better represented, as Professor Bright has illustrated, that points out that really what the ABA is interested in is not increasing the quality of justice, but causing a sensation and making a political statement about the death penalty. I was not impressed. I don't think the American public will be either.

PROFESSOR DASH: Judge Kozinski, you now have six minutes to close and make any additional rebuttal and statements to what Professor Bright has said or anything now that you want to close with.

JUDGE KOZINSKI: I don't think I will take my full six minutes. I'll yield it to my opponent. Let me just say a couple of things. You know, this was styled as a debate and maybe—I'm not going to ask for your vote at the end. It's really, in my mind, more of a conversation than a debate, because there are large areas where Professor Bright and I really do agree, and I think that there are problems in our criminal justice system, and sometimes problems are worse in the death area and sometimes are not. As I said earlier, sometimes you can do somebody a favor, literally, by charging the death penalty because they simply get better representation at trial and sometimes are more likely to get off than if you don't charge them with the death penalty. At least that's true in the states in our circuit.

I do worry about the fact that we put too many people on death row. I have said this before. I do worry about the fact that far too broad a range of people are put on death row and then very few wind up being executed. So in some ways it's a charade. In some ways it's a farce. It's an expensive farce. It's a farce that costs us as a society not only the money and the grief that we mentioned earlier, but also just takes away judicial resources from the other things courts have to do. The State Supreme Court of California, which is an important court despite what Professor Bright says, it has areas of jurisdiction where its decision-making is needed. It is the supreme court of the largest state in the country. They're the Pacific Rim. There are many problems that need resolution of state law. That court spends a third of its time deciding death cases. In my personal judgment, that is not a good investment, that is not a wise investment of scarce resources.

My view is that we ought to decide once and for all, yes, for the worst members of our society, the people who really, really kill, not just once but many times. Who don't simply kill but maim and torture. People who show no remorse. People who kill for pay. Hired killers. The very small number or class of killers. Those we ought to decide, yes, they have forfeited their right to live amongst us. And we ought to be careful, we ought to be scrupulously fair, but we ought to proceed with all deliberate speed to convict them, and if they do get convicted, put them to death. And everybody else, what is it 300 or so a year, I would say maybe ten of those ought to be—maybe only one in one year in that category; everybody else ought to get some lesser punishment. And we ought not to fool ourselves into thinking that if we put—if we have 3,000 people or 3,100 people on death row, that we will ever put all of these to death. We have kind of a charade. We make it likely that the judges and prosecutors will vie for each other and make it political football. I think the fact that we don't accept the death penalty, there's this huge debate, to some extent makes it more likely that this will be used as a political football.

I suggest we simply accept it, that we as a society want the death penalty and what we ought to focus our attentions on is narrowing it significantly and making sure we do it right.

PROFESSOR DASH: Professor Bright, your closing remarks?

PROFESSOR BRIGHT: Thank you, Professor Dash. I want to say one thing first just in response to the point a moment ago about—that Judge Kozinski made with regard to the American Bar Association and why [it is] only concerned with the death penalty. I should say in full disclosure I'm not even a member of the ABA; I can't afford the dues. But I do think when you get out of law school, it's very cheap there for the first year, so take advantage, okay? But—

PROFESSOR DASH: And law professors get it now for free.

PROFESSOR BRIGHT: Yes. But the American Bar Association hasn't just talked about counsel. In fact, there's report after report after report about the quality of legal representation that poor people get in juvenile cases, in misdemeanor cases. We just filed a lawsuit in our office in a county in Georgia which has never even started following *Argersinger*,[48] the case that years ago decided you had to provide lawyers to poor people in misdemeanor cases where they face jail time. They've run the misdemeanor court to this day without lawyers and just have the people come in and plead guilty, and the judge sentences them without lawyers, or they try them themselves. There's a lot of problems with our failure to come to grips with *Gideon*, and I think the American Bar Association has pointed those things out. I think what the moratorium was, was a suggestion that this punishment, which is irreversible—I mean, as I said earlier, I've known people—Ruben Carter is on my board and a good friend of mine, spent twenty years in prison for a crime he didn't do. But at least he's out today. William Neal Moore, who was here teaching my class last week, spent sixteen years on death row, but we heard him talk about in class the contributions he's making to our society today as a teacher, as a role model, as an assistant pastor, in the five years that he's been in the community.

But where I come out at bottom is that what we have to do is recognize, and have some humility, about what our courts can and can't do. I think if we're involved in a traffic accident, we disagree about whose fault it is and we've got to divide up some money, that having twelve people listen to both stories and decide who gets the money is as good a way as we can come up with. Anybody who's practiced law, as I have in the trial courts for the last twenty-five years, knows that system is not infallible, that those decisions are made based on how people look and their demeanor and how articulate they are. Some people have the good fortune of whatever happens to them happens where the witnesses are good witnesses; some people things happen to them where there are not any witnesses, and that affects the strength of your case. But basically, when we're asking the courts to decide fairly small questions—who ran the red light, who fired the shot, whose fault was

48. Argersinger v. Hamlin, 407 U.S. 25 (1972).

it, who was careless—those factual decisions we can give to a jury, give them some instructions, and we can come out with a decision we can live with to resolve that dispute. Our courts are not very good at answering the question of who is so beyond redemption they should be eliminated from the human community. For some people that's a legal question, for some people it's a political question, for some people it's a moral question, a philosophical question, theological question. And that's why there's no consistency in the way people are being sentenced to death.

I think we also have to realize that we really can't overcome two centuries of race relations with a few questions during the jury selection process or an instruction to the jury not to discriminate. It would be so wonderful if we could, but the fact of the matter is we're not able to do that. And it's equally clear, I think, that we're not going to provide counsel for poor people. We haven't in the thirty-five years since *Gideon*, and there's absolutely no indication that we're going to. And that's important in terms of how good the fact-finding is, whether it's the forensic questions at trial—Gary Nelson, who spent eleven years on death row in Georgia based on hair evidence. It turned out to be completely bogus, but his lawyer didn't have any money, he was only paid twenty dollars an hour, didn't have an expert. So Gary Nelson was released after eleven years.[49] I have to part company here and say that I think it's better to release somebody after eleven years and let them have the rest of their life than to execute them wrongfully. But as long as we have this indigent defense system, as long as we have lawyers who know so little about things like brain chemistry and injuries to the brain and so forth, we're not going to be able to sort out these questions with penalty, in terms of how to decide to punish people, as well as these questions about guilt or innocence. I do hope, though, that Judge Kozinski will make his views known, because the need for counsel is so crucial right now. I mean, there's a man named James McWilliams that may live in Florida, excuse me, in Alabama, because Professor Hebert here, Jerry Hebert, just agreed to take his case and because five students in my class wrote a petition for post-conviction relief right before the deadline expired. Whether somebody lives or dies, whether they have access to the courts, shouldn't depend on that sort of coincidence.

But I think even if we could straighten out all these problems, we have to come to grips with the fact that while there are some people—and I don't disagree with this at all, that there are clearly some people who deserve to die. As Sister Helen Prejean has pointed out, the question is really whether any of us are worthy to decide who those people are. That's the real question.

I wish everybody here could have met Billy Moore last week when he was here, to see a man that the state of Georgia spent millions of dollars trying to kill. I wish you could have met Joseph Carl Shaw, who grew up in the Catholic church and

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

was an altar boy, who was put to death by the state of South Carolina. Or I wish you could see some of the other people like David Raulerson or Larry Gene Heath that I've said good-bye to before the state extinguished their lives. I think we have to realize that we're killing children, we're killing the mentally retarded, we're killing people who are poor, we're killing the mentally ill. And we have to realize that we've got to get beyond tinkering with the machinery of death, that just changing the method of execution or just changing some procedure at a trial, is not going to do that, and that we should follow the example of the court in South Africa which said it's time to replace hatred with understanding, it's time to replace vengeance with reconciliation.[50] And it's time once and for all to make permanent, absolute and unequivocal the injunction, "Thou shalt not kill." Thank you.

PROFESSOR DASH: On behalf of the Law Center, I think you all agree with me that this has been as high-level a discussion as we could possibly have had on the death penalty from two outstanding authorities, agreeing and disagreeing. And therefore, I want to thank both of you: Judge Kozinski, for your wonderful contribution, and you, Professor Bright, for yours, for adding to the education of the Law Center. Thank you.

50. The State v. Makwanyane, Constl. Ct. of South Africa, June 6, 1995, *reprinted in* 16 HUMAN RTS. L.J. 154 (1995).