THE ABA'S RESOLUTION CALLING FOR A MORATORIUM ON EXECUTIONS: WHAT JURISDICTIONS CAN DO TO ENSURE THAT THE DEATH PENALTY IS IMPOSED RESPONSIBLY

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I. INTRODUCTION

On February 3, 1997, the Individual Rights and Responsibilities and the Litigation Sections of the House of Delegates of the American Bar Association ("ABA") voted 280–119 to issue a resolution calling for a moratorium on executions in the United States ("Resolution").[1] Although the ABA stands neutral on the issue of capital punishment,[2] the Resolution recognized four goals that jurisdictions should achieve before imposing a death sentence:[3] 1) preserve due process; 2) ensure competent legal counsel for capital defendants at each stage of the process, including conviction, sentencing, and appeals; 3) eliminate racial discrimination in the imposition of the death sentence; and 4) prevent unconscionable executions of individuals such as juvenile offenders and the mentally retarded.[4] Despite the ABA's intention to stir renewed debate on the issue of capital punishment, the call for a moratorium has served more to generate controversy over whether the ABA should be issuing such a resolution at all.[5]

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1. James Podgers, *Time Out for Executions*, 83 A.B.A. J., Apr. 1997, at 26.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id. See* Leslie A. Harris, *The Task Ahead: Reconciling Justice With Politics*, 24 HUM. RTS., Spring 1997, at cov. Initial reaction to the Resolution has included opposition from numerous practitioners, politicians, and organizations, including: N. Lee Cooper, the president of the ABA, Senator Orrin Hatch, the Chairman of the Senate Judiciary Committee, the U.S. Justice Department, and the Clinton administration. Podgers, *supra* note 1, at 26. Specifically, Deputy Attorney General Jaimie Gorelick expressed concern over the timing of the Resolution, in part due to the then-pending capital cases of suspects in the Oklahoma City bombing and the prosecution of the Unabomber. Gina Chon,

The passage of the Resolution occurred after a dramatic rise in the number of executions in 1996.[6] This sharp rise was a result of many factors,[7] including recent acts of Congress that limit appeals, thereby allowing a death sentence to be imposed more readily than under the former laws. The new laws are accompanied by the Supreme Court's apparent reluctance to review them[8] and judicial notice that the imposition of a death sentence does not per se constitute "cruel and unusual punishment."[9] President Clinton also supports the death penalty, and many politicians have launched successful campaigns for office on pro-death penalty/anti-crime sentiments.[10] Many judges who are reluctant to impose the death sentence have been ousted from office.[11] It is clear that acceptance of capital punishment in America is growing.[12] Thus, the reaction by policy makers in favor of capital punishment is probably a response to perceived public sentiment.

In light of these factors, why the call for a moratorium on the death penalty from the ABA? This Note addresses this question. Specifically, this Note analyzes the individual elements of the ABA's Resolution, while suggesting what jurisdictions should do to reform the capital punishment regime. This Note concludes that reform is necessary, as the Resolution suggests, in the following areas: 1) the preservation of due process; 2) the realization of the guarantee of effective assistance of counsel; 3) the elimination of racial bias in the imposition of the death sentence; and 4) the prevention of unconscionable executions of minors and the mentally retarded.

The Death Penalty: Calling on Jurisdictions to Clean Up Their Act, 24 HUM. RTS., Spring 1997, at 8. *See also* Terry Carter, *A Conservative Juggernaut: Judicial Attacks Push Debate to Right, Put Hatch in Middle*, 83 A.B.A. J., Jun. 1997, at 32.

6. Eric Pooley, *Crime and Punishment*, TIME, June 16, 1997, at 34. The year 1996 is used here to demonstrate the stark difference in the number of executions in 1996 contrasted with previous years. The statistics outline different states which implement the death sentence and demonstrate heightened instances of executions in 1996. For example, 127 people have been executed in Texas since 1976 (not including 1996), while 23 people were executed in Texas in 1996; 39 people have been executed in Virginia since 1976, while 10 people were executed in Virginia in 1996; 11 people have been executed in South Carolina since 1976, while 6 people were executed in 1996.

7. The most influential factors are rising public and political approval of the death sentence. The statistics of a recent *Time/CNN* poll reflect that seventy-four percent of respondents favor the death penalty for individuals convicted of serious crimes.

8. See Justice Blackmun's dissenting from the denial of certiorari in *Callins v. Collins*, 510 U.S. 1141 (1994).

9. *See* Gregg v. Georgia, 428 U.S. 153 (1976).

10. 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, 773–74 (1995).

11. *Id.* at 760.

12. This rising acceptance is demonstrated from the statistical data presented in the *Time* magazine article, the obvious effect of the political pressures which elected judges are subjected to, and the fact that executions are on the rise. *See* Pooley, *supra* note 6; Bright & Keenan, *supra* note 10.

II. THE RESOLUTION

A. Due Process

Two distinct and completely divergent complaints about the capital punishment system in the United States are most commonly heard: (1) capital punishment is overregulated leading to a lengthy appeals process and causing exorbitant costs and lapses in time between the offense committed and the subsequent execution; and (2) capital punishment is underregulated rendering an arbitrary result and leading to the overrepresentation of death-row inmates who are young, poor, of particularly low intelligence, or of a racial minority.[13] Congress has sought to remedy the first of these complaints with legislation imposing restrictions on appeals. The ABA, in contrast, has responded to both sets of concerns with the issuance of the Resolution.

One of the ABA's goals outlined in the Resolution is "preserving, enhancing, and streamlining" state and federal courts' authority to judge the merits of constitutional claims in state post-conviction and federal habeas corpus proceedings.[14] Although the ABA has been an active advocate of fair procedural protections in capital habeas proceedings for many years, its recommendations have never been generally accepted.[15] These recommendations include entitling a death row inmate to a stay of execution in order to complete one round of post-conviction appeals, granting federal courts the authority to adjudicate claims which were not raised in state court if the failure do so was a result of ignorance or neglect of defense counsel, and permitting a capital defendant to file a second or successive federal petition if it raises a new claim that undermines his or her guilt or the appropriateness of the death sentence.[16]

Contrary to these recommendations, Congress has enacted legislation that hinders the federal courts' ability to consider claims in capital cases by limiting the availability of appellate relief to death-row defendants. One such measure is the Anti-Terrorism and Effective Death Penalty Act ("AEDPA").[17] Through this Act,

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13. Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 356 (1995).

14. ABA INDIVIDUAL RIGHTS & RESPONSIBILITIES REPORT NO. 107 at 9 (1997) [hereinafter ABA REPORT]. This goal is listed in the ABA's report as the second goal, referred to as "Proper Processes." This Note discusses this goal first, as it is fundamentally different from the other three goals. This goal deals with the procedural protections of capital defendants, while the other three goals are related to the identities of the capital defendants themselves. This Note will include a discussion of the interaction of the procedural protections with the demographics of death row inmates.

15. *Id.* at 10. Fourteen years ago, the ABA publicly opposed three Congressional bills that would have restricted the federal courts' ability to adjudicate prisoners' habeas claims, while proposing alternatives to streamline the system without compromising its integrity or the federal courts' authority to adjudicate such claims. Since that time, the ABA has been active in opposing such restricting legislation.

16. *Id.*

17. Public Law 104-132, 110 Stat. 1214 (1996) (now codified as 28 U.S.C. §§

which was signed into law on April 26, 1996, Congress sought to confront the quandary of lengthy appeals entrenched in the federal habeas corpus system for capital defendants.[18] The final product of Congress' efforts has been criticized as being extremely confusing, poorly written, and potentially subject to a great deal of judicial interpretation.[19]

Despite the AEDPA's confusing nature, it appears that it will be, and probably has been, successful in achieving Congress's goal of expediting executions.[20] The AEDPA attempts to "streamline" the capital habeas system by imposing deadlines for filing federal habeas petitions, limiting evidentiary hearings into federal claims, establishing timetables for federal actions, restricting appellate review of successive petitions, and baring federal relief for constitutional violations where state courts have erred in concluding that no such violation occurred.[21] These measures may, however, be more harmful to capital defendants than previously imagined. At first glance, the measures appear procedurally designed to move the process along by establishing deadlines and limits on the number of postconviction appeals a single capital prisoner may file.[22] When analyzed from a death-row inmate's perspective, the laws appear to eliminate some valid measures of relief.[23] Thus, although the new laws appear to respond to the problem of lengthy appeals, Congress has failed to account for the inadequacies which exist in the system at the early levels of capital adjudication for which appellate relief is necessary. Two measures which demonstrate this point are filing deadlines and limits on successive petitions.[24]

2261–2266 (1996)). The AEDPA is an ad hoc composite of many different initiatives, that failed to become legislation in the past. Perhaps most notable of these was a portion of the "Contract With America" initiative which focused on procedural changes in the habeas system in general and especially in regards to the capital punishment system. Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996).

18. Yackle, *supra* note 17, at 433.

19. *Id.* at 381.

20. *See* Pooley, *supra* note 6, at 34.

21. *Id.*

22. Yackle, *supra* note 17, at 384.

23. Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POVERTY 3, 32 (1996).

24. Because of the confusing nature of the new laws, the changes that the AEDPA enacts can be categorized in various ways. One set of scholars has categorized the "fundamental changes" which the law imposes into nine seperate categories. These are: 1) limitations on filing habeas corpus petitions; 2) deference to state-court decisions; 3) limits on federal evidentiary hearings; 4) exhaustion of state remedies; 5) limits on successive petitions; 6) new appellate procedures; 7) opt-in provisions for qualifying states; 8) retroactivity of the statute itself; and 9) waiver of retroactivity of the statute. Marshall J. Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism After the Anti-Terrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337, 352 (1997). The new laws are extremely complex and this Note does not attempt to thoroughly explain them. This Note groups the new statutes into two distinct categories of temporal deadlines and limits on the number of petitions one defendant may file, as these are the

1. Filing Deadlines

The AEDPA requires the filing of a petition in federal court that attacks a state capital conviction within one year from the conclusion of direct review or the most recent event in the state proceeding.[25] The purpose of this deadline is to encourage capital prisoners, who have a stake in delaying subsequent procedures as long as possible, to file their petitions in a timely manner.[26] While a year appears to be ample time for a death-row inmate to file a federal post-conviction petition,[27] in reality it is difficult for an indigent capital defendant to obtain counsel in time to meet the deadline. The reason for this delay is that different attorneys are representing the capital defendants at the appellate level than those representing them at the initial trial.[28] Thus, the new attorneys are unfamiliar with the case and with what occurred at the trial court. Moreover, it may be difficult to find an attorney willing and able to become involved in capital litigation at a stage where he or she is subject to strict filing deadlines.[29]

The problems that this situation presents, however, are not insurmountable. If indigent capital litigants are appointed an attorney within sufficient time to prepare a competent petition for federal review, the problem will cease to exist. Thus, Congress could ensure fair processes and expedite the capital system's function by requiring the appointment of counsel with enough expediency to get the post-conviction petitions, entitled to indigent capital defendants under the federal system, completed and filed by the deadline.

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major procedural changes that appear to limit a capital defendant's appellate relief while attempting to streamline the process. This Note will illustrate the problems a death-row inmate might face with each of these classes of restrictions.

25. Yackle, *supra* note 17, at 387. There is also a special provision for death penalty cases only which requires a state to appoint counsel for indigent petitioners during post-conviction proceedings in state court. If a prisoner in a state that has invoked this chapter chooses to file a federal habeas petition, he or she must do so within 180 days of the conclusion of direct review in the state court. This deadline is criticized as being exceedingly difficult to meet. Indeed, the petitioner's execution date might arise before he or she is even able to find counsel under the federal statute which provides counsel for indigent defendants (21 U.S.C. § 848(q) (1994)). *Id.* at 393–95 & n.45.

26. *Id.* at 387 n.19.

27. Capital defendants are entitled to counsel at the post-conviction stage, whereas counsel might not be available to other indigent defendants. *Id.* at 395–96 n.45 (stating that death-row prisoners are entitled to appointed counsel at federal expense pursuant to 21 U.S.C. § 848(q) (1994)). *But cf.* Murray v. Giarratano, 492 U.S. 1 (1989) (holding that neither the Eighth Amendment nor the due process clause of the Fourteenth Amendment require states to appoint counsel for indigent death row inmates seeking post-conviction relief).

28. Yackle, *supra* note 17, at 387 n.19.

29. *Id.*

2. Limits on Successive Petitions

The AEDPA places limits on second or successive federal petitions from a capital petitioner.[30] Under the AEDPA, such petitions will be dismissed unless the petitioner can demonstrate that the claim is either: (1) based on a "new rule of constitutional law...made retroactive to cases on collateral review"; or (2) that a constitutional error has occurred which deprived the defendant of a "factual predicate" on which he or she can demonstrate by clear and convincing evidence that given the evidence, a reasonable jury would have found the defendant innocent.[31] As a result, second or successive federal petitions are eliminated in all but the rarest cases.[32] Additionally, the petitioner must be granted permission to file the second or successive federal petition by a three-judge panel after demonstrating that he or she meets the criteria for doing so.[33] Again, this mechanism appears to expedite the system by eliminating stalling tactics of a death-row inmate who has nothing more to look forward to than his or her own execution; however, in reality, this law imposes a huge burden on capital defendants who did not initiate a claim at the trial level. Specifically, the measures limit the ability of a capital defendant to bring a claim of ineffective assistance of counsel, unless such ineffectiveness constitutes a "factual predicate" upon which the petitioner's innocence can be demonstrated. In addition, the limits on successive petitions foreclose any remedy for racial bias in sentencing at the trial level and do not account for the absence of laws protecting juvenile offenders and the mentally retarded.

3. Suggested Reform

The procedural limits on federal petitions that are designed to expedite the execution process should be supplemented with certain minimum protections of capital defendants at the trial stage. Indeed, most states that impose capital punishment are beginning to compensate for the ineffectiveness of indigent capital representation by providing counsel in post-conviction proceedings at the state level.[34] By implementing the goals outlined by the ABA to protect capital defendants from ineffective assistance of counsel, racial bias, and the practice of executing juvenile offenders and mentally incompetent individuals, jurisdictions that impose the death penalty can compensate at the trial level for the limitations of appellate review.

B. Ineffective Assistance of Counsel

A woman in Talladega County, Alabama was sentenced to death for arranging the murder of her adulterous husband who physically abused her and her

30. *Id.* at 391 (quoting 28 U.S.C. § 2244(b) (Supp. 1996)).

31. *Id.* This is basically the same standard that is imposed on a petitioner's attempt to obtain a federal evidentiary hearing. *Id.* at 391 n.37.

32. *Id.* at 392.

33. *Id.* at 392–93.

34. *Id.* at 394 n.43. However, due to the limits on bringing a claim for ineffective assistance of counsel at the appellate level, the remedy of assuring counsel at this stage may be too little, too late.

children.[35] Her court-appointed attorney showed up intoxicated on the day of the trial to the extent that the trial had to be postponed while he served his own jail sentence for contempt of court.[36] Both the attorney and the client were released from jail the next day, and the trial resumed.[37] Although a death sentence is rarely imposed in a domestic violence case, the attorney appointed in this case failed to produce available evidence of hospital records which proved that violence had occurred against both the woman and her daughter. Additionally, the expert who was retained by the attorney to testify regarding the effects of spousal abuse did not interview the client until 8:00 P.M. on the night before he testified at the trial.[38]

One of the ABA's goals to be achieved before resuming executions is the implementation of certain guidelines to establish minimum standards for the appointment and competency of counsel in capital litigation.[39]

1. The Supreme Court

Since the Supreme Court's decisions in *Gideon v. Wainwright*[40] and *Powell v. Alabama*,[41] any person facing a potential death sentence who cannot afford legal counsel is entitled to a court-appointed attorney to represent him or her during the prosecution. This requirement, however, does not prescribe any minimum standards or qualifications which these publicly-appointed attorneys must meet. Indeed, the Supreme Court has held that the standard is one of "reasonableness,"[42] which may in practice be somewhat less than "effectiveness."[43] The Court in *Strickland* held that in order to prove a claim of ineffective assistance of counsel at the trial level, a defendant must overcome "a strong presumption" that counsel's conduct was not below an objective standard of reasonableness.[44] The defendant must also prove "prejudice" by demonstrating that but for the attorney's

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35. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1835–36 (1994). *See* State v. Haney, 603 So. 2d 368 (Ala. Crim. App. 1991).

36. Bright, *supra* note 35, at 1835.

37. *Id.*

38. *Id.* at 1836.

39. The ABA has advocated its own "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases" along with other policies designed to enhance the competency of counsel in capital cases. ABA REPORT, *supra* note 14, at 4–9.

40. 372 U.S. 335 (1963). The *Gideon* Court overruled *Betts v. Brady*, 316 U.S. 455 (1942), which held that the right to counsel did not apply to all felony cases, but only those which the denial of counsel would be "shocking to the universal sense of justice." *Brady*, 316 U.S. at 462.

41. 287 U.S. 45 (1932) (holding that the Due Process Clause of the Fourteenth Amendment of the Constitution requires the appointment of counsel for indigent defendants who are on trial for a capital offense).

42. Strickland v. Washington, 466 U.S. 668 (1984).

43. *Cf.* Evitts v. Lucey, 469 U.S. 387 (1985) (holding that the right to "effective" assistance of counsel upon appeal is a procedural protection which the defendant must be granted if the state allows an appeal). *See* Bright, *supra* note 35, at 1858.

44. *Strickland*, 466 U.S. at 689.

incompetence, the outcome of the trial would have been different.[45] Some courts have been criticized for taking what appear to be exceptional measures to ensure that an attorney is not found to be "ineffective."[46] Often, the mistakes or neglect on the part of the attorney are labeled legal "strategy" or "tactics," and as such, are not subject to scrutiny by the reviewing court.[47] Courts prefer not to apply a hindsight test to determine whether defense counsel's performance was "ineffective," or just unsuccessful.[48] Courts have also expressed reluctance to reverse convictions based on claims of ineffective assistance of counsel because of the notion that attorneys will be discouraged from representing criminal defendants if the claim was more widely accepted.[49] Other reasons which courts use to explain the general reluctance toward the ineffective assistance of counsel claim include: 1) fear of overburdening the appellate system with these claims if they were more successful;[50] 2) desire to uphold the policy of "finality" in court judgments;[51] and 3) skepticism regarding a convicted defendant's motives for bringing such a claim, such as a desire to put the defense attorney on trial.[52] Additionally, appellate courts must rely on the trial transcript to decide a case of ineffective assistance of counsel and an evidentiary hearing is generally unavailable.[53] Although these criticisms are valid, they sometimes serve to eliminate legitimate claims of ineffective assistance of counsel. This is clearly an undesirable result in cases where the ultimate punishment for the convicted crime is as final as death.

2. The ABA

The 1997 call for a moratorium on executions was not the first time the ABA expressed concern about the state of the capital punishment system regarding ineffective assistance of counsel. In 1982, the ABA and the National Legal Aid and Defender Association determined that the system which provides funding for indigent defense was inadequate, and that the dream of *Gideon v. Wainwright* was

45. *Id.* at 694.

46. Bright, *supra* note 35, at 1858. *See* Rogers v. Zant, 13 F.3d 384 (11th Cir. 1994).

47. Bright, *supra* note 35, at 1858 & n.138. Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 633–34 (1986).

48. Klein, *supra* note 47, at 633.

49. *Id.* at 634–35.

50. *Id.* at 635. *See* Mitchell v. U.S., 259 F.2d 787 (D.C. Cir. 1958).

51. Klein, *supra* note 47, at 635. *See* Strickland v. Washington, 466 U.S. 668, 697 (1989). This policy also corresponds with public and political desire to limit the appellate review of capital claims.

52. Klein, *supra* note 47, at 635. *See* Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir. 1945) (stating that a disappointed prisoner may wish to challenge counsel's ability on appeal and allowing such accusations is tantamount to opening a "Pandora's Box").

53. Klein, *supra* note 47, at 635. Evidentiary hearings are available in federal habeas corpus review and where state statutes permit them. *See id.*

yet unattained.[54] In 1993, the ABA again warned about the problems of insufficient funding and neglect of indigent capital defense.[55]

The ABA's report calling for a moratorium on executions reflects the belief that competent[56] counsel should be provided for indigent capital defendants at every stage of capital litigation.[57] The ABA asserts that to ensure effective assistance of counsel, jurisdictions which impose the death sentence should establish organizations that "recruit, select, train, monitor, support and assist" attorneys who represent capital defendants.[58]

3. Capital Jurisdictions

No jurisdictions that impose the death penalty have completely adopted the ABA's goals.[59] Critics assail the current system that imposes widely divergent standards from state to state, and even from county to county.[60] What does remain common to all jurisdictions that impose the death sentence is the grievous lack of funding plaguing indigent capital defense.[61] Capital defense attorneys face burdensome workloads and diminutive wages.[62] It is not surprising that these appointed lawyers are often young and inexperienced, and do not stay in their positions long enough to master the complex legal intricacies of capital defense work.[63] These deficiencies have been generally acknowledged, but seem to be getting worse.[64] How can our purportedly civilized society allow such a system to impose death on individuals accused of crime? The answer appears to be that it is not a pressing priority to the majority of citizens because the people facing the

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54. Bright, *supra* note 35, at 1866.

55. *Id.*

56. The ABA's definition of "competent" counsel includes "adequately compensated" counsel. The ABA defines this as a "reasonable rate of hourly compensation which...reflects the extraordinary responsibilities inherent in death penalty litigation." Additionally, the ABA believes that counsel should be provided adequate time and funding for proper investigations, expert witnesses and other support services which counsel deems necessary to launch an adequate defense. ABA REPORT, *supra* note 14, at 4.

57. "Every stage" of capital litigation is interpreted as including trial, direct review, collateral proceedings in both state and federal court, and certiorari petitions to the United States Supreme Court. The ABA also advocates the appointment of two "experienced" attorneys at each stage of capital litigation, although the ABA does not explain in the Report what "experienced" entails, or whether the appointment of one "experienced" attorney would be a significant improvement over the current requirements. *Id.*

58. *Id.*

59. *Id.* at 5.

60. Bright, *supra* note 35, at 1851.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 1851–52. Bright quotes one critic of the system as saying, "You put a mirror under the court-appointed lawyer's nose, and if the mirror clouds up, that's adequate counsel." Hal Strauss, *Indigent Legal Defense Called "Terrible"*, ATLANTA J.-CONST., July 7, 1985, at 12A.

death sentence are generally poor, racial minorities, or mentally deficient individuals who are accused of very serious, offensive acts.[65]

4. Suggested Reform

Many of the ABA's measures appear rather expensive and perhaps even extreme, especially in light of the public's strong desire to limit the cost of capital litigation through the appeals process. The ABA's ideas, however, may improve the current system for capital defendants, while continuing to streamline its procedures. If a capital defendant were ensured competent assistance of counsel, many successive petitions could subsequently be eliminated on this basis without depriving that defendant of his or her due process rights under the Fourteenth Amendment. However, if competent counsel has not been provided and the subsequent procedural protections are limited, a capital defendant is left with virtually no remedy, and can only look forward to an all too final punishment. To avoid this potentially unjust result, jurisdictions imposing the death penalty could adopt guidelines that ensure competent counsel for indigent capital defendants.

C. Racial Bias

Over sixty percent of homicide cases involve African-American victims, while in cases where the death penalty is sought, over eighty percent involve Caucasian victims.[66] A African-American defendant who kills a Caucasian victim is over five times more likely to be sentenced to death than a Caucasian defendant who kills a Caucasian victim.[67] An African-American who kills a Caucasian is sixty times more likely to be sentenced to death than an African-American who kills another African-American.[68] In Georgia, killers of Caucasian victims are almost ten times as likely to receive the death sentence as killers of African-American victims.[69] In a capital punishment case in Alabama, all twenty-six African-American individuals who qualified for jury duty were challenged by the prosecutor who had secretly ranked the potential jurors as "strong," "medium," "weak," and "black."[70] These data and examples of racial prejudice are not only disturbing, but quite compelling in light of the fact that racial discrimination is not commonly a ground for reversal of a death sentence.[71]

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65. Bright, *supra* note 35, at 1878.

66. Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 519, 519 (1995).

67. *Id.*

68. *Id.*

69. *Id.* In Florida, killers with white victims are eight times more likely to receive the death sentence than killers of black victims; in Illinois, they are six times as likely to receive a death sentence. Ronald J. Tabak, *Is Racism Relevant? Or Should the Fairness in Death Sentencing Act Be Enacted to Substantially Diminish Racial Discrimination in Capital Sentencing?*, 18 N.Y.U. REV. L. & SOC. CHANGE 777, 781 (1990–91).

70. Tabak, *supra* note 69, at 785.

71. Chemerinsky, *supra* note 66, at 529.

The ABA's third goal of the resolution calling for a moratorium on executions is to eliminate discrimination in capital sentencing on the basis of the race of the victim or the accused.[72] The ABA is not the first organization to criticize the effect of racial bias in the imposition of the death sentence. Numerous studies have indicated a tendency of capital defendants to be sentenced to death if their victims were white as opposed to black.[73] Other studies have demonstrated that black defendants receive the death sentence more often than white defendants.[74]

1. The Supreme Court

The Supreme Court considered the problem of racial bias in *Furman v. Georgia*,[75] and acknowledged that the death sentence would certainly be "unusual" punishment if imposed in such a way as to discriminate against an individual by virtue of race, religion, social position, or class, even if the procedures were such that discrimination was effectuated through the process.[76] The *Furman* court first looked at the English Bill of Rights of 1689 to analyze the origins of the American system of capital punishment. The English system also recognized that the selective or irregular use of penalties applied to minorities would constitute "cruel and unusual" punishment.[77] The *Furman* court determined that, "[t]he death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups,"[78] and subsequently found the carrying out of the death sentence in the cases before the court would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.[79]

Furman was decided in 1972 by a five to four split.[80] By 1987, the Court came to the opposite conclusion in another five to four decision regarding the same issue, *McCleskey v. Kemp*.[81] In *McCleskey*, the Court was faced with the question whether the Georgia death-sentencing process was unconstitutional in light of a study[82] that indicated that the death penalty was imposed more often on black defendants and killers of white victims than on white defendants and killers of black victims.[83] The Court held that in order to prevail on the Equal Protection

72. ABA REPORT, *supra* note 14, at 11–13.

73. Tabak, *supra* note 69, at 780–83.

74. *See, e.g.*, DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 399 (1990).

75. 408 U.S. 238 (1972).

76. *Id.* at 242.

77. *Id.* at 244–45 (Douglas, J., concurring).

78. *Id.* at 249–50 (Douglas, J., concurring).

79. *Id.* at 238.

80. *Furman*, 408 U.S. 238.

81. 481 U.S. 279 (1987).

82. The Baldus Study was based on over 2000 Georgia murder cases which occurred during the 1970s. The study analyzed data relating to the victim's race, defendant's race and various combinations of both. The study found that a capital defendant in Georgia was 4.3 times more likely to receive a death sentence if his or her victim was white instead of black. BALDUS, *supra* note 74, at 154; Tabak, *supra* note 69, at 781.

83. *McCleskey*, 481 U.S. at 279.

claim, the defendants had to demonstrate that there was discrimination by the decision maker in their specific case, and that although the study may have demonstrated a general tendency, it alone was insufficient to implicate a violation of the defendant's Equal Protection rights.[84] The Court stated that the "study at most indicated a discrepancy that appeared to correlate with race, not a constitutionally significant risk of racial bias affecting Georgia's capital-sentencing process." Similarly, the Court held that a violation of the Eighth Amendment was not established by the evidence.[85]

2. Proposed Legislation

The Supreme Court in *McCleskey* invited Congress to take action against racial discrimination in capital sentencing.[86] Thus far, Congress has not responded in any meaningful way to the threat of discrimination in the imposition of the death penalty. There has, however, been proposed legislation that sought to remedy this problem. One such proposal was the Fairness in Death Sentencing Act of 1991.[87] This proposal would have allowed a challenge based on the same type of evidence which the court in *McCleskey* would not consider as probative.[88] The law would have permitted a court to draw an inference that race was the basis of a death sentence if the defendant was able to demonstrate that race was a statistically significant factor in the imposition of the death sentence in the jurisdiction in question, whether by virtue of the victim's race or that of the defendant.[89]

Another proposed measure to deal with the problem of racial bias in capital sentencing was the ABA's Racial Justice Act.[90] This Act was approved by the House of Representatives twice, but never gained acceptance by the full Congress.[91] The Racial Justice Act was similar to the Fairness in Death Sentencing Act in that it would have allowed a court to consider legitimate statistical data as evidence of racial bias in the imposition of the death sentence within the particular jurisdiction.[92] Upon a demonstration of such bias by the defense, the burden would have shifted to the prosecution to demonstrate that race was not a significant factor in seeking the death sentence in the specific case.[93]

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84. *Id.*

85. *Id.* Compare Beck v. State, 396 So. 2d 645, 652–56 (Ala. Sup. Ct. 1980), which analyzes statistical data regarding racial demographics of the imposition of the death penalty in Alabama, both during pre-*Furman* and post-*Furman* years. The Court retraces the history of Alabama's death penalty statutes and the effect of *Furman* on the statutory scheme.

86. *Id.* at 319. *See* ABA REPORT, *supra* note 14, at 13.

87. H.R. 2851, 102d Cong., 1st Sess. (1991). *See* Tabak, *supra* note 69, at 778.

88. Tabak, *supra* note 69, at 778.

89. H.R. 2851, 102d Cong., 1st Sess. (1991). *See* Tabak, *supra* note 69, at 778.

90. H.R. 4017, 103rd Cong., 2d Sess. (1994).

91. ABA REPORT, *supra* note 14, at 13.

92. Tabak, *supra* note 69, at 778.

93. Chemerinsky, *supra* note 66, at 520.

Although the Racial Justice Act was in direct conflict with the holding in *McCleskey*,[94] it seems to have comported with the Supreme Court's holding in *Batson v. Kentucky*.[95] The *Batson* Court held that preemptory strikes of potential jurors which are based on race are unconstitutional because they deny the defendant equal protection.[96] Under *Batson*, the defendant must present a prima facie case of discriminatory use of preemptory strikes, and the prosecution must provide a non-race based reason for the challenge.[97] Procedurally, the Racial Justice Act would have worked the same way. Substantively, it would have ensured that latent racial prejudice be discovered and the defendant's equal protection rights be protected.

3. Suggested Reform

It seems peculiar that our justice system purports to protect civil rights so fervently in many spheres, but as yet, has failed to do so in the criminal realm. Government protections against racial prejudice exist in such social spheres as employment, housing, eligibility for public benefits, voting, and fulfilling the civic duty of jury service, but are lacking in our capital punishment regime where the consequences of such prejudice are often the most dire.[98] If the statistical disparities which exist on death row were to be present in an employment situation, a defendant would certainly be able to bring suit under Title VII of the 1964 Civil Rights Act.[99] Thus, why has Congress been so unsuccessful in responding to the Supreme Court's holding in *McCleskey* which expressly invited it to codify protections against the effect of this racial discrimination? At the very least, Congress could demonstrate its concern for the problem of racial bias in capital sentencing by passing legislation that would allow courts to consider legitimate statistical data on the incidence of racial bias in the imposition of the death sentence.[100]

The evidence suggests that jurisdictions that impose capital punishment cannot in good faith ignore the proven effects of racial bias on the imposition of the death sentence. Measures such as the "Fairness in Death Sentencing Act" and the "Racial Justice Act" are examples of what jurisdictions can do to remedy the

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94. Indeed, the Act was designed to overturn the effects of *McCleskey*. *Id.* at 530.

95. 476 U.S. 79 (1986).

96. *Id.*

97. *Id.* at 98–99.

98. Chemerinsky, *supra* note 66, at 520.

99. *Id.* at 519. *But see* McCleskey v. Kemp, 481 U.S. 279, 294 (1986) (Powell, J.) (stating that "the nature of the capital sentencing decision, and the relationship of the statistics to that decision, are fundamentally different from the corresponding elements in...Title VII cases"). *Cf. id.* at 350 (Blackmun, J., dissenting) (stating that McCleskey's racial discrimination claim "fits easily" into the same framework applied to Title VII claims).

100. The Racial Justice Act has been criticized as an attempt to outlaw capital punishment. Chemerinsky, *supra* note 66, at 532–33 (quoting George F. Will, *Racial Justice Act is Ploy To Kill Death Penalty*, CHICAGO SUN TIMES, May 19, 1994, at 31).

impact of latent racial prejudice. Congress, as well as state legislatures in jurisdictions which impose the death penalty, should adopt protections such as these acts to ensure fairness in the sentencing of capital defendants of a racial minority.

D. Unconscionable Executions

Mario Marquez had been routinely beaten by his father since his early childhood, because he was "slow."[101] When Marquez was twelve years old, his parents abandoned him and his younger siblings, leaving them with no further parental support.[102] Marquez was later found to be mentally retarded, apparently since birth, and was diagnosed as having severe brain damage as a result of the beatings.[103] Marquez's level of intellectual and emotional maturity was found to be that of a five year old.[104] The mental deficiency suffered by Marquez was shockingly exhibited by him while he was eating his last meal before his execution, when he stated he wanted to save his apple pie "for later."[105]

The ABA's fourth goal of the Resolution is to prevent the execution of

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101. It is reported that his father "beat him mercilessly, using boards, sticks, and fists[,]...whip[ping] him with a horsewhip[,] and on several occasions [binding] Mario's hands and legs and [hanging] him from a pole or tree and horsewhipp[ing] him until he was unconscious." Coyne, *supra* note 23, at 42. (citing Petition for Writ of Certiorari at 5–7, *Marquez v. Scott*, 513 U.S. 881 (1994)).

102. *Id.* at 42–43.

103. *Id.* at 43.

104. *Id.*

105. *Id.* In 1984, Marquez was convicted of murdering his estranged wife and her fourteen year-old sister by strangulation after brutally raping them both. He admitted to another victim of his sexual assault who lived with the deceased victims that he killed the two to "get even" for his wife's alleged infidelities, and for "vengeance," so that no one would "laugh at him" anymore. Marquez was an extremely violent individual, who stabbed a fellow inmate with a ballpoint pen, attempted the murder of a uniformed police officer while evading arrest for four burglary charges, attacked a cameraman at his trial, and threatened the prosecuting attorney. *See* Marquez v. State, 725 S.W.2d 217, 220–23 (Tx. Ct. App. 1987). The use of the case of Mario Marquez in this Note is not intended as a blanket prohibition against the execution of individuals with mental deficiencies or unfortunate backgrounds and should not be construed as such. Instead, Marquez's statement prior to his execution is presented to illustrate his inability to comprehend the finality of his death sentence, and the story of his own problematic childhood demonstrates the compelling circumstances that can constitute mitigating evidence in the trial of a mentally deficient individual. The example of an individual with such a sympathetic background, coupled with the ability to commit such horrifying crimes, poses the most difficult moral questions for the sentencing of mentally deficient individuals. Although complete abandonment of the death sentence for those who cannot be rehabilitated as a result of their purely violent nature may not be desirable, courts must consider compelling mitigating circumstances, even when evaluating an appropriate sentence in the most shocking crimes.

mentally retarded individuals[106] and juvenile offenders.[107] Although the Supreme Court has upheld the constitutionality of executions in both cases,[108] many states are now beginning to bar executions when these circumstances are present.[109]

1. Aggravating and Mitigating Circumstances

American society has traditionally held the belief that people should not be unduly punished for crimes that they did not have complete control due to diminished mental or emotional capacity, or even when social disadvantage has played a significant role in behavior.[110] In capital punishment proceedings, evidence of a defendant's mental or emotional incapacity is admissible during the sentencing phase as either "mitigating" or "aggravating" circumstances.[111] Evidence that is admitted as "mitigating" is evidence which suggests that the defendant deserves some measure of leniency, or at the very least, should not be executed for his crime. "Aggravating" evidence is that which demonstrates that the accused is a menace to society or will be dangerous in the future.[112] Ironically,

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106. The ABA adopts the standards of the American Association of Mental Retardation to define the term "mentally retarded." Specifically, the definition states that "mentally retarded persons" have "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the development period." This definition is currently used in all twelve jurisdictions that prohibit the execution of mentally retarded individuals. Coyne, *supra* note 23, at 40 & n.366.

107. ABA REPORT, *supra* note 14, at 13–14. "Juvenile offenders" includes people who were under the age of eighteen at the time of the offense, but who were not necessarily juveniles at the time of execution. *Id.* at 13.

108. *See* Penry v. Lynaugh, 492 U.S. 302 (1989) (refusing to hold the execution of a mentally retarded individual unconstitutional under the Eighth Amendment); Stanford v. Kentucky, 492 U.S. 361 (1989) (refusing to hold that the execution of individuals who were sixteen and seventeen at the time they committed the offenses was unconstitutional under the Eighth Amendment).

109. ABA REPORT, *supra* note 14, at 13. Eleven states and the federal government are reported to prohibit the execution of mentally retarded individuals, while twenty-eight capital jurisdictions still permit such executions. Georgia is the only state that has enacted legislation to that effect. Coyne, *supra* note 23, at 40 & n.367.

110. *See* Deborah W. Denno, *Testing* Penry *and Its Progeny*, 22 AM. J. CRIM. L. 1 (1994); *see also* Ford v. Wainwright, 477 U.S. 399 (1986) (holding that the Eighth Amendment prohibits the execution of a prisoner who is insane).

111. The practice of using "mitigating" and "aggravating" circumstances is promulgated by the Model Penal Code approach, which provides for a system of guided discretion in capital sentencing. Whereas the "aggravating" circumstances are expressly provided for by statute, "mitigating" evidence has been held to be any relevant evidence which the defense wishes to present on behalf of the accused. Eddings v. Oklahoma, 455 U.S. 104, 110–12 (1982). *See* Lockett v. Ohio, 438 U.S. 586 (1978). For a general discussion on the system of guided discretion as established through the American Law Institute, the Model Penal Code and its effect on the capital punishment system, see Raymond Pascucci, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129 (1984).

112. These are illustrative definitions of what constitutes "mitigating" and "aggravating" evidence. These explanations are examples, and are by no means exhaustive.

evidence of mental retardation is a "two-edged sword" and can serve as both mitigating and aggravating evidence.[113] Mental retardation works against a capital defendant because it tends to show he will continue to be dangerous as a result of his incapacity. Mental retardation works in favor of leniency in the sense that the accused may not have fully comprehended his crime in the first place.[114]

2. The Supreme Court

In *Penry v. Lynaugh*, the Supreme Court held that the Eighth and Fourteenth Amendments require that a jury should be allowed to "consider and give effect to" the evidence of a defendant's mental retardation as mitigating evidence, to allow them to express their "reasoned moral response" in deciding whether the individual should live or die.[115] The Court also held that executing mentally retarded individuals is not per se unconstitutional or prohibited by the Eighth Amendment.[116]

The *Penry* Court, however, did acknowledge that at common law, the punishment of "idiots" was prohibited.[117] This is because of our society's deeply-held belief that punishment must correlate appropriately with the crime and that an individual may be less culpable by virtue of a mental or emotional disability that affects his judgment or perception of reality.[118] The Court also reasoned that it may in fact *be* "cruel and unusual" punishment to execute individuals who suffer such a mental disability that they cannot appreciate the wrongful nature of their conduct, but explained that this condition is accounted for by the insanity defense.[119] The Court did not, however, attempt to account for the number of mentally retarded individuals who remain on death row.[120]

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113. Penry v. Lynaugh, 492 U.S. 302, 324 (1989). John Paul Penry suffered from organic brain damage and mild to moderate retardation. A clinical psychologist testified that Penry had the mental age of a six and a half year old child, and the social maturity of a nine or ten year old. There was also evidence that Penry was subject to beatings and abuse as a child. The psychologist found that Penry had poor control over his impulses and was unable to learn from experience. The psychologist testified that Penry's afflictions made it impossible for him to understand the wrongful nature of his conduct, or to conform to the law. These factors served to work against Penry as demonstrating an inability to be rehabilitated, as opposed to their intended effect as mitigating evidence. Penry was subsequently sentenced to death. Denno, *supra* note 110, at 8 n.37; Coyne, *supra* note 23, at 41.

114. *Penry*, 492 U.S. at 324.

115. *Id.* at 304. *See Eddings*, 455 U.S. at 113–14; *Lockett*, 438 U.S. at 604.

116. *Penry*, 492 U.S. at 302.

117. The term "idiot" referred to "persons totally lacking in reason, understanding, or the ability to distinguish between good and evil." *Id.* at 305.

118. *Id.* The court also includes those individuals from a "disadvantaged background" as potentially being of lesser culpability. *Id.* at 304.

119. *Id.* at 305.

120. ABA REPORT, *supra* note 14, at 13. The Report notes that in 1993, mentally retarded prisoners accounted for twelve to twenty percent of the population on death row. EMILY F. REED, THE PENRY PENALTY: CAPITAL PUNISHMENT AND OFFENDERS WITH MENTAL RETARDATION 39 (1993). Additionally, there were thirty-two death row inmates who were

One of the most effective arguments against executing minors and the mentally retarded is that civilized societies simply do not do such things.[121] Such activity has been compared to the "barbarous" act of eliminating the "least culpable on death row."[122] The fact that several states have passed laws against executions where the defendant was unable to fully comprehend his or her actions and the ensuing repercussions has been attributed to public distaste for such executions.[123] Although this may be a reflection of public opinion, there are still jurisdictions imposing the death sentence that do not have such statutory protections of juvenile and mentally retarded defendants.

3. Suggested Reform

The ABA advocates the enactment of legislation that would prohibit such unconscionable executions as those of juvenile offenders and mentally retarded individuals. Such protections will not only allow juries to express their "reasoned moral response" to such evidence, but force them to seek a sentence which gives effect to it.

III. SHOULD THE GOALS OF THE ABA RESOLUTION BE ADOPTED?

Our American jurisprudential system recognizes the premise that because the death sentence is fundamentally distinguishable from a sentence of life-imprisonment, the degree of reliability of procedural safeguards must be heightened to avoid the arbitrary and capricious application of such a final punishment.[124] It has also been acknowledged that the procedural safeguards necessary to ensure such a heightened level of certainty may be too costly to sustain a reliable capital punishment system.[125] Among those who share this view

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under the age of eighteen at the time of their offenses at the end of 1990; that number rose to forty-two by 1995. RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA 95 (1991). One hundred and forty juvenile offenders have been executed since 1973. ABA REPORT, *supra* note 14, at 13 (citing Letter from the Death Penalty Information Center (Apr. 2, 1996)).

121. Dan Quinn, *Executing the Mentally Retarded: An Unresolved Debate*, 22 AM. J. CRIM. L. 321, 324 (1994).

122. *Id.* at 322 (quoting Harvard law school professor Alan Dershowitz as quoted by Alain L. Sanders, *Bad News for Death Row; the Court Okays the Execution of Teenage and Retarded Criminals*, TIME, July 10, 1989, at 48).

123. *See* REED, *supra* note 120. Reed gives an example of a mentally retarded convict who was to be executed and asked his attorney what he should wear to his own funeral, as he simply did not understand the finality of his execution. *See* Quinn, *supra* note 121, at 324.

124. Caldwell v. Mississippi, 472 U.S. 320, 329–33 (1985); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (stating that sentencers have an "awesome responsibility" that is inextricable with the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in the specific case"). *See* Michael D. Hintze, Note, *Attacking the Death Penalty: Toward A Renewed Strategy Twenty Years After* Furman, 24 COLUM. HUM. RTS. L. REV. 395 (1993).

125. Hintze, *supra* note 124, at 412–15.

are those who "tinker with the machinery of death" themselves.[126] In his dissent in the denial of certiorari in *Callins v. Collins*, Justice Blackmun abdicated his role of deciding whether the system that imposes death onto individuals acts fairly and consistently.[127] After twenty years of "tinkering" with the system, Justice Blackmun decided that the death penalty could not be administered in accord with the Constitution.[128] Blackmun noted that the Supreme Court virtually conceded as much in *McCleskey v. Kemp* but still tried to perfect a system that is imperfectable.[129] Blackmun also noted that the public's desire to keep the death penalty is a driving force in its continued existence.[130]

In Justice Scalia's concurring opinion denying review, he criticized Blackmun's view and argued that death by lethal injection, which Justice Blackmun so adamantly condemns for the killer, is in fact a much more desirable demise than being unexpectedly shot by a bullet and left to die on the floor of a bar, as was the fate of the victim in *Callins*.[131] Surely, this debate among two senior members of the United States Supreme Court is demonstrative of the raging controversy regarding the death sentence throughout the nation.

Those who side with Scalia would argue that the only appropriate punishment for such an atrocious crime is death. However, those who side with Blackmun would present an equally compelling argument that a criminal justice

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126. *See* Callins v. Collins, 510 U.S. 1141 (1994). Bruce Edwin Callins was sentenced to death after he shot a patron during a robbery attempt at a local bar. *See* Callins v. Collins, 998 F.2d 269 (5th Cir. 1993). At issue in *Callins* was the defendant's claim of error on the following five events which occurred in his capital murder trial: (1) the court did not allow Callins to impeach the credibility of a witness who testified that he was threatened by the defendant with a gun prior to the robbbery; (2) the sentencing phase of Callins' two counts of burglary and murder were adjudicated seperately, subjecting him to double jeopardy; (3) Callins was not allowed to present mitigating evidence of his troubled childhood and history of drug abuse, thereby giving full effect to the fact that after he shot the bar patron he told him he would "be alright" and asked for someone to call an ambulance; (4) the court failed to declare a mistrial upon the finding that a venire member was making racist comments in reference to Callins and stating that blacks are more likely to commit armed robbery than are whites; and (5) the court failed to find Callins' counsel ineffective even though the attorney was unfamiliar with the bifurcated sentencing process, failed to investigate any mitigating evidence because he was also unfamiliar with that process, and did not present evidence of self-defense, the only defense which was available to Callins. *Id.* at 273–77.

127. *Callins v. Collins*, 510 U.S. at 1145.

128. Justice Blackmun stated that he has "struggled—along with a majority of the Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor," but reached the conclusion that the goal of actual fairness in the imposition of the death sentence can never truly be attained. Blackmun criticized the high standard which capital defendants must overcome to have their cases reviewed through federal habeas corpus as being "indefensible," and lamented that "the prospect of meaningful judicial oversight has diminished" at the trial level in capital cases. *Id.* at 1145–46 & n.2.

129. *Id.* at 1154.

130. *Id.* at 1147.

131. *Id.* at 1142.

system which imposes this final penalty in an arbitrary or capricious manner is also an atrocity. Justice Blackmun goes one step farther to argue that after twenty years the capital punishment system should be abandoned as it is impossible to implement the requisite degree of procedural protection. Justice Scalia, however, is not willing to give up on what appears to be the only remedy for the sense of rage and demand for just retribution against individuals who would commit such a crime.

It would appear that due to rising anti-crime sentiment and judicial notice that the death sentence does not constitute "cruel and unusual punishment" per se, capital punishment will not be abandoned in the near future. Indeed, the death penalty is rising in its rate of application.[132] This fact cannot be ignored, and the system must respond with adequate procedural protections. If the death sentence is to be imposed more "effectively," procedural safeguards such as those proposed by the ABA should be adopted at the trial level to prevent errors that are now less appealable due to the AEDPA.

In addition to the measures proposed by the ABA, jurisdictions should be encouraged to develop their own procedural protections for capital defendants at the trial level. Among potential reforms that capital jurisdictions could adopt to ensure adequate counsel are: (1) a certification system for defense attorneys in cases where a death sentence might potentially be imposed; (2) requisite minimum levels of experience and training for capital defense attorneys; (3) a system which requires capital defense attorneys to work on teams, so that when a novice attorney takes on his or her own death penalty case for the first time, he or she has had the prior experience of working with a seasoned attorney; (4) a capital defense system which adequately compensates court-appointed attorneys for representing indigent defendants, thereby creating an incentive for experienced attorneys to remain in this capacity to become experts, as opposed to taking the jobs to gain first-time experience; and (5) limits on the caseloads of attorneys who represent indigent capital defendants, to ensure that error will not arise due to a lack of time or energy to investigate potentially mitigating circumstances or defenses.

Capital jurisdictions should adopt measures to ensure the courts' vigilance regarding racial bias. Such measures include legislation permitting valid statistical data to be considered as probative evidence of potential racial bias which affects the fair outcome of proceedings. This evidence could be subjected to the same standards as expert testimony is in other areas of the law. Regardless, the existence of racial bias, which has been acknowledged by the Supreme Court, should not be ignored as a general problem, but should be specifically addressed as a safeguard against the arbitrary imposition of the death sentence. All jurisdictions which impose the death sentence should also be encouraged to adopt legislation which protects juvenile offenders and mentally retarded individuals.

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132. *See supra* note 6 and accompanying text.

IV. CONCLUSION

An effective way to judge a civilized society may be to analyze how it treats its most abhorrent members. No society condones criminal activity, especially the most heinous crimes of rape and murder. These crimes justifiably provoke intense emotion and desire for retribution. An attribute of civilized society is surely that of administering rehabilitation and punishment of criminals. However, the need for remonstrance does not justify subjecting individuals to arbitrary judicial proceedings where they must overcome such obstacles as inadequate representation, racial bias, and disregard for mental affliction, to save their own lives. Thus, procedural protections should be adopted at the trial level to prevent such injustices from occurring, especially now that Congress has limited appellate remedies. By adopting reforms that will preserve due process, provide competent legal counsel, eliminate discrimination based on race, and prevent the executions of juvenile offenders and the mentally retarded, capital jurisdictions can ensure that the death penalty will be imposed more responsibly.