

Pace University

DigitalCommons@Pace

---

Pace Law Faculty Publications

School of Law

---

1993

## Themes of Injustice: Wrongful Convictions, Racial Prejudice, and Lawyer Incompetence

Bennett I. Gershman

*Elisabeth Haub School of Law at Pace University*

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Civil Rights and Discrimination Commons](#), [Criminal Law Commons](#), [Criminal Procedure Commons](#), [Legal Ethics and Professional Responsibility Commons](#), and the [Legal Profession Commons](#)

---

### Recommended Citation

Bennett L. Gershman, Themes of Injustice: Wrongful Convictions, Racial Prejudice, and Lawyer Incompetence, 29 *Crim. L. Bull.* 502 (1993), <http://digitalcommons.pace.edu/lawfaculty/937/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact [dheller2@law.pace.edu](mailto:dheller2@law.pace.edu).

# Themes of Injustice: Wrongful Convictions, Racial Prejudice, and Lawyer Incompetence

By Bennett L. Gershman\*

*The U.S. criminal justice system has undergone radical changes in the past generation. Crime is more complex; prosecutors are more powerful; and courts, corrections agencies, and defense services are burdened with larger case loads and tighter budgets. It is not the best of times to talk about justice. Yet, it is a subject that needs to be constantly addressed, particularly in times of crisis. The following essay focuses on some of the problems that present themselves in the criminal justice system today, including the conviction of innocent defendants, especially in capital cases; racial prejudice; and lawyer incompetence.*

There has always existed a tension between justice and law.<sup>1</sup> Contrary to popular belief, justice and law are not coextensive. They may coincide, for example, when law is used to end racial or other invidious discriminatory practices. On the other hand, justice and law may be strikingly at odds, as in the Los Angeles jury's verdict last year acquitting four police officers in the brutal beating of Rodney King. There are just laws. And there are unjust laws. There are judges who believe they should dispense justice. And there are judges who believe they should mechanically apply the law, regardless of the equities.

Notwithstanding the election of a new president, and a potentially new make-up of the Supreme Court, there is much cause for concern over justice in the United States. To borrow from Shakespeare, "the times are out of joint."<sup>2</sup> The Bill of Rights, whose two-hundredth anniversary we celebrated recently, has been sapped of much of its vitality over the past twenty years by a determined Supreme Court, two conservative presidents, and

---

\* Professor of Law, Pace University School of Law, White Plains, New York. This essay is based on remarks delivered on Law Day 1992 before the Rockland County Bar Association, New City, N. Y.

<sup>1</sup> For an excellent coursebook addressing this fascinating subject, see A. D'Amato & A. Jacobson, *Justice and the Legal System* (1992).

<sup>2</sup> W. Shakespeare, *Hamlet*, Act I, scene v.

## THEMES OF INJUSTICE

a law-and-order Congress. Virtually every key protection of the Bill of Rights has been diluted, eviscerated, or interpreted out of existence.<sup>3</sup> A recent polls shows that few 1990s Americans can identify the Bill of Rights or are aware of its guarantees.<sup>4</sup> Two of its greatest defenders—Justices William J. Brennan and Thurgood Marshall—are gone. And the highest court mirrors the public's insensitivity and apathy by continuing a steady retreat from its long-recognized function "to be watchful for the constitutional rights of the citizen, and against any steady encroachments thereon."<sup>5</sup>

This erosion of judicial protection for individual rights is also reflected in the agonizing death of Habeas Corpus, the Great Writ of liberty second only to the Magna Carta. We have witnessed over the past decade a frantic legal foot-race between a majority of the Supreme Court and some members of Congress to abolish habeas corpus, thereby preventing state inmates from seeking federal judicial redress for constitutional violations. To be sure, as with any legal remedy, habeas corpus can be abused. But statistics show that writs from state prisoners on death row have been found meritorious in one third to one half of all cases.<sup>6</sup> Not long ago, we watched anxiously as a few federal judges in California stayed an execution so that they could decide whether using cyanide gas for executions—the kind used in the concentration camps of World War II—violated evolving constitutional standards of decency.<sup>7</sup> In a tense, early morning battle of judicial power, a majority of the Supreme Court firmly directed the execution to proceed, reminding us of Chief Justice Rehnquist's view about delays in executions: "Let's get on with it."<sup>8</sup>

<sup>3</sup> W. Kunstler, "The Bill of Rights—Can It Survive?," 26 Gonz. L. Rev. 1 (1991).

<sup>4</sup> "Poll Finds Only 33% Can Identify Bill of Rights," N.Y. Times, Dec. 15, 1991, at 33.

<sup>5</sup> *Boyd v. United States*, 116 U.S. 616, 636 (1886).

<sup>6</sup> J. Liebman, *Federal Habeas Corpus Practice and Procedure* § 2.2, 23–24 n. 97 (1988) (49 percent success rate); Godbold, "Pro Bono Representation of Death Sentenced Inmates," 42 Rec. N.Y. City B. Ass'n 859, 873 (1987) (one third success rate). See also *Barefoot v. Estelle*, 463 U.S. 880, 915 (1983) (Marshall, J., dissenting) (over 70 percent of cases decided in favor of death sentenced petitioners).

<sup>7</sup> *Vasquez v. Harris*, 112 S. Ct. 1713, 1714 (1992) ("No further stays of Robert Alton Harris' execution shall be entered by the federal courts except upon order of this Court."). See also Bishop, "After Night of Court Battles, a California Execution," N.Y. Times, Apr. 22, 1992, at 1.

<sup>8</sup> *Id.*

Diminished protection for individual liberties parallels diminished protection for civil rights. Blatant prejudice and racial discrimination continue to infect the criminal justice system. There was a time when northerners in this country would deride the southern judicial system for operating a racist justice. Between 1930 and 1974, of the 455 men executed in the south for rape, 405, or 89 percent were black. Virtually all of the complainants were white.<sup>9</sup> But we delude ourselves if we think that racial prejudice is confined to the South. A recent report by the New York State Judicial Commission on Minorities states that minority users of the New York State court system "face many of the same travesties as did their southern counterparts—unequal access, disparate treatment, and frustrated opportunity."<sup>10</sup>

Further, our nation's appetite for executing people, even arguably innocent people, seems to be increasing. There are presently 2,729 inmates on death row.<sup>11</sup> We will execute more men and women this year than in any year since the Supreme Court allowed executions to resume in 1976. At a time in our history when the highest court in the land makes life and death decisions based on technical procedural grounds, rather than justice, and begins an opinion that will decide whether a condemned man will live or die with the words, "This is a case about federalism,"<sup>12</sup> it is important to talk about justice.

However, defining the idea of justice, and the quintessential "just result," often proves a frustrating and elusive task. The term itself is so indefinite and subjective. Is justice done when a condemned prisoner is put to death for murder without an opportunity to present new evidence of his innocence?<sup>13</sup> Is it justice when a court's interpretation of the Civil Rights Act prevents judges from hearing claims against persons charged with obstructing access to an abortion clinic?<sup>14</sup> These examples

<sup>9</sup> *United States v. Wiley*, 492 F.2d 547, 555 (D.C. Cir. 1974) (Bazelon, J., concurring).

<sup>10</sup> *New York State Judicial Commission on Minorities* vii (1990) (letter dated May 16, 1990, from Franklin H. Williams, Esq., Chairman of the Commission, to Chief Justice Sol Wachtler).

<sup>11</sup> *Death Row U.S.A.* 1 (Spring 1993).

<sup>12</sup> *Coleman v. Thompson*, 111 S. Ct. 2546, 2552 (1991).

<sup>13</sup> *Herrera v. Collins*, 113 S. Ct. 853 (1993).

<sup>14</sup> *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993).

## THEMES OF INJUSTICE

may appear to some to be the antithesis of justice. Others, however, may see them as perfectly neutral applications of law.

Rather than talk about the concept of justice in the abstract, it might be more realistic to talk about the other side of justice, the concept of injustice. For if the meaning of justice eludes us, the meaning of injustice might be easier to grasp. Perhaps participants in the criminal justice system can arrive at greater understanding and sensitivity about their professional obligations, and confront justice issues more effectively and even compassionately, by focusing on the subject of injustice: what broad categories provide the grist for miscarriages of justice; who is responsible for perpetrating those injustices; how they can be corrected, if it is not too late.<sup>15</sup> Three overriding themes of injustice come to mind: convicting the innocent, racial prejudice, and lawyer incompetence.

### Convicting the Innocent

Our society, as expressed by the Supreme Court in the landmark case of *In re Winship*,<sup>16</sup> has made a fundamental value judgment that it is far worse to convict an innocent person than to let a guilty person go free. Indeed, we probably could reach a consensus that the greatest injustice any society can perpetrate is to convict, and possibly even put to death, an innocent person. We read recently of two men released from a California state penitentiary after spending seventeen years in jail for what the judge described as a "concocted murder conviction."<sup>17</sup> Of the 2,729 men and women on death row in the United States, there are several persons who, based on reports of newly discovered evidence, probably are innocent. We prefer not to think about such matters. We prefer to trust prosecutors, judges, and juries to do the right thing.

Prosecutors, however, often do not do the right thing, as several recently highly publicized murder cases have docu-

---

<sup>15</sup> The catalyst for the discussion of the subject of justice in terms of injustice came from the late Edmund Cahn's outstanding work, *Confronting Injustice* (1967).

<sup>16</sup> 397 U.S. 358 (1970).

<sup>17</sup> Mydans, "After 17 Years, Sunshine and Freedom," N.Y. Times, Mar. 27, 1992, at A14.

mented.<sup>18</sup> Judges also shirk their responsibility to prevent miscarriages of justice, as demonstrated by the Supreme Court's anti-habeas crusade.<sup>19</sup> Juries also make mistakes, terrible mistakes, particularly when the prosecution's proof is mistaken or fabricated.<sup>20</sup> Persons who carefully examined the evidence have made a persuasive case that Roger Coleman in Virginia, and Leonel Herrera in Texas, had strong claims to innocence.<sup>21</sup> Indeed, virtually every law-enforcement official in the state of Texas was convinced that Randall Dale Adams was guilty of murdering a police officer, until a courageous film-maker—not a lawyer, prosecutor, or judge—produced a documentary entitled "The Thin Blue Line," which exposed the Texas judicial system at its most vicious and corrupt, and which led to Adam's exoneration.<sup>22</sup>

According to a well-known study published in 1987, more than 350 people in this century have been erroneously convicted in the United States of crimes punishable by death; 116 of those were sentenced to death and 23 actually were executed.<sup>23</sup> This same study found that there have been twenty-nine mistaken convictions in capital cases in New York State, sixteen of which resulted in death verdicts.<sup>24</sup> New York State leads all states in executing the innocent; eight New Yorkers have been executed in error.<sup>25</sup> And a recent study prepared by the New York State Defenders Association concludes that fifty-nine wrongful homi-

<sup>18</sup> The cases are those of Randall Dale Adams in Texas, James Richardson and Joseph Brown in Florida, and Eric Jackson in New York. See B. Gershman, *Abuse of Power in the Prosecutor's Office*, *The World & I* 477, 480 (June 1991).

<sup>19</sup> Greenhouse, "A Window on the Court—Limits on Inmates' Habeas Corpus Petitions Illuminate Mood and Agenda of the Justices," *N.Y. Times*, May 6, 1992, at A1.

<sup>20</sup> The recent scandal in upstate New York involving fake evidence may be merely an indication of a much more pervasive phenomenon. See "Former State Trooper Explains Ways He Fabricated Evidence," *N.Y. Times*, Apr. 16, 1993, at B5; "Trooper's Fall Shakes Both Police and Public," *N.Y. Times*, Nov. 15, 1992, at 41; Suro, "Ripples of a Pathologist's Misconduct in Graves and Courts of West Texas," *N.Y. Times*, Nov. 22, 1992, at 22; Holloway, "False Charges by Woman Culminate in Her Arrest," *N.Y. Times*, Oct. 18, 1992, at 47.

<sup>21</sup> *Killing Justice—Government Misconduct and the Death Penalty*, Death Penalty Information Center (1992).

<sup>22</sup> Gershman, "The Thin Blue Line: Art or Trial in the Fact-Finding Process?" 9 *Pace L. Rev.* 275 (1989).

<sup>23</sup> Bedau & Radelet, "Miscarriages of Justice in Potentially Capital Cases," 40 *Stan. L. Rev.* 21, 36 (1987).

<sup>24</sup> *Id.* at 37.

<sup>25</sup> Rosenbaum, "Inevitable Error: Wrongful New York State Convictions, 1965-1988," 18 *N.Y.U. Rev. L. & Soc. Change* 807, 809 (1990-1991).

## THEMES OF INJUSTICE

cide convictions have occurred in New York between 1965 and 1988.<sup>26</sup>

Judges, lawyers, and the general public trust the legal system to make reliable determinations of guilt. The right to counsel, confrontation, compulsory process, trial by jury, and heightened standards of proof manifest our society's commitment to truth. We also trust that claims of innocence will be heard before it is too late. Consider in this context the case of Roger Coleman. He was found guilty of raping and murdering Wanda McCoy in 1981, and sentenced to death. A lengthy article in the *New Republic* makes a powerful case for Coleman's innocence.<sup>27</sup> He was represented at trial by court-appointed lawyers who had never before defended a murder case. Proof of his innocence was presented and rejected by a Virginia trial court. Coleman sought to appeal to the state court of appeals, but Coleman's lawyers filed their notice of appeal two days late. Because of this procedural error, the Virginia court rejected his appeal. Coleman then unsuccessfully sought federal habeas corpus review, seeking to have his claim of innocence examined on the merits. The Supreme Court, in upholding the refusal of the federal courts to entertain Coleman's petition on the merits, never discussed whether Coleman might have been innocent.<sup>28</sup> The majority opinion discussed whether a decision of a state court finding procedural default because a lawyer's filing delay is entitled to respect under principles of federalism. The Court said that it was. Coleman was executed on May 22, 1992.

Consider also the case of Leonel Herrera. Herrera was sentenced to death for the murder of a police officer in Texas in 1981.<sup>29</sup> Herrera maintained from the beginning that he was innocent. His conviction was based largely on his own statements, which he claimed were fabricated by the police. Herrera offered several affidavits and eyewitness accounts to prove his innocence, including an eyewitness affidavit from the real murderer's own son. Last February, a federal district judge stayed the execution to allow Herrera to prove his innocence at an evidentiary hearing. The Texas director of criminal justice appealed, and the Court

---

<sup>26</sup> *Id.* at 808.

<sup>27</sup> Tucker, "Dead End," *New Republic* 21 (May 4, 1992).

<sup>28</sup> *Coleman v. Thompson*, 111 S. Ct. 2546 (1991).

<sup>29</sup> *Herrera v. Collins*, 954 F.2d 1029 (5th Cir. 1992).

of Appeals for the Fifth Circuit reversed, ordering Herrera's execution for the following day.<sup>30</sup> In dispensing its swift justice, the court wrote the following chilling words: "Herrera's claim of 'actual innocence' presents no substantial claim for relief. The rule is well established that claims of newly discovered evidence, casting doubt on petitioner's guilt, are not cognizable in federal habeas corpus."<sup>31</sup> The court of appeals held, in essence, that the Constitution does not forbid the execution of an innocent man.

Herrera filed a petition in the Supreme Court hours before his scheduled execution. He sought an appeal and a stay of his execution. The Supreme Court responded in a manner that reflects the nightmarish, Kafkaesque quality that so much of current death penalty jurisprudence was acquired. The Court allowed Herrera the opportunity to bring his appeal. Four justices—Justices Blackmun, Stevens, O'Connor, and Souter—granted certiorari, because that number is required under Supreme Court rules for a case to be heard.<sup>32</sup> The question on which these justices granted certiorari was whether it violates the Eighth and Fourteenth Amendments to execute a person who has been convicted of murder, but who is innocent. However, the Supreme Court rules require a majority of five justices to stay an execution. And a majority of the justices—Chief Justice Rehnquist, and Justices White, Kennedy, Scalia, and Thomas—believed that the execution should proceed on schedule, notwithstanding that the Court had decided to hear the condemned man's case.<sup>33</sup> Herrera's execution was set for April 15. Two days before the execution, the Texas court of criminal appeals, by a five to three vote, stayed Herrera's execution to allow the Supreme Court to consider the merits of the claim.<sup>34</sup>

The Court heard arguments last October, and decided the case in January.<sup>35</sup> Speaking for a five-judge majority, Chief Justice Rehnquist wrote that, although Herrera's proof of innocence had some probative value, it came too late. Moreover, he

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 1033.

<sup>32</sup> *Herrera v. Collins*, 112 S. Ct. 1074 (1992).

<sup>33</sup> *Id.*

<sup>34</sup> Suro, "Inmate Given Stay to Argue That Execution Would Violate Rights," *N.Y. Times*, Apr. 14, 1992, at A21.

<sup>35</sup> *Herrera v. Collins*, 113 S. Ct. at 853.



## THEMES OF INJUSTICE

did not present a sufficient showing to entitle him to a hearing to prove his innocence. His only recourse would be to seek executive clemency. Herrera was executed on May 12, 1993.

Under the U.S. criminal justice system, any death case—indeed, virtually every sort of criminal case—from beginning to end is exclusively an exercise of the prosecutor's use, and abuse, of power.<sup>36</sup> Ethically the prosecutor is obligated "to seek justice, not merely to convict."<sup>37</sup> In pursuit of "justice," the prosecutor alone decides what criminal charges to bring, and whether to charge a murder case as a capital case. The prosecutor alone decides whether to allow a defendant to plead guilty, to grant immunity to accomplices, to rely on the testimony of jailhouse informants, or to disclose to the defense exculpatory evidence. All of these decisions are largely unreviewable, and, therefore, subject to abuse. The prosecutor literally decides who goes to jail, and who goes free; who lives, and who dies. The recent prosecutions of John Gotti and Manuel Noriega demonstrated astonishingly broad grants of immunity to murderers and drug traffickers so that they would become government witnesses; these people had criminal records far more extensive and serious than the defendants on trial.<sup>38</sup> Public exposés increasingly describe how purchased, and frequently perjurious, testimony by government informants is used to convict defendants, often with a wink and a nod from the prosecutor.<sup>39</sup> Many prosecutors, if they are candid, would admit that testimony of jailhouse stoolpigeons is often utterly unreliable, but unbelievably effective before a jury. Some prosecutors have even been heard to boast that "Any prosecutor can convict a guilty man; it takes a great prosecutor to convict an innocent man."<sup>40</sup>

Concealment by prosecutors of favorable evidence that would assist a defendant in proving his innocence is pervasive and probably accounts for as many miscarriages of justice as any

<sup>36</sup> B. Gershman, *Prosecutorial Misconduct* (1985).

<sup>37</sup> *ABA Standards for Criminal Justice* § 3-1.2(c) (3d ed. 1992).

<sup>38</sup> Johnston, "No Victory for Panama," *N.Y. Times*, Apr. 11, 1992, at 1 (prosecution called forty witnesses who were convicted drug traffickers, fifteen of whom were granted immunity for crimes more serious than those for which Noriega stood trial).

<sup>39</sup> "Use of Jailhouse Informers Reviewed in Los Angeles," *N.Y. Times*, Jan. 3, 1989, at A14.

<sup>40</sup> Note 22, *supra* at 275.

other single factor.<sup>41</sup> Prosecutors, because of their superior resources and early involvement with police in criminal investigations, invariably accumulate evidence that may cast doubt on a defendant's guilt. A prosecutor is legally and ethically obligated to turn over this evidence to the defense.<sup>42</sup> Many prosecutors obey these rules. Many other prosecutors, however, violate these rules, sometimes inadvertently, sometimes willfully. The published decisions describing such misconduct are merely the tip of the iceberg; most of this misconduct occurs beyond public or judicial scrutiny, in the twilight zone of criminal justice of which only prosecutors and police are aware. Moreover, the absence of meaningful professional discipline of prosecutors for such misconduct makes these tactics almost routine, and a cause for deep concern.<sup>43</sup>

Courts, bar associations, and legislatures should be much more alert to this quagmire in criminal justice. Reversals of convictions should be required automatically for the deliberate suppression of evidence. Disciplinary sanctions against prosecutors should be the norm rather than the exception. Legislation should be enacted making it a crime for prosecutors to willfully suppress evidence resulting in a defendant's wrongful conviction, the degree of the prosecutor's culpability related to the gravity of the conviction.

It should come as no surprise that the Supreme Court and the federal courts have abdicated much of their responsibility to ensure high standards for prosecutors.<sup>44</sup> However, state courts occasionally have filled this breach. Some state courts, notably the New York State Court of Appeals, have affirmatively used

---

<sup>41</sup> The cases of prosecutorial suppression of evidence are legion. See B. Gershman, *Prosecutorial Misconduct*, Ch. 5. Very recently, in *People v. Alfred Davis*, 81 N.Y.2d 281 (1993), the New York Court of Appeals unanimously reversed a conviction obtained by the Manhattan district attorney for suppressing exculpatory evidence. See also "The 'Brady' Rule: Is It Working?" Nat'l L.J. 1 (May 17, 1993).

<sup>42</sup> *Brady v. Maryland*, 373 U.S. 83 (1963). See also *ABA Standards for Criminal Justice* § 3-3.11(a) (3d ed. 1992).

<sup>43</sup> Rosen, "Disciplinary Sanctions Against Prosecutors for 'Brady' Violations: A Paper Tiger," 65 N.C.L. Rev. 693 (1987).

<sup>44</sup> See *United States v. Williams*, 112 S. Ct. 1735 (1992) (federal courts have no supervisory authority over prosecutorial suppression of exculpatory evidence before grand juries); *United States v. Hasting*, 461 U.S. 499 (1983) (federal courts may not use supervisory power to deter prosecutorial misconduct without first determining whether misconduct was harmless error).

## THEMES OF INJUSTICE

their own state constitutions to protect individual rights when the federal Constitution, as interpreted by the Supreme Court, fails to provide adequate protection.<sup>45</sup> This "new federalism" is a healthy and welcome legal development, particularly at a time when fair play for persons charged with crime is not a popular view.

### Racial Prejudice

Racial prejudice continues to haunt U.S. criminal justice. In its recent report, the New York State Judicial Commission on Minorities decried what it saw as the many similarities between apartheid and the travesties of justice found to exist in the U.S. South. The commission's findings include the frequency of all-white juries in counties of substantial minority populations; minorities clustered in the worst courthouses in the state; blacks receiving sentences of incarceration where whites do not, and longer sentences than similarly situated whites; underrepresentation of minorities as administrators, despite their availability in the labor pool; and judges taking twice as long to explain to whites certain of their rights as they do to blacks. In short, the commission concluded, "there is in New York State in the 1990's the reality of a biased court system."<sup>46</sup>

Racial discrimination in the application of the death penalty is a window to racial discrimination generally. One half of the persons on death row in the United States are black or hispanic. But that is not the real story. Perhaps the most shocking statistic reveals that defendants charged with killing white victims are at least four times, and as much as eight times, more likely to receive a death sentence as those charged with killing black victims in otherwise similar cases. The most carefully documented study, the Baldus study, examined over 2,000 murder cases in Georgia, and isolated 230 nonracial variables.<sup>47</sup> The study concluded that a defendant's odds of receiving a death

<sup>45</sup> See, e.g., *People v. Vilardi*, 76 N.Y.2d 67, 556 N.Y.S.2d 518, 555 N.E.2d 915 (1990) (refusing to apply Supreme Court decision limiting prosecutor's disclosure obligations). See also Kaye, "Dual Constitutionalism in Practice and Principle," 61 St. John's L. Rev. 399 (1987); Brennan, "State Constitutions and the Protection of Individual Rights," 90 Harv. L. Rev. 489 (1977).

<sup>46</sup> See note 10, *supra*.

<sup>47</sup> D. Baldus, G. Woodworth & C. Pulaski, Jr., *Equal Justice and the Death Penalty: An Empirical Analysis* (1990).

sentence were 4.3 times greater if the victim was white than if the victim was black. In some states, disparities are even higher.<sup>48</sup> In Maryland, killers of whites are eight times more likely to be sentenced to death than killers of blacks; in Arkansas, they are six times more likely; and in Texas, they are five times more likely.<sup>49</sup> The race of the victim also operates as a "silent aggravating circumstance" in the jury's decision to impose the death penalty.<sup>50</sup>

In *McCleskey v. Kemp*,<sup>51</sup> the Supreme Court, although accepting the validity of the Baldus study, declined to find the practice unconstitutionally discriminatory. *McCleskey* has been called the "Dred Scott" decision of this century.<sup>52</sup> Justice Brennan, in one of his greatest dissents, recalled that 130 years ago the Supreme Court denied U.S. citizenship to blacks, and a mere 3 generations ago sanctioned racial segregation. Warren *McCleskey's* evidence, Justice Brennan wrote, confronts us with "disturbing proof" that "we remain imprisoned by the past as long as we deny its influence in the present."<sup>53</sup> "It is tempting to pretend," he said, "that minorities on death row share a fate in no way connected to our own." This is "an illusion . . . for the reverberations of injustice are not so easily confined. . . . [T]he way in which we choose those who will die reveals the depth of moral commitment among the living." Justice Brennan concluded:

The court's decision today will not change what attorneys in Georgia tell other Warren *McCleskeys* about their chances of execution. Nothing will soften the harsh message they must convey, nor alter the prospect that race undoubtedly will continue to be a topic of discussion. *McCleskey's* evidence will not have obtained judicial acceptance, but that will not affect what is said on death row. However many criticisms of today's decision may be rendered, these painful conversations will serve as the most eloquent dissents of all.<sup>54</sup>

<sup>48</sup> "Killers of Blacks Escape the Death Penalty," Dallas Times Herald, Nov. 17, 1985, at 1.

<sup>49</sup> *Id.*

<sup>50</sup> Tabak & Lane, "The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty," 23 Loy. L.A. L. Rev. 59, 90 (1989).

<sup>51</sup> 481 U.S. 279 (1987).

<sup>52</sup> Kennedy, "McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court," 101 Harv. L. Rev. 1388, 1389 (1988).

<sup>53</sup> 481 U.S. at 344.

<sup>54</sup> *Id.* at 344-345.

Warren McCleskey was executed on September 25, 1991.

Racial injustice in jury selection also continues unabated. *Batson v. Kentucky*<sup>55</sup> sought to eliminate such discrimination. But blacks and other minorities continue to be excluded from juries, and both prosecutors and defense lawyers continue to provide spurious reasons for the strikes.<sup>56</sup> The California jury that acquitted the four police officers of beating Rodney King did not include any blacks. The blatant circumvention of *Batson* in New York State recently prompted Judge Bellacosa, in an opinion joined by Chief Judge Wachtler and Judge Titone, to urge the total elimination of peremptory challenges.<sup>57</sup> Judge Bellacosa wrote that “peremptories have outlived their usefulness and, ironically, appear to be disguising discrimination—not minimizing it, and clearly not eliminating it.”<sup>58</sup>

### Incompetence of Counsel

Finally, the inadequacy of representation, which all members of the legal profession should take very seriously, needs to be addressed. The ability of public defenders and appointed counsel to deliver quality defense services is being threatened by lack of funds, huge volume, and often inept training and supervision.<sup>59</sup> The vast majority of criminal defendants in New York State and nationwide are too poor to afford private counsel and therefore must rely for their constitutionally guaranteed defense on legal aid and counsel assigned by the court. There are many talented, although grossly underpaid, attorneys representing indigent defendants. The quality of representation in New York State is probably much higher than the quality of representation nationwide. The dismal level of indigent representation nationwide is particularly noticeable in those jurisdictions that allow capital punishment. An American Bar Association task force recently concluded that “the inadequacy and inadequate compensation of counsel at trial” was one of the “principal failings” of the capital

<sup>55</sup> 476 U.S. 79 (1986).

<sup>56</sup> See, e.g., *Hernandez v. New York*, 111 S. Ct. 1859 (1991); *People v. Kern*, 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647 (1990).

<sup>57</sup> *People v. Bolling*, 79 N.Y.2d 317, 591 N.E.2d 1136, 582 N.Y.S.2d 950 (1992) (concurring opinion).

<sup>58</sup> 79 N.Y.2d at 326.

<sup>59</sup> Gershman, “Defending the Poor,” 29 *Trial* 47 (March 1993).

punishment system.<sup>60</sup> All too often defense lawyers are ill-trained and unprepared. Consider the following examples.<sup>61</sup>

1. Larry Heath was executed last year. His court-appointed lawyer's appellate brief contained only a single page of argument, raised only a single issue, and cited only a single legal precedent.
2. Herbert Richardson was executed in 1989. His appellate brief failed to mention that at his sentencing hearing the prosecutor argued, without any basis in the record, but with no objection by defense counsel, that Richardson should be sentenced to death because he belonged to a black muslim organization in New York, had killed a woman in New Jersey, and had been dishonorably discharged from the military. Richardson's lawyer was later disbarred for other reasons.
3. Arthur Jones was executed in 1986. He was represented at trial by a court-appointed lawyer who made no opening or closing statement and offered no evidence at the penalty phase. During the postconviction phase he was represented by a sole practitioner just two years out of law school who had never handled a capital case.
4. Horace Dunkins, a mentally retarded black man who was executed in 1989, was represented by a lawyer so incompetent that the jury was never told that Dunkins was mentally retarded. Dunkins had an IQ of sixty-five and the mental age of a ten-year-old.
5. The capital trial of a battered woman was interrupted for a day when her defense lawyer appeared in court so intoxicated that he was held in contempt and sent to jail for the day and night.
6. A defense lawyer requested an adjournment between the guilt phase and penalty phase of a murder trial so that he could read the state's death penalty statute.
7. A lawyer's brief was sent back to him by the appellate court because it did not cite a single case.

---

<sup>60</sup> ABA Task Force Report, *Toward a More Just and Effective System of Review in State Death Penalty Cases* 7 (Aug. 1990).

<sup>61</sup> The following examples were provided by Stephen B. Bright, Esq., Director, Southern Center for Human Rights, in a Statement to the Committee on the Judiciary, U.S. Senate, regarding the nomination of Ed Carnes to the U.S. Court of Appeals for the Eleventh Circuit (Apr. 1, 1992).

## THEMES OF INJUSTICE

8. A capital defendant was visited only once by his lawyer in eight years. In another case, the lawyer never visited his client in eight years.

One confronts these examples with shock and dismay. Are they merely aberrations? Or do they reflect a much more prevalent condition? Clearly, incompetent lawyering and injustice go hand in hand.

While persons of means are able to obtain "the best counsel money can buy,"<sup>62</sup> these lawyers are also finding their role increasingly more difficult to perform effectively. More and more privately retained lawyers are being subpoenaed to testify against their clients, particularly in connection with their receipt of legal fees, and have been jailed for refusing to testify before grand juries.<sup>63</sup> Prosecutors are increasingly using the statutory summoning power of the Internal Revenue Service to force criminal defense lawyers to disclose the identities of clients who pay cash.<sup>64</sup> There has been rising incidence of law office searches, disqualification of attorneys, forfeiture of attorney fees, and prosecution of attorneys under obstruction of justice statutes for giving legal advice to clients.<sup>65</sup> The future of our adversary system is at risk by these tactics.

### Conclusion

The law can be a vital force for justice, as well as for injustice. We look to it to find rational solutions to problems and disputes, and we hope that these solutions achieve justice. When that happens, the law has a meaning beyond its often arid and sterile language. When that does not happen, when innocent persons are convicted, when racism continues to infect our courts, and when lawyers fail in their obligations, we confront injustice. It is at that time that those who participate in the criminal justice system can more fully appreciate their own responsibility to dispense justice, and to eliminate injustice.

---

<sup>62</sup> *Morris v. Slappy*, 461 U.S. 1, 23 (1983) (Brennan, J., concurring).

<sup>63</sup> Stern & Hoffman, "Privileged Informers: The Attorney-Subpoena Problem and a Proposal for Reform," 136 U. Pa. L. Rev. 1783 (1988).

<sup>64</sup> *United States v. Goldberger & Dubin*, 935 F.2d 501 (2d Cir. 1991).

<sup>65</sup> Gershman, "The New Prosecutors," 53 U. Pitt. L. Rev. 393 (1992).