The Scholar: St. Mary's Law Review on Race and Social Justice

Volume 10 | Number 2 Article 4

12-1-2008

Capital Punishment or Lack-of-Capital Punishment - Indigent Death Penalty Dependants Are Penalized by a Procedurally Flawed Counsel Appointment Process.

Talia Nye-Keif

"CAPITAL" PUNISHMENT OR "LACK-OF-CAPITAL" PUNISHMENT? INDIGENT DEATH PENALTY DEFENDANTS ARE PENALIZED BY A PROCEDURALLY FLAWED COUNSEL APPOINTMENT PROCESS

TALIA NYE-KEIF*

"[F]rom every mountainside, [L]et freedom ring."[1]

During the height of the Civil Rights era of the 1960s,[2] the United States Supreme Court issued the landmark opinion *Gideon v. Wain-*

---

* Talia L. Nye-Keif, a second-year law student when she wrote this comment, completed her law studies at St. Mary's School of Law in December 2007. Mother of daughters Chelsea and Courtney, and wife of San Antonio police detective Jerald Keif, Nye-Keif brings to the field of law her experiences in the United States Air Force and public, media, and government relations. Professor of Law John M. Schmolesky, who teaches a number of criminal law courses at St. Mary's School of Law, provided invaluable assistance in the research and review of this comment. Nye-Keif wishes to acknowledge his many contributions, including his incredible patience and careful guidance."

1. Samuel F. Smith, *America*, in BREATHES THERE THE MAN: HEROIC BALLADS & POEMS OF THE ENGLISH-SPEAKING PEOPLES 81 (Frank S. Meyer ed., 1973) (1832).

2. *See generally* SparkNotes: The Civil Rights Era (1865-1970), http://www.sparknotes.com/history/american/civilrights (last visited Nov. 2, 2007).

wright[3] that rang sounds of equal justice for all through the halls of democracy.[4] "[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided to him."[5]

Today, that ringing endorsement of a truly adversarial system of justice for all probably sounds more like the same old song and dance to indigent death-penalty defendants. Far too often, indigent death-penalty defendants are appointed ineffective, inexperienced, or inexcusably incompetent counsel whose best efforts at representation fail both their clients and the entire justice system.[6]

For the indigent death-penalty defendant lacking the resources to adequately defend himself, the prospect of capital punishment is ironically the "lack of capital" punishment.

I. INTRODUCTION

"Our criminal justice system is interdependent: if one leg of the system is weaker than others, the whole system will ultimately falter."[7]

Anecdotes from case law perhaps best describe how the current counsel appointment method weakens the entire judicial process by failing to protect indigent defendants' constitutional rights.

---

3. Gideon v. Wainwright, 372 U.S. 335 (1963).

4. *See generally* ANTHONY LEWIS, GIDEON'S TRUMPET (2d. ed. 1989) (depicting the entertainment industry's response to the momentous decision in *Gideon v. Wainwright*).

5. *Gideon*, 372 U.S. at 344 (expanding upon the principles articulated by Justice Sutherland in *Powell v. Alabama*).

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. (quoting Powell v. Alabama, 287 U.S. 45, 68–69 (1932)).

6. *See generally* Abanet.org: Death Penalty Moratorium Implementation Project, http://www.abanet.org/moratorium/why.html (last visited Nov. 2, 2007) (outlining the rationale behind the American Bar Association's call for a moratorium on the death penalty until a comprehensive review of the process can be completed).

7. Janet Reno, U.S. Att'y General, Remarks at the National Symposium on Indigent Criminal Defense (Feb. 25, 1999), *in* 14 SUM CRIM. JUST. 61 (1999).

In Texas, when Calvin Burdine was tried for capital murder, his court-appointed attorney, Joe Cannon, actually slept several times during trial for up to ten minutes at a time in some instances.[8] Despite affirmation on appeal by the Texas Court of Criminal Appeals, Burdine's January 30, 1984 conviction and death sentence were overturned and remanded for retrial.[9] On writ of habeas corpus, the United States District Court for the Southern District of Texas ruled that the facts showed Cannon's sleeping violated Burdine's Sixth Amendment right to an attorney.[10]

> Ordinarily, the two-prong test enumerated in *Strickland v. Washington* will suffice to resolve instances of ineffective assistance of counsel. "Of course, the buried assumption in our *Strickland* cases is that counsel is present and conscious to exercise judgment, calculation, and instinct, for better or worse. But that is an assumption we cannot make when counsel is unconscious at critical times." Indeed, "there is a great difference between having a bad lawyer and having no lawyer." This Court therefore concludes that when a defense attorney sleeps through a "substantial" portion . . . of his client's crimi-

---

8. Burdine v. Johnson, 66 F. Supp. 2d 854, 857–59 (S.D. Tex. 1999) (detailing several eyewitness accounts of Cannon's inappropriate napping during trial).

> [Jury foreperson] Strickland testified that on several occasions he saw Cannon "nod off or perhaps doze . . . catch himself dozing . . . just kind of dozed off for a few minutes." A second juror . . . testified that she noticed Cannon "nodding," with his eyes closed and chin on his chest, on the second day of trial. The third juror . . . testified that he observed Cannon's "nodding," as well.
>
> . . . .
>
> Former District Judge Joseph M. Guarino . . . did recall Cannon closing his eyes on multiple occasions during the trial and sometimes leaning back in his chair. Joe Cannon testified that he did not sleep during any portion of Burdine's trial. Instead, Cannon claims that he tends to close his eyes when thinking, and that during periods of deep concentration he would nod his head. Cannon testified further that he had never slept at any trial . . . . *Id.*

9. *Id.* at 866.

10. *Id.* (explaining why Cannon's sleeping during the presentation of the state's case meant that he could not have provided effective counsel). The Court stated:

> [A]s Burdine was the sole defendant on trial, and Cannon was the sole defense attorney, Cannon's periods of sleep could only occur during the presentation of the prosecution's case directly against Burdine, *i.e.* crucial times when Burdine's interests, including his life, were at stake. Hence, every prosecution witness should have compelled Cannon's fastidious and exacting attention. Contrary to the state's present assertions to this Court, there is absolutely no basis for the contention that Cannon was functioning as an attorney during these critical periods of Burdine's capital murder trial. There was clearly a breakdown in the adversarial process. *Id.*

The Court concluded that "Burdine was denied the effective assistance of counsel during his criminal trial in violation of his Sixth Amendment right to counsel." *Id.*

> nal trial, prejudice is to be presumed as a matter of law. A sleeping counsel is equivalent to no counsel at all.[11]

In Pennsylvania, Ronald Rompilla was convicted and sentenced to death after two public defenders appointed to represent him at trial failed to review files regarding his prior convictions.[12] On writ of certiorari following a federal habeas corpus petition, the United States Supreme Court held that the oversight of the files was prejudicial and represented ineffective assistance of counsel because the attorneys would have found mitigating information and the information could have resulted in a different sentence.[13]

In addition, the *San Antonio Express-News*, covered what it termed "shoddy lawyering" in death row appeals.[14] The newspaper highlighted the cases of several defendants, including Justin Chaz Fuller[15] and Arturo Eleazar Diaz.[16] One *San Antonio Express-News* article referred to the Fuller appeal, crafted by attorney Toby C. Wilkinson, "as an example of

---

11. *Id.* (quoting Tippins v. Walker, 77 F.3d 682, 687 (2d Cir. 1996); United States v. Taylor, 933 F.2d 307, 312 (5th Cir. 1991); Javor v. United States, 724 F.2d 831, 834 (9th Cir. 1984)).

12. *See* Rompilla v. Beard, 545 U.S. 374, 376 (2005) (holding that the death sentence was invalid due to ineffective assistance of counsel). The Court stated:

> A *de novo* examination of this element shows that counsel's lapse was prejudicial. Had they looked at the prior conviction file, they would have found a range of mitigation leads that no other source had opened up. The imprisonment records contained in that file pictured Rompilla's childhood and mental health very differently from anything they had seen or heard. The accumulated entries–*e.g.*, that Rompilla had a series of incarcerations, often related to alcohol; and test results that would have pointed the defense's mental health experts to schizophrenia and other disorders–would have destroyed the benign conception of Rompilla's upbringing and mental capacity counsel had formed from talking to five family members and from the mental health experts' reports. *Id.*

13. *Id.* at 377 ("[E]ven when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of the trial.").

14. Maro Robbins, *Convict's Odds Today May Rest on Gibberish,* SAN ANTONIO EXPRESS-NEWS, Aug. 24, 2006, at 1A; Maro Robbins, *Shoddy Lawyering Can Prove Fatal in Death Row Appeals*, SAN ANTONIO EXPRESS-NEWS, Sept. 24, 2006, at 1A.

15. *Id.* (covering the impending execution of Justin Chaz Fuller).

16. *Id.* (reporting the problems the paper's investigation found with the trial of Arturo Eleazar Diaz). The article describes:

> With his client's life on the line, the lawyer appointed to file the death row inmate's final state appeal cobbled together arguments that were incomplete, vague and, in at least one place, just plain wrong. They perplexed the prosecutor and provoked a 606–page response from the judge. "Applicant totally misinterprets what actually occurred in this case," State District Judge Noe Gonzalez of Edinburg wrote about one of the attorney's claims. *Id.*

the state's failure to adequately examine death-penalty convictions."[17] The article pointed out several major problems, including "incoherent repetitions, rambling arguments and language clearly lifted from one of [Wilkinson's] previous cases, so that at one point it described the wrong crime."[18] Fuller was executed on August 24, 2006.[19] In regards to the Diaz case, the newspaper reported that the convict's habeas corpus appeal by McAllen, Texas attorney Mark Alexander, triggered a grievance against Alexander that was subsequently dismissed by the State Bar of Texas.[20] These individual cases, highlight a systemic problem in the administration of death penalty cases that is more likely to be effectively and equitably addressed by systemic rather than case-by-case analysis.

In September 2000, the Texas Bar received a report from its Committee on Legal Services to the Poor in Criminal Matters, which painted a dismal picture of the availability of adequate legal counsel to indigent Texas defendants.[21] Based upon a comprehensive survey of judges, prosecutors,

---

17. *Id.*

> While inmate Justin Chaz Fuller's last hope for a temporary reprieve now waits on the U.S. Supreme Court and the governor, his case is being cited as an example of the state's failure to adequately examine death penalty convictions. The same lawyer, in another pending capital case, apparently copied his client's letters so that, instead of citing legal cases, the filed documents echo the inmate's unintelligible arguments, flawed grammar and even his complaint that he was about to run out of paper. For his work in these two appeals, the state paid the attorney Toby C. Wilkinson of Greenville about $18,000 in each case, for a total of $36,514. Wilkinson did not return repeated calls. *Id.*

18. *Id.*

19. Texas Dep't of Crim. Just.: Executed Offenders, http://www.tdcj.state.tx.us/stat/executedoffenders.htm (last visited Nov. 2, 2007) (chronicling the following offender information: last statement, name, Texas Department of Corrective Justice number, age, execution date, race, and county of executed offenders).

20. Maro Robbins, *Shoddy Lawyering Can Prove Fatal in Death Row Appeals*, SAN ANTONIO EXPRESS-NEWS, Sept. 24, 2006, at 1A.

> Appalled by the lawyer's work, a committee of attorneys and citizens formally complained to the agency that polices attorney misconduct, the State Bar of Texas The result? The attorney, Mark Alexander of McAllen, remains on the state's list of 136 lawyers who can be appointed to the cases that challenge convictions and help ensure no one unfairly convicted reaches the execution chamber. The State Bar dismissed the grievance against Alexander. His former client, Arturo Eleazar Diaz, remains on death row, arguing the courts never really reviewed his case because Alexander botched the appeal. *Id.*

21. ALLAN K. BUTCHER & MICHAEL K. MOORE, MUTING GIDEON'S TRUMPET: THE CRISIS IN INDIGENT CRIMINAL DEFENSE IN TEXAS (2000), *available at* http://www.uta.edu/pols/moore/indigent/whitepaper.htm (providing the State Bar of Texas with an assessment by the Committee on Legal Services to the Poor in Criminal Matters of the Texas indigent criminal defense process).

> This paper examines the status of indigent criminal defense in Texas and draws information from the surveys conducted by the Committee. Based on these surveys, this

and criminal defense attorneys in Texas, the report found that of three primary modes of ensuring representation for indigents, judicial appointment was the most widely used across the state.[22] Further, the report showed that indigent cases were typically used as a training ground for young attorneys who, upon attaining wider experience, later declined such cases.[23] The report cited to a theory known as "the economics of the modern law practice" as one of the reasons for this disturbing trend.[24]

> The survey of defense attorneys reveals that the average hourly rate for retained criminal legal work in Texas is $135.98 per hour. Defense attorneys further report that overhead expenses consume $71.36 of this hourly rate, leaving a profit of $64.62 per hour in retained matters. However, when defense counsel are [sic] assigned to represent indigent clients, they report that they receive, on average, $39.81 per hour. Not only does the rate paid by the counties fall 55[%] short of covering their overhead expenses, but it means that the attorney fails to earn any profit whatsoever and is subsidizing the county at a rate of $96.17 per hour![25]

---

report concludes that "the system of representing indigents charged in criminal matters in Texas is in need of serious reform. By virtually every standard examined here, the current system of indigent legal representation ignores at least the spirit of *Gideon v. Wainwright*." The report further notes that "Gideon's trumpet sounded out the promise that all persons rich, poor, or otherwise would have access to the same level of justice in our nation's courts. As matters currently exist in Texas, the sound from Gideon's trumpet has effectively been muted." *Id.*

22. *Id.* at 6 (discussing what the authors termed "assigned counsel systems").

> These "appointed" or "assigned" counsel systems, however, vary significantly throughout the state. Some judges assign attorneys from a list of all the licensed attorneys in the county, while other judges only assign attorneys from pools of those who have volunteered for such service. Other judges restrict their appointments to attorneys who have met certain standards, such as years of practice, minimum trial experience or proof of continuing legal education. *Id.* at 6–7.

23. *Id.* at 5 (explaining that the current process is viewed as being a training ground).

> One of the concerns that some have with the assigned counsel system is that it often results in a revolving door of young or beginning attorneys who accept appointed cases only to gain needed experience and establish themselves in the community. Once their skills become polished and their positions secure, the young attorneys then refuse further appointments, leaving the representation of the poor to the next batch of young and inexperienced lawyers. This view is supported by our finding that it is not uncommon for lawyers, prosecutors, and judges to view assigned matters as a training ground for new criminal attorneys. *Id.*

24. *Id.* at 14 (suggesting that more seasoned attorneys lose interest in taking court-appointed capital cases because the cases often result in a net financial loss for the defense counsel).

25. *Id.* (distinguishing Texas from other states when it comes to the fees provided to cover overhead expenses).

Economics is only one of many problems inherent in indigent defense services noted by the American Bar Association (ABA). On August 9, 2005, the ABA's Standing Committee on Legal Aid and Indigent Defendants (SCLAID) reported that indigent defense systems, including public defender services and appointed-counsel programs, suffered from shortcomings such as lack of adequate funding, inadequate attorney compensation, lack of essential resources and training, short sighted cost-cutting procedures, and an imbalance in the resources available to prosecutors and indigent defenders.[26]

This inequitable outcome is due, in part, to the disorganized and non-uniform funding of indigent defense.[27] As the SCLAID report noted, some jurisdictions obtain money for poor defendants from municipal taxes, others from state levies, and yet others from funds obtained through the issuance of traffic tickets.[28] The report observed that "the measure of justice received by an indigent defendant may depend more upon location than the actual merits of a case."[29]

---

26. BILL WHITEHURST ET AL., ABA STANDING COMMITTEE ON LEGAL AID & INDIGENT DEFENDANTS, REPORT TO HOUSE OF DELEGATES: RESOLUTION 107, at 4–11 (2005), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/res107.pdf.

27. *Id.* at 4 (discussing the impact inadequate funding has on the quality of representation provided by court-appointed counsel).

> Quality legal representation cannot be rendered unless indigent defense systems are adequately funded. Attorneys who do not receive sufficient compensation have a disincentive to devote the necessary time and effort to provide meaningful representation or even participate in the system at all. With fewer attorneys available to accept cases, the lawyers who provide services often are saddled with excessive caseloads, further hampering their ability to represent their clients effectively. Additionally, the lack of funding leads to inadequate support services by decreasing the availability of resources for training, research, and basic technology, as well as the indispensable assistance of investigators, experts, and administrative staff. *Id.*

28. *Id.* at 5 (comparing input from various respondents regarding methods of deriving funding for court-appointed counsel).

> In eight of the states examined during the hearings, states furnish all of the funding for indigent defense. In the other fourteen states, counties provide most or all of the funding. Numerous witnesses testified to the chronic inability of budget-stretched counties in their states to provide adequate funding for indigent defense. Varying levels of local funding for indigent defense means that the measure of justice received by an indigent defendant may depend more upon location than the actual merits of a case. According to a witness from Louisiana, local funding in that state derives from court costs assessed against defendants for criminal violations and varies dramatically depending upon factors as unpredictable as the number of traffic tickets issued by local police each month. In states where some or all of the funding is provided by the state, the amount of state funding is grossly insufficient. *Id.*

29. *Id.*

Such an observation echoes concerns articulated three decades earlier by Justice Brennan in the landmark decision of *Furman v. Georgia*.[30] "When a country of over 200 million people inflicts an unusually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied. To dispel it would indeed require a clear showing of non-arbitrary infliction."[31] A showing of non-arbitrary infliction is not necessarily accomplished by an arbitrary increase in the number of executions as occurred in the wake of the *Furman* decision. Rather, a due, fair, and equitable process is a more humane, just, and constitutional means of dispelling the inference of irregular and unfair application of the death penalty.

II. LEGAL BACKGROUND

> "Our history shows that the death penalty has been unjustly imposed, innocents have been killed by the state, effective rehabilitation has been impaired, judicial administration has suffered. It is the poor, the weak, the ignorant, the hated who are executed . . . ."[32]

Though recorded cases of the application of the death penalty in the American colonies can be found as early as 1607,[33] 1930 was the first year the United States kept and tracked statistics.[34] The University of Alaska-Anchorage Justice Center noted that between 1930 and 1967, "Georgia had the highest number of executions . . . totaling 366 more than nine percent of the national total. Texas followed with 297 executions . . . ."[35] Even though nearly all states during this period authorized capital punishment and about 130 executions occurred annually, as the 1960s were ending, so, too, was America's tolerance for the death penalty—a mood that triggered an unofficial moratorium on the practice, which was formalized by the 1972 *Furman v. Georgia* decision.[36]

In the 5–4 plurality decision, the United States Supreme Court declared that the death sentences imposed against two rapists and a mur-

---

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

31. Furman v. Georgia, 408 U.S. 238, 293 (1972) (Brennan, J., concurring) (analyzing the justifications for the death penalty in North American jurisprudence and finding that capital punishment was available in many more cases than it was applied).

32. Ramsey Clark, U.S. Att'y General, Address Before the Senate Judiciary Committee (1968), *in Clark Favors End of Death Penalty*, N.Y. TIMES, July 3, 1968, at A1.

33. Melissa S. Green, *History of the Death Penalty & Recent Developments*, http://justice.uaa.alaska.edu/death/history.html (last visited Nov. 2, 2007).

34. *Id.* (basing an assessment of executions on data made available by the Bureau of Justice Statistics from 1930 to 1967).

35. *Id.* (quoting Bureau of Justice Statistics).

36. *Id.* (discussing the number of states that legalized execution prior to *Furman v. Georgia*, and the number of executions annually prior to *Furman*).

derer violated the Eighth and Fourteenth Amendments' proscriptions against cruel and unusual punishment.[37] The decision triggered nine different opinions by the nine Justices; but, only two Justices took the view that capital punishment was always unconstitutional.[38] The three concurring opinions highlighted the arbitrary way the death penalty was applied.[39] In his concurrence, Justice Douglas observed, "It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, *wealth, social position, or class*, or if it is *imposed under a procedure* that gives room for the play of such prejudices."[40]

In the wake of the uncertainty created by nine different expressions of what "cruel and unusual" actions the Eighth Amendment proscribed, the death penalty was placed on a brief hiatus; but, executions resumed after the Court decided *Gregg v. Georgia,*[41] *Jurek v. Texas*[42] and *Proffitt v. Florida*[43] in 1976.

---

37. *Furman*, 408 U.S. at 240 (reversing each case in part and remanding the cases for further processing). The Court referred to its opinion in *McGuatha v. California* in which it found it "offensive to anything in the Constitution" to allow jurors unfettered discretion to sentence convicts to death. *Id.* at 247; *see also* McGuatha v. California, 402 U.S. 183, 198 (1971).

38. *Furman*, 408 U.S. at 257 (Brennan, J., concurring); *Id.* at 314 (Marshall, J., concurring).

39. *Furman*, 408 U.S. at 295 (Brennan, J., concurring) ("The probability of arbitrariness is sufficiently substantial that it can be relied upon, in combination with the other principles, in reaching a judgment on the constitutionality of this punishment."); *Id.* at 310 (Steward, J., concurring) ("I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."); *Id.* at 402 (Marshall, J., concurring) ("I could more easily be persuaded that mandatory sentences of death, without the intervening and ameliorating impact of lay jurors, are so arbitrary and doctrinaire that they violate the Constitution.").

40. *Furman*, 408 U.S. at 242 (Douglas, J., concurring) (emphasis added) (showing how the application of capital punishment violated the Constitutional proscription against cruel and unusual punishment).

41. Gregg v. Georgia, 428 U.S. 153, 169 (1976).

> Although this issue was presented and addressed in *Furman*, it was not resolved by the Court. Four Justices would have held that capital punishment is not unconstitutional *per se*; two Justices would have reached the opposite conclusion; and three Justices, while agreeing that the statutes then before the Court were invalid as applied, left open the question whether such punishment may ever be imposed. We now hold that the punishment of death does not invariably violate the Constitution. *Id.*

42. Jurek v. Texas, 428 U.S. 262 (1976) (clarifying for which crimes the death penalty could be imposed and creating the bifurcated trial method of guilt/innocence and sentencing during which evidence of mitigation could be presented for consideration as to whether the defendant would receive the death penalty).

43. Proffitt v. Florida, 428 U.S. 242 (1976) (clarifying for which crimes the death penalty could be imposed and creating the bifurcated trial method of guilt/innocence and sen-

Since then, the United States Supreme Court Justices wrestled with a multitude of challenges to the death penalty's constitutionality.[44] In *McCleskey v. Kemp*,[45] the Court considered and rejected a challenge based on a study that showed murderers of White victims were more likely to be sentenced to death than murderers of Black victims.[46] More recently, however, the Court used an "evolving standards of decency" test to hold the death penalty unconstitutional when applied to the mentally retarded[47] or when applied to those who were under the age of eighteen when their crime was committed.[48] The Court also used the evolving standards of decency test when considering civil rights claims challenging the lethal injection process under 42 U.S.C. § 1983.[49]

---

tencing during which evidence of mitigation could be presented for consideration as to whether the defendant would receive the death penalty).

44. *See* Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002); McCleskey v. Kemp, 481 U.S. 279 (1987).

45. McCleskey v. Kemp, 481 U.S. 279 (1987).

46. *McCleskey*, 481 U.S. at 279–80 (explaining why the study appellant used in an attempt to show that his death sentence violated the Constitution was insufficient). The Court stated:

> The Baldus study does not establish that the administration of the Georgia capital punishment system violates the Equal Protection Clause . . . . To prevail under that Clause, petitioner must prove that the decisionmakers in *his* case acted with discriminatory purpose. Petitioner offered no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence, and the Baldus study is insufficient to support an inference that any of the decisionmakers in his case acted with discriminatory purpose. *Id.*

47. *Atkins*, 536 U.S. at 317 (reasoning that the reduced culpability of the mentally retarded should exempt them from capital punishment).

> This consensus unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty. Additionally, it suggests that some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards. *Id.*

48. *Roper*, 543 U.S. at 553 (reasoning that the execution of individuals who were under the age of eighteen when they committed a crime is against societal standards).

> Rejection of the imposition of the death penalty on juvenile offenders under 18 is required by the Eighth Amendment. Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution. Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders . . . . Once juveniles' diminished culpability is recognized, it is evident that neither of the two penological justifications for the death penalty—retribution and deterrence of capital crimes by prospective offenders . . . provides adequate justification for imposing that penalty on juveniles. *Id.*

49. Hill v. McDonough, 126 S. Ct. 2096, 2102 (2006) (explaining that, though the method of injection could be challenged as violative of appellant's civil rights, the § 1983

From the key opinions in *Furman*, through which emerged the concept of "fair administration of the death penalty,"[50] the Supreme Court appears to be searching for a formula that ameliorates the unfair administration of the death penalty. This comment suggests that a § 1983 action would more effectively scrutinize the problematic issues surrounding the administration of the death penalty in light of society's changing standards of decency.

III. LEGAL ANALYSIS

A. *42 U.S.C. § 1983*

42 U.S.C. § 1983 provides a civil cause of action for the deprivation of constitutional rights.[51]

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[52]

To begin, a 42 U.S.C. § 1983 challenge contains several hurdles. Courts construe its language as providing protection only to citizens victimized by acts committed by an *individual*.[53] Further, case law makes it clear that individuals acting in their official capacity may hold various forms of immunity that shield them from § 1983 liability.[54] Since the process of appointing counsel to impoverished death-penalty defendants is adminis-

---

action could not be seen as requesting an injunction against execution of the sentence by other means). "Hill's challenge appears to leave the State free to use an alternative lethal injection procedure. Under these circumstances a grant of injunctive relief could not be seen as barring the execution of Hill's sentence." *Id.*

50. *See generally id.* at 2096; *Roper*, 543 U.S. at 551; *Atkins*, 536 U.S. at 304; *McCleskey*, 481 U.S. at 279; *Gregg*, 428 U.S. at 169; *Jurek*, 428 U.S. at 262; *Proffitt*, 428 U.S. at 242.

51. The Public Health and Welfare, 42 U.S.C.A. § 1983 (1996).

52. *Id.*

53. CHARLES F. ABERNATHY, CIVIL RIGHTS AND CONSTITUTIONAL LITIGATION CASES AND MATERIALS 178 (4th ed. 2006) (explaining the court's interpretation of 42 U.S.C.§ 1983).

54. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91 (1978) (establishing that municipalities and local governments do not enjoy Eleventh Amendment immunity); Clark v. Tarrant County, 798 F.2d 736, 742 (5th Cir. 1986) (adopting a six-part test to determine whether and when Eleventh Amendment immunity is available); Crane v. Texas, 759 F.2d 412, 415 (5th Cir. 1985) (providing an exception to the *Monell* rule).

tered by the judiciary,[55] and judges hold absolute immunity in most situations,[56] it may be argued that a civil rights claim challenging the process under § 1983 would necessarily fail. However, such an argument does not provide justice for indigent people defending themselves against capital charges. Accordingly, this comment will provide an analysis of the issue under § 1983 that both fits within the strictures of constitutional and case law and allows the justice system to live up to its name.

B. *Initiating 42 U.S.C. § 1983 Challenge*

1. Standing

As explained by noted § 1983 practitioner, Elaine Casas, any individual challenging the administration of the death penalty must invoke a court's jurisdiction by showing standing at the time the action is filed.[57] To clarify, an individual must establish standing by emphasizing that his constitutional right to due process of law is being infringed. In regards to indigent defendants accused of capital crimes, due process of the law refers to an indigent's right to have counsel appointed to him in a fair and equitable fashion. Therefore, standing arises for an indigent defendant the moment he is charged with a capital offense and elects to have counsel appointed; for, it is at that time that the process immediately affects his ability to defend himself in accordance with the requirements of the adversarial process.

Next, the defendant must meet a two-prong test.[58] The United States Supreme Court articulated in *Parratt v. Taylor*[59] that two elements must

---

55. *See generally* ALLAN K. BUTCHER & MICHAEL K. MOORE, MUTING GIDEON'S TRUMPET: THE CRISIS IN INDIGENT CRIMINAL DEFENSE IN TEXAS 13–14 (2000), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/res107.pdf (providing an overview of the systems states employ to oversee the provision of counsel); BILL WHITEHURST ET AL., ABA STANDING COMMITTEE ON LEGAL AID & INDIGENT DEFENDANTS, REPORT TO HOUSE OF DELEGATES: RESOLUTION 107, at 4 (2005), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/res107.pdf (recommending changes to the current process in which indigents are appointed counsel).

56. *See* Mays v. Sudderth, 97 F.3d 107, 111 (5th Cir. 1996) (finding that judges enjoy absolute immunity from damage claims arising from judicial acts so long as there was jurisdiction).

57. Elaine Casas, Assistant County Att'y, Travis County, Tex., Presentation to St. Mary's University School of Law Civil Rights students (Oct. 4, 2006) (demonstrating that standing can not be established subsequent to an action being filed).

58. Parratt v. Taylor, 451 U.S. 527, 535 (1981) ("Accordingly, in any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.").

59. *Id.*

be proven by a plaintiff bringing a claim under § 1983.[60] The first element is whether the complained of activity was conducted by an individual who was acting "under color of state law."[61] The second element is whether the activity complained of deprived the individual of rights, privileges, or immunities arising under the United States Constitution or laws.[62] As argued earlier, case law and the Fifth, Sixth, and Fourteenth Amendments articulate a right to effective assistance of counsel arising under the United States Constitution.

Although individual jurisdictions may establish different methods of implementing the constitutional mandate of the right to effective counsel, the plethora of different methods is not a barrier to liability. Instead, each different mandate is a jurisdiction's response to the constitutional directive to provide counsel, and each state is liable for its actions attempting to comply with that command. Accordingly, it becomes clear that each jurisdiction is vulnerable to § 1983 liability by perpetuating the present inequitable counsel appointment system.

2. Immunity

Whether immunity may be a defense to § 1983 liability must be examined. Immunity is generally classified as absolute, qualified,[63] or arising under the Eleventh Amendment.[64]

As discussed earlier, case law articulates several instances in which officials are deemed to possess absolute immunity from § 1983 liability.[65] For instance, judges enjoy absolute immunity from liability for judicial acts performed with proper jurisdiction.[66] Similarly, criminal prosecutors

60. CHARLES F. ABERNATHY, CIVIL RIGHTS AND CONSTITUTIONAL LITIGATION CASES AND MATERIALS 23 (4th ed. 2006) (citing Parratt v. Taylor, 451 U.S. 527, 535 (1981) (Marshall, J., dissenting) and West v. Atkins, 487 U.S. 42, 49 (1988)).

61. Lectric Law Library, The 'Lectric Law Library's Lexicon On "Under Color of State Law," http://www.lectlaw.com/def2/u002.htm (last visited Nov. 2, 2007).

> To act "under color of state law" means to act beyond the bounds of lawful authority, but in such a manner that the unlawful acts were done while the official was purporting or pretending to act in the performance of his official duties. In other words, the unlawful acts must consist of an abuse or misuse of power which is possessed by the official only because he is an official. *Id.*

62. *See Monell*, 436 U.S. at 658; *Clark*, 798 F.2d at 742; *Crane*, 759 F.2d at 415.

63. *See* CHARLES F. ABERNATHY, CIVIL RIGHTS AND CONSTITUTIONAL LITIGATION CASES AND MATERIALS 178 (4th ed. 2006) (discussing absolute and qualified immunities).

64. *See Crane*, 759 F.2d at 423 (recognizing when the Eleventh Amendment does and does not apply).

65. *See* Imbler v. Pachtman, 424 U.S. 409, 421 (1976).

66. *See* Forrester v. White, 484 U.S. 219, 225 (1988) ("As a class, judges have long enjoyed a comparatively sweeping form of immunity, though one not perfectly well-defined.").

benefit from absolute immunity in connection with activities "intimately associated with the judicial phase of the criminal process,"[67] or "taken in connection with a judicial proceeding."[68] City officials are also deemed entitled to absolute immunity when their actions take place within the "sphere of legitimate legislative activity." Court clerks also retain absolute immunity in some instances.[69]

In addition, the doctrine of qualified immunity stems from common law and serves to protect a government employee from suit and liability when that employee is performing duties in accordance with established procedures and in compliance with settled law.[70]

Lastly, the Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[71] In essence, the Eleventh Amendment creates a form of immunity that exempts state governments or entities acting as arms of the state, such as state agencies, from § 1983 liability unless the government or entity agrees to incur liability.

On the surface, this triad of immunities may seem to exempt governments and the judiciary from § 1983 liability stemming from the deprivation of civil rights suffered by indigent death-penalty defendants as a result of the current counsel appointment process. However, while judges, prosecutors, and elected officials retain absolute immunity, this entitlement is a misnomer—in fact, courts hold members of the judiciary liable for actions that are administrative in nature.[72] The task of appointing counsel to represent indigent defendants is clearly an administrative action. Appointment of counsel is the carrying-out of the

---

67. Brummet v. Camble, 946 F.2d 1178, 1181 (5th Cir. 1991) (acknowledging prosecutors need for absolute immunity).

68. Reynolds v. Strayhorn, No. A-05-CA-638 LY, 2006 WL 3341030, slip op. at 9 (W.D. Tex. Nov. 15, 2006) ("Acts undertaken by the prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protection of absolute immunity.").

69. Antoine v. Beyers & Anderson, Inc., 508 U.S. 429, 436 (1993) (explaining that court clerks enjoy absolute immunity when their acts are the functional equivalent of that of judges or when their actions are taken in accordance with a court order).

70. Brady v. Fort Bend County, 58 F.3d 173 (5th Cir. 1995) (holding that qualified immunity did not shield from liability a sheriff violated the law during the commission of his duties knowingly or due to incompetence).

71. U.S. CONST. amend. XI.

72. Morrison v. Lipscomb, 877 F.2d 463, 467 (6th Cir. 1989) (finding that a state court judge did not qualify for judicial immunity in a suit stemming from an order placing a hold on the issuing of writs of restitution because the judge's actions were administrative rather than judicial).

processes designed by various jurisdictions that reflects their attempts to respond to the Sixth Amendment's mandate. As such, members of the judiciary could potentially be exposed to liability; however, since judges' acts in this regard are directly responsive to their jurisdictions' requirements, suing them is not likely to generate a meaningful remedy. Instead, indigent defendants should be able to look to the law-making entities in their jurisdictions for recourse.

As was discovered in the ABA report discussed earlier, methods of appointing counsel vary from jurisdiction to jurisdiction based upon the methods outlined and financed by the laws of that jurisdiction.[73] Laws are not promulgated by omnipotent entities; they are drafted, debated, and decided upon by elected officials acting in their capacity as representatives of the people.

C. *The Constitutional Right to Assistance of Counsel*

While it remains debatable what kind of counsel the drafters intended, the inclusion of the basic verbiage in the Bill of Rights clearly makes the right to counsel fundamental.[74] A proposition supported by the United States Supreme Court's ruling in *United States v. Cronic*.[75] *Cronic* indicates that "[t]he adversarial process protected by the Sixth Amendment requires that the accused have counsel acting in the role of an advocate."[76]

The Court's view in *Cronic* that case by case evaluation is sufficient to safeguard death penalty defendants' rights is counter to the Court's own observations in *Gideon v. Wainwright*.[77] In *Gideon*, the Court indicated that the constitutional right guaranteed to criminal defendants is the right to a fair trial that allows for a true adversarial testing of the facts.[78] The

---

73. *See* BILL WHITEHURST ET AL., ABA STANDING COMMITTEE ON LEGAL AID & INDIGENT DEFENDANTS, REPORT TO HOUSE OF DELEGATES: RESOLUTION 107, at 5 (2005), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/res107.pdf.

74. U.S. CONST. pmbl. (explaining that, when adopting the Constitution, state's representatives wanted to clarify the restrictions to be placed on the federal government in order to keep it from abusing its power).

75. United States v. Cronic, 466 U.S. 648, 656–57 (1984).

76. *Id.* (holding that the attorney had only twenty-five days of preparation time, was young and not very experienced, and faced complex and severe charges as well as witness who were hard to access). Such facts were still not enough to prove ineffective assistance of counsel without showing actual ineffectiveness. *Id.*

77. *See Gideon*, 372 U.S. at 344 (discussing an indigent defendant's right to court appointed counsel).

78. *Id.* ("[I]n our adversarial system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.").

Court also stated indigent defendants who cannot afford the necessary representation are to be appointed counsel as a matter of law.[79] Finally, the Court held counsel must be effective in order to satisfy the constitutional requirement.[80] The *Cronic* Court's observations show a "separate but (un)equal" paradigm is created when the process of appointing counsel is not standardized. The result shifts the burden onto defendants to ensure they receive constitutionally adequate representation. This burden-shifting prejudices the process before the fact to mandate systemic rather than case by case reform.

Additional burdens to the process are further encouraged by an adversarial system that: (1) mandates unrealistic caps on counsels' compensation;[81] (2) provides inadequate regulation of court-appointed counsel in indigent defense cases;[82] and (3) provides insufficient oversight of the minimum standards counsel must meet to represent indigent death-penalty defendants.[83]

Opponents may insist that there are already sufficient constitutional safeguards to ensure adequacy of counsel in the form of the *Strickland* test, which requires that counsel's incompetence materially affect the outcome of the trial in order for that incompetence to rise to the level of unconstitutionality.[84] Certainly, the *Strickland* test is a crucial *post*-trial component of evaluating whether Sixth Amendment rights have been

---

79. *Id.* (pointing out the right to legal counsel is a fundamental right in the United States).

80. *Id.* (discussing the complexity of procedural nuances implicit in the United States legal system that make it difficult for a non-lawyer to understand legal proceedings).

81. BILL WHITEHURST ET AL., A.B.A STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 107, at 5 (2005), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/res107.pdf (mentioning a twenty year-old Illinois statute that caps attorney compensation at $150 for a misdemeanor and $1250 for a felony).

82. *Id.* at 12 (discussing the need for statewide regulation to ensure uniformity in indigent defense services).

83. *Id.* at 9–10 (citing efforts in Georgia counties requiring all lawyers to represent indigent defendants without regard to experience or training).

84. Strickland v. Washington, 466 U.S. 668, 669 (1984) (establishing the requirement that allegations against an attorney claiming ineffective assistance of counsel must be supported by specific actions that had a material effect on the case).

> The Sixth Amendment right to counsel is the right to the effective assistance of counsel, and the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. The same principle applies to a capital sentencing proceeding—such as the one provided by Florida law—that is sufficiently like a trial in its adversarial format and in the existence of standards for decision that counsel's role in the proceeding is comparable to counsel's role at trial. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction of setting aside of a death sentence requires that the defendant

met; however, it is unnecessary to contemplate *Strickland* in the scope of this argument because the unconstitutionality being argued here is the inadequacy of the entire *pre*-trial process.

Also, economic status remains a point of contention. While economic status is not yet deemed a suspect class for purposes of legal argument, *Griffin v. Illinois*[85] reveals that the criminal justice system is different—it requires enough equality between the classes to provide for due process.[86] In the case of indigent death penalty defendants, "enough due process" is ensured only through application of a procedurally standardized counsel qualification and appointment process.

As established in the seminal case of *Marbury v. Madison*,[87] "[a] law repugnant to the Constitution is void . . . "[88] Applying that reasoning, it is plain that the present system of appointing counsel to indigent death-penalty defendants, though it be promulgated by a series of laws rather than a single law, encourages results that do not comport with the tenets of the Constitution—specifically, the Fifth and Sixth Amendments; thus, judicial interpretations allowing the process to continue in its present form must necessarily be void.

D. *Due Process*

> "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. . . . There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[89]

A due process claim encompasses two prongs of analysis; procedural and substantive.[90] Because the nature of the offending activity presently

---

show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Id.*

85. Griffin v. Illinois, 351 U.S. 12 (1956).

86. *Id.* (involving an Illinois requirement of a bill of exceptions, which required a stenographer's transcript for the defendant to receive full direct appellate review and providing that only indigent defendants sentenced to death were given transcripts for free).

87. Marbury v. Madison, 5 U.S. 137 (1803).

88. *Id.* (inferring that the intent of the Framers of the Constitution was to not allow an act that violated the Constitution to become law). The Court reasoned that the Constitution organized the government, assigned powers to different departments, and established limits that cannot be altered by an ordinary act. *Id.*

89. *Griffin*, 351 U.S. at 12 (holding that Due Process and Equal Protection protects prisoners from invidious discriminations, therefore prisoners must be afforded adequate and equal appellate review).

90. *See* CHARLES F. ABERNATHY, CIVIL RIGHTS AND CONSTITUTIONAL LITIGATION CASES AND MATERIALS 88 (4th ed. 2006) ("Although the Fourteenth Amendment has only one Due Process Clause limiting state power, the Court has interpreted the Clause to have two distinctive components, 'procedural due process' and 'substantive due process.'").

at issue is procedural, it is appropriate to apply a procedural due process test, beginning by determining the basis for protection.[91]

1. Procedural Due Process

Subsequently, the appropriate queries are: "(1) has there been a deprivation; (2) of life, liberty, or property; [and] (3) without due process of law?"[92]

a. Has There Been a Deprivation?

In *DeShaney v. Winnebago County Dep't of Soc. Servs.*, the United States Supreme Court held that the state did not violate an abused child's civil rights even though the state, aware that he was being victimized by his father, failed to intercede or protect the child.[93] The *DeShaney* dissent, however, reasoned that, because Wisconsin's child protective system assumed responsibility of abused children, it could be construed that "the State of Wisconsin has relieved ordinary citizens and governmental bodies . . . of any sense of obligation to do anything more."[94] This dissenting opinion provides an important analogy to the legal conundrum surrounding the death penalty process.

Similarly, the creation of a court-regulated system of ensuring constitutionally sufficient representation for indigent death-penalty defendants can be interpreted as having effectively relieved ordinary citizens and private entities from the obligation to protect the due process rights of these defendants. Thus relieved by the creation of the adversarial system, these indigent death-penalty defendants are unlikely and possibly unwilling to petition their legislatures for reform; as a result, change is unlikely to

---

91. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1006 (Erwin Chemerinsky ed., 2d. ed. 2005) (explaining the circumstances when a procedural due process test is necessary).

92. *Id.* at 1007 (listing the three-pronged procedural due process test).

93. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989) ("Petitioner sued respondents claiming that their failure to act deprived him of his liberty in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. We hold that it did not.").

94. *Id.* at 210 (Rennan, J., dissenting).

> Through its child-welfare program, in other words, the State of Wisconsin has relieved ordinary citizens and governmental bodies other than the Department of any sense of obligation to do anything more than report their suspicions of child abuse to DSS. If DSS ignores or dismisses these suspicions, no one will step in to fill the gap. Wisconsin's child-protection program thus effectively confined Joshua DeShaney within the walls of Randy DeShaney's violent home until such time as DSS took action to remove him. Conceivably, then, children like Joshua are made worse off by the existence of this program when the persons and entities charged with carrying it out fail to do their jobs. *Id.*

occur. Therefore, when the adversarial system is so procedurally flawed that due process is denied, the most logical venue through which to seek a remedy is the court. The court's reluctance to rectify the process results in continued deprivation of indigent death-penalty defendants' rights to life, liberty and property.

Opponents may counter that the process, if flawed, is only so due to negligent administration; thus, a constitutional claim to due process should fail. As the United States Supreme Court stated in *Daniels v. Williams*, "[w]e conclude that the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property."[95] Thus, if the judiciary's failure to act could be categorized as negligence, the flawed process would seemingly be exempt from procedural due process analysis.

In the present situation, however, the failure to adequately control the process of appointing counsel to indigent death-penalty defendants is intentional rather than negligent. The process is the product of decades, of case law and scholarly legal work determining issues such as: which crimes are punishable by death and which persons should be exempt from the death penalty, what levels of compensation should be paid to court-appointed counsel, and what their required competency levels should be.[96] In the face of that reality, it is clear that there is nothing accidental or unintended about the process by which our courts impose the death penalty. Therefore, the process cannot be held to be a negligent deprivation insufficient to state a due process claim.

b. Is it of Life, Liberty, or Property?

The promotion of justice and the protection of life and liberty are among the most fundamental concepts of the United States Constitution, evidenced by the wording of the Fifth and Sixth Amendments as well as the preamble itself: "We the People of the United States, in Order to . . . *establish Justice* . . . and *secure the Blessings of Liberty* to ourselves . . . do

95. Daniels v. Williams, 474 U.S. 327, 329 (1986) (explaining that the petitioner's due process rights were not violated by a state official's negligence which caused unintentional injury or loss of life, liberty, or property).

96. *See generally* ALLAN K. BUTCHER & MICHAEL K. MOORE, MUTING GIDEON'S TRUMPET: THE CRISIS IN INDIGENT CRIMINAL DEFENSE IN TEXAS (2000), *available at* http://www.uta.edu/pols/moore/indigent/whitepaper.htm (providing the State Bar of Texas with an assessment by the Committee on Legal Services to the Poor in Criminal Matters of the Texas indigent criminal defense process); BILL WHITEHURST ET AL., ABA STANDING COMMITTEE ON LEGAL AID & INDIGENT DEFENDANTS, REPORT TO HOUSE OF DELEGATES: RESOLUTION 107, at 4–11 (2005), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/res107.pdf.

ordain and establish this Constitution for the United States of America."[97]

Upon conviction, death-penalty defendants are subjected to deprivation of liberty for a period of time. Moreover, should appeals prove unsuccessful, those defendants are then deprived of their lives. One could argue, as to all other duly charged and convicted individuals, the remedy of money damages is sufficient to offset their deprivations should their convictions be overturned. For death-penalty defendants, however, there is no post-deprivation remedy. Neither medicine nor technology yet devises a way to make a deprivation of life anything less than irrevocable. It is because of this basic reality that when the defendant's life is at stake, an unjust process of providing counsel to indigent defendants is necessarily a deprivation of not only their life and liberty, but their constitutional right to due process.

c. Is it Without Due Process of Law?

With life directly at issue, it is incumbent upon the individual jurisdictions to implement sufficient mechanisms to ensure that the due process rights of those defendants are not violated.[98]

Presently, according to the ABA's SCLAID report, there are a myriad of mechanisms available:

> State and local governments have responded to the constitutional mandate to provide legal representation through the establishment of a variety of indigent defense delivery systems. The primary models for furnishing counsel include: (1) traditional "public defender" programs, in which salaried attorneys provide representation in indigent cases; (2) court assignments of indigent cases to private attorneys who are compensated on a case-by-case basis; and (3) contracts in which private attorneys agree to provide representation in indigent cases. In many states, a mixture of these systems is used to provide counsel to the indigent accused. Systems may be organized at the state, county, judicial district, or other regional level. Further,

97. U.S. CONST. pmbl. (emphasis added).

98. Mathews v. Eldridge, 424 U.S. 319 (1976) (clarifying that due process does not necessarily have to mean judicial process and reasoning that administrative hearings can be sufficient to provide due process under the constitutional meaning of the term). "The essence of due process is the requirement that a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." *Id.* at 348. "All that is necessary is that the procedures be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,' to insure that they are given a meaningful opportunity to present their case." *Id.* at 349.

> funds for defense services may derive from the state, counties, cities, court fees or other assessments, or a combination of these sources.[99]

However, as the report notes, it is the lack of consistency and absence of uniformity inherent in the application of the above methods that compelled the ABA to draft the report and resolution, excerpted as follows:

> RESOLVED, That the American Bar Association urges that the following steps be taken to fulfill the constitutional guarantee of effective assistance of counsel under the Sixth Amendment as prescribed in decisions of the United State Supreme Court:
>
> 1. State and territorial governments should provide increased funding for the delivery of indigent defense services in criminal and juvenile delinquency proceedings at a level that ensures the provision of uniform, quality legal representation. The funding for indigent defense should, at a minimum, be substantially comparable with funding for the prosecution function, assuming that prosecutors are funded and supported adequately in all respects;
>
> 2. State and territorial governments should establish oversight organizations that ensure the delivery of independent, uniform, quality indigent defense representation in all criminal and juvenile delinquency proceedings;
>
> 3. The federal government should provide substantial financial support to the states and territories for the provision of indigent defense services in state criminal and juvenile delinquency proceedings.[100]

The ABA's suggestions to provide increased funding, establish oversight organizations and provide substantial financial support are broad and sweeping recommendations that will take time, talent, and treasure to implement.[101] Until an actual method of implementation is devised, tested, and deemed workable, capital punishment actions against impoverished defendants will continue to constitute a violation of their fundamental right to procedural due process.

---

99. BILL WHITEHURST ET AL., ABA STANDING COMMITTEE ON LEGAL AID & INDIGENT DEFENDANTS, REPORT TO HOUSE OF DELEGATES: RESOLUTION 107 2 (2005), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/res107.pdf (quoting Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 59 LAW & CONTEMP. PROBS. 31, 32 (1995)).

100. *Id.* at 1.

101. *Id.* at 4–8.

2. Substantive Due Process

While Charles F. Abernathy noted, "Procedural Due Process has not had a great impact in § 1983 litigation[,]"[102] the argument nonetheless withstands a substantive due process analysis that usually begins with the question: Does the manner of appointing counsel for indigent death-penalty defendants involve a fundamental right denied to a identifiable "class" of individuals who are receiving inequitable treatment under the law?[103]

While opponents may argue that indigence or socio-economic status is not a "protected class," the fundamental rights analysis does not require such a categorization.[104] The Fourteenth Amendment provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States; nor shall any State deprive *any person* of life, liberty, or property, without due process of law; nor deny to *any person* within its jurisdiction the equal protection of the laws.[105]

Whether those words necessarily mandate a showing of class status,[106] it is, nonetheless, quite possible to make a successful argument that indigence is, indeed, a class deserving of constitutional protection. *Griffin v. Illinois* demonstrates such an argument by pointing out a situation where only indigent defendants sentenced to death were given transcripts for free; all other convicts had to pay to get them.[107] This decision highlighted the reality that, although wealth—or the lack of it—is not suspect as defined by law, fair administration of criminal justice requires not parity but sufficient equity between the classes to allow for due process.[108]

Historically, courts identify suspect classes in regards to fundamental rights in response to the recognition of systemic inequity: voting rights,[109]

---

102. CHARLES F. ABERNATHY, CIVIL RIGHTS AND CONSTITUTIONAL LITIGATION CASES AND MATERIALS (4th ed. 2006).

103. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 646–92 (Erwin Chemerinsky ed., 2d ed. 2005) (discussing discrimination based on race and national origin and the means for proving a classification exists).

104. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

105. U.S. CONST. amend. XIV, § 1 (emphasis added) (setting forth the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment).

106. Posting of Jim Pivonka to Constitutional Contradictions, http://www.greaterdemocracy.org/archives/44 (last visited Nov. 2, 2007) ("There is only one 'protected class' under the Fourteenth Amendment, and that is the class of 'any person.'").

107. *Griffin*, 351 U.S. at 12.

108. *Id.*

109. *See* Guinn v. United States, 238 U.S. 347 (1915) (holding unconstitutional a requirement that, in order to be eligible to vote, an individual must be descended from men enfranchised before the Fifteenth Amendment was enacted).

education,[110] mental disability,[111] gender bias,[112] and, homosexuality.[113] Inequity is inherent when the same system that allows appointment of incompetent counsel to indigent defendants provides their opponents with the full array of government resources. Such a system is precisely the type of unequal treatment proscribed by the Fifth, Sixth, and Fourteenth Amendments.

Those who insist that socio-economics cannot be a suspect or quasi-suspect class rely heavily on the fact that the Court currently does not recognize it as a suspect class when analyzing the denial of the fundamental right to counsel. While there is no case law that articulates socio-economics as a suspect class, suggesting it can never be one is the epitome of circular reasoning. Such reasoning would require that the Constitution remain frozen in the status quo and never adapt to meet the evolving standards of society. While there are those, including the Justice Scalia, who prefer that constitutional interpretation remain confined to the intent of the Framers at the time the Constitution was crafted,[114] this rigid

---

110. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (reasoning that the separation of races is inherently unequal and that segregation by law leads to feelings of inferiority, undermines and lowers motivation and allows for unequal benefits).

111. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (reasoning that a law is not rationally related to a legitimate government purpose when its purposes do not appear reasonable)

> A Texas city denied a special use permit for the operation of a group home for the mentally retarded, acting pursuant to a municipal zoning ordinance requiring permits for such homes. The Court of Appeals for the Fifth Circuit held that mental retardation is a "quasi-suspect" classification and that the ordinance violated the Equal Protection Clause because it did not substantially further an important governmental purpose. We hold that a lesser standard of scrutiny is appropriate, but conclude that under that standard the ordinance is invalid as applied in this case. *Id.* at 435.

112. *See* United States v. Virginia, 518 U.S. 515 (1996) (holding that Virginia Military Institute (VMI), a male-only educational institute, could not continue to prohibit women from attending); Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982) ("Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females.").

113. Romer v. Evans, 517 U.S. 620 (1996) (holding that a law making it harder for one group of citizens than for another to get help from the government does not serve a legitimate government purpose).

114. *Scalia Raps "Living Constitution"*, CBS NEWS, Feb. 14, 2006, available at http://www.cbsnews.com/stories/2006/02/14/supremecourt/main1315619.shtml ("In a speech Monday sponsored by the conservative Federalist Society, Scalia defended his long-held belief in sticking to the plain text of the Constitution as it was originally written and intended.").

> "Scalia does have a philosophy; it's called originalism," he said. "That's what prevents him from doing the things he would like to do," he told more than 100 politicians and lawyers from this U.S. island territory. According to his judicial philosophy, he said, there can be no room for personal, political or religious beliefs. Scalia criticized those who believe in what he called the "living Constitution." "That's the argument of flexi-

method of interpretation is not endorsed by the entire Court. In 2005, the Court outlawed capital punishment for juveniles.[115] Clearly, the Constitution, if not "living," is at least flexible enough to accommodate shifting societal values.

Societal values become clear when it comes to how our nation regards poverty. That indigence is a status to be shunned is evidenced by American society's innumerable, though commendable, efforts to eradicate poverty around the world. Programs such as food banks, homeless shelters, employment programs, and incentives to encourage individuals to remove themselves from welfare teach Americans that poverty is not desirable, but something to be pitied and alleviated. The poor lack the one commodity upon which our capitalistic society turns—capital. Without money, the poor are relegated to a second-class existence, unable to obtain the credit required to finance even a simple lifestyle. The poor remain unheard by government leadership that determine the paths of their lives and unaccepted by the very society that professes to want to help them. If socio-economic status is not a *class*, it is only because the word is not large enough to encompass the enormity of the exclusion to which indigent people are subjected.

Regardless of whether socio-economic status is established as a protected class under the Constitution, the denial of the fundamental right to counsel requires a determination as to the required level of scrutiny pursuant under substantive due process analysis.[116] Strict scrutiny is applied when a fundamental right is infringed upon by the state or federal government.[117] The right to counsel is a fundamental right expressly articulated in the Sixth Amendment of the United States Constitution.[118] The

---

bility and it goes something like this: The Constitution is over 200 years old and societies change. It has to change with society, like a living organism, or it will become brittle and break. But you would have to be an idiot to believe that," Scalia said. "The Constitution is not a living organism; it is a legal document. It says something and doesn't say other things." *Id.*

115. *Roper*, 543 U.S at 560–61.

The prohibition against cruel and unusual punishments, like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to the evolving standards of decency that mark the progress of a maturing society to determine which punishments are so disproportionate as to be cruel and unusual. *Id.*

116. *See* Brady v. Fort Bend County, 58 F.3d 173 (5th Cir. 1995) (analyzing sheriff's liability after deciding not to rehire seven deputies).

117. *See* Washington v. Glucksberg, 521 U.S. 702 (1997).

118. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.").

fundamental right of all United States citizens to due process of law is, likewise, expressly set out in the Fifth and Fourteenth Amendments.[119] Even if one rejects the express wording of the amendments as establishing the fundamental right to effective counsel, case law provides precedent that the Court can, and has, declared the right to be fundamental and analyzed it under strict scrutiny regardless of whether it was expressly articulated.[120] Therefore, it follows that the strict scrutiny of the law is necessary when an indigent defendant's right to effective counsel is violated through a flawed system of appointment that denies due process.

The strict scrutiny test requires the government to show that its action is necessary to achieve a compelling purpose.[121] There is no doubt that the death penalty, in the abstract, can be viewed as serving a vital interest. Traditional arguments supporting the death penalty express why the finality of execution is a necessary deterrent to capital crimes and an ultimate form of retribution.[122]

The point at issue here, however, does not reach those arguments. It is important to recognize that, for purposes of the proposition posited here, the government action referenced is not the imposition of the death penalty itself; rather, it is the maintenance of an unequal process of ensuring adequate counsel for indigent defendants facing the death penalty. Therefore, the government must show that continued maintenance of an unjust system is necessary to achieve a compelling purpose. As argued earlier by both the ABA's SCLAID[123] and the Texas Bar Committee,[124]

---

119. U.S. CONST. amend. V ("No person shall be held . . . deprived of life, liberty, or property, without due process of law."); U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law.").

120. *See* Skinner v. Okla., 316 U.S. 535, 540–41 (invalidating Oklahoma's Habitual Criminal Sterilization Act because the Act prohibited defendant's right to procreate which the Court interpreted to be fundamental to existence and survival (citing Bain Peanut Co. v. Pinson, 282 U.S. 499, 501 (1931)).

121. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 528–29 (employing the *Mathews* test which weighs the affected private interest and the government's asserted interest).

122. *Atkins*, 536 U.S. at 305 ("[T]here is a serious question whether either justification underpinning the death penalty—retribution and deterrence of capital crimes—applies to mentally retarded offenders.").

123. *See* BILL WHITEHURST ET AL., ABA STANDING COMMITTEE ON LEGAL AID & INDIGENT DEFENDANTS, REPORT TO HOUSE OF DELEGATES: RESOLUTION 107, at 2 (2005), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/res107.pdf.

> [T]housands of persons are processed through America's courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation. All too often, defendants plead guilty, even if they are innocent, without really understanding their legal rights or what is occurring. Sometimes the proceedings reflect little or no recognition that the accused is mentally ill or does not adequately understand English. The fundamen-

maintenance of the present system is not only unnecessary, it is ineffective and unmanageable. The SCLAID report compiled the following results exposing the concern:

- Forty years after *Gideon v. Wainwright*, indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction.
- Funding for indigent defense services is shamefully inadequate.
- Lawyers who provide representation in indigent defense systems sometimes violate their professional duties by failing to furnish competent representation.
- Judges and elected officials often exercise undue influence over indigent defense attorneys, threatening the professional independence of the defense function.
- Indigent defense systems frequently lack basic oversight and accountability, impairing the provision of uniform, quality services.
- Efforts to reform indigent defense systems have been most successful when they involve multi-faceted approaches and representatives from a broad spectrum of interests.
- The organized bar too often has failed to provide the requisite leadership in the indigent defense area.
- Model approaches to providing quality indigent defense services exist in this country, but these models often are not adequately funded and cannot be replicated elsewhere absent sufficient financial support.[125]

---

tal right to a lawyer that Americans assume apply to everyone accused of criminal conduct effectively does not exist in practice for countless people across the United States; forty years after the Gideon decision, the promise of equal justice for the poor remains unfulfilled in this country. *Id.*

124. *See* ALLAN K. BUTCHER & MICHAEL K. MOORE, MUTING GIDEON'S TRUMPET: THE CRISIS IN INDIGENT CRIMINAL DEFENSE IN TEXAS (2000), *available at* http://www.uta.edu/pols/moore/indigent/whitepaper.htm

> The system of representing indigents charged in criminal matters in Texas is in need of serious reform. By virtually every standard examined here, the current system of indigent legal representation ignores at least the spirit of Gideon v. Wainwright. In Texas, indigent criminal representation is, at times, politicized, ineffective, and provides a different standard of justice when compared to those who can afford their own attorneys. The appointment process unnecessarily and inappropriately considers personal and political relationships. Defense attorneys are frequently provided with neither proper financial incentives nor with sufficient resources to vigorously defend their clients. Most disturbingly, the current system appears to provide a lower standard of justice for the state's poor. *Id.*

125. *See* BILL WHITEHURST ET AL., ABA STANDING COMMITTEE ON LEGAL AID & INDIGENT DEFENDANTS, REPORT TO HOUSE OF DELEGATES: RESOLUTION 107, at 4–11

As for whether the purpose of the present system, described above, is compelling, one must look to case law to determine what may be considered compelling for purposes of a strict scrutiny analysis. "The Supreme Court never has articulated criteria for determining whether a claimed purpose is to be deemed 'compelling.' The most that can be said is that the government has the burden of persuading the Court that a truly vital interest is served by the law in question."[126]

Because the right of all death penalty defendants to a process that provides an equitable means of obtaining counsel is clearly fundamental, there is no need to look to anything other than strict scrutiny. Some, however, may insist that a more flexible method of review is indicated. Specifically, intermediate scrutiny may be invoked in alignment with the 1976 Supreme Court decision in *Craig v. Boren*,[127] requiring a law to be *substantially related* to an *important* government purpose.[128] Others may advocate for a rational basis review, which will result in a law being upheld if it is "rationally related to a legitimate government purpose."[129]

The Supreme Court has previously examined issues of wealth disparity in the context of rational basis review; in fact, the Court expressly stipulated that rational basis review was the appropriate level of scrutiny when it decided *San Antonio Independent School District v. Rodriguez*,[130] which challenged Texas's method of levying local property taxes to fund

---

(2005), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/res107.pdf (summarizing the findings in the report).

126. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 820 (Erwin Chemerinsky, 2d. ed. 2005) (referencing Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917 (1988)).

127. Craig v. Boren, 429 U.S. 190 (1976) (Powell, J., concurring) (overturning an Oklahoma statute prohibiting sale of 3.2% beer to men under age twenty-one and women under age eighteen).

> As is evident from our opinions, the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications. There are valid reasons for dissatisfaction with the "two-tier" approach that has been prominent in the Court's decisions in the past decade. Although viewed by many as a result-oriented substitute for more critical analysis, that approach with its narrowly limited "upper-tier"—now has substantial precedential support. As has been true of Reed and its progeny, our decision today will be viewed by some as a "middle-tier" approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential "rational basis" standard of review normally applied takes on a sharper focus when we address a gender-based classification. *Id.*

128. *Id.*

129. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 619–20 (Erwin Chemerinsky ed., 2d. ed. 2005) (referencing Pennell v. San Jose, 485 U.S. 1, 14 (1988); Allied Stores of Ohio v. Bower, 358 U.S. 522, 527 (1959)).

130. *Rodriguez*, 411 U.S. at 1 (holding that poverty is not a suspect class).

public schools.[131] That case, however, does not mandate rational basis review in all matters involving wealth.[132] In analyzing the Court's decision in *Rodriguez* to determine which issues should undergo rational basis analysis, it is plain that the majority felt that the complainants in its prior decisions were distinguished from *Rodriguez* by two characteristics: "they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit."[133]

As indicated earlier, indigent defendants charged with capital crimes are afforded counsel as a matter of constitutional right when they are "completely unable" to pay for that representation.[134] Failure to provide them adequate counsel results in failure of the judicial process which the Court has recognized requires a confrontation between adversaries.[135] Thus, *Rodriguez* is distinguishable from this issue by the complete inability to pay for a benefit and the "absolute deprivation of a meaningful opportunity."[136] These factors allow the Court to pursue strict scrutiny analysis of the deprivation of the fundamental right to effective assistance of counsel that is conferred by the Constitution upon indigent death-penalty defendants.

E. *The Final Analysis*

Several possible methods of analysis have been briefly explored above; each presenting a strong argument in favor of finding that the present

---

131. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 811 (Erwin Chemerinsky ed., 2d. ed. 2005).

> The plaintiffs argued, in part, that the disparity in funding discriminated against the poor in violation of the Equal Protection Clause. The Supreme Court, in a 5–4 decision, held that discrimination against the poor does not warrant heightened scrutiny. The Court also rejected the claim that the law should be regarded as discriminating against the poor as a group. *Id.*

132. *Rodriguez*, 411 U.S. at 20–21.

> The precedents of this Court provide the proper starting point. The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit. *Id.*

133. *Id.* at 20–21.

134. *Id.*

135. *See Gideon*, 372 U.S. at 344 (stating "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him").

136. *Rodriguez*, 411 U.S. at 20 (stating the two distinguishing characteristics shared among individuals constituting a class that were discriminated against because of their impecunity).

process of appointing counsel to indigent death-penalty defendants is a violation of their constitutional rights. When determining which method is best employed, Professor Erwin Chemerinsky notes:

> [I]f a law denies the right to everyone, then due process would be the best grounds for analysis; but if a law denies a right to some, while allowing it to others, the discrimination can be challenged as offending equal protection or the violation of the right can be objected to under due process.[137]

Complicating the matter is the reality that the "process," while mandated by the Constitution, is not one law but instead a series of rules and regulations promulgated by many different jurisdictions.[138]

Compiling data from across the country, evaluating which processes will best serve citizens and the judicial process as a whole, and making recommendations for the creation, implementation, and oversight of a new process will be a daunting and time-consuming task. As an adjunct to the ABA's SCLAID recommendations[139] and in an effort to create transparency, foster inclusion, and promote the emergence of equity, a national committee should be seated to begin the evaluation. State-level task forces, appointed with time-certain deadlines, should meet to evaluate their state's systems and report their findings to the national committee. The latter should be tasked with recommending to Congress a comprehensive national policy and a procedure to ensure that indigent death-penalty defendants receive effective assistance of counsel.

IV. CONCLUSION

Regardless of whether the debate is decided for or against the various methods of analysis posited herein, the point is that those processes be debated thoroughly, that public input be actively pursued, and that the ultimate resolution adequately and accurately reflect the standard of society. It is clear by the many interpretations and shifts of opinion that a remedy is not yet fully developed. If it were, the process would not con-

---

137. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 817 (Erwin Chemerinsky, 2d. ed. 2005) (discussing fundamental rights as examined under both due process and equal protection analysis).

138. BILL WHITEHURST ET AL., ABA STANDING COMMITTEE ON LEGAL AID & INDIGENT DEFENDANTS, REPORT TO HOUSE OF DELEGATES: RESOLUTION 107 15 (2005), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/res107.pdf (urging for a comprehensive examination of how the indigent population can more fully realize their Sixth Amendment right to counsel since the Supreme Court's holding in *Gideon v. Wainwright*).

139. *Id.* (urging for a comprehensive examination of how the indigent population can more fully realize their Sixth Amendment right to counsel since the Supreme Court's holding in *Gideon v. Wainwright*).

tinue to make front-page headlines in the local newspapers, it would not engender split decisions from the nation's courts, and it would not continue to put potentially innocent people to death.

What is at stake is the humanity of a nation founded upon principles of freedom, equality, and justice. It is without question that the nation has an absolute right to protect and defend the health and welfare of its citizens by exacting the highest degree of punishment imaginable when it deems that the twin principles of punishment and deterrence require such a penalty. Yet, convicts sent to an early grave when their guilt is not clearly established through a truly fair and equitable adversarial process suffer a punishment that may not fit their crime; and, are more likely to become martyrs than crime deterrents. Rather than execute defendants who are potentially innocent of any wrongdoing, the nation should place a moratorium on the death penalty until it enacts uniform and just processes governing the appointment of effective counsel to indigent defendants in capital cases.