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*100 Yale L.J. 1005, **

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Yale Law Journal

January, 1991

100 Yale L.J. 1005

LENGTH: 3412 words**ESSAY:** "To the Best of Our Knowledge, We Have Never Been Wrong": Fallibility vs. Finality in Capital Punishment.**NAME:** Joseph M. Giarratano [+]**BIO:**

[+] Mr. Giarratano is currently on Death Row in Virginia, where he serves as a client advisor for the Virginia Coalition on Jails and Prisons and as a member of the advisory board of the Peace Center, Washington, D.C. His fight to avoid electrocution has attracted the support of advocates as diverse as columnist James J. Kilpatrick and Amnesty International, many of whom argue that there is serious doubt as to Mr. Giarratano's guilt. Mr. Giarratano has also attracted significant attention due to the innovative legal scholarship he has brought to his involvement in right-to-counsel and other death penalty related litigation, and to the articles he has published on Death Row issues. At the time this issue of *The Yale Law Journal* went to the printer, Mr. Giarratano's execution date had been set for February 22, 1991, and it was not known whether Governor L. Douglas Wilder would grant Mr. Giarratano's request for a conditional pardon and a new trial. -- Ed.

SUMMARY:

... Thirty-six states currently practice capital punishment. ... In our passion for the death penalty, we are losing our respect for the appellate process as a safeguard against miscarriages of justice. ... The inescapable risk of executing even one innocent individual should be reason enough to abolish capital punishment. ... Furthermore, even under today's allegedly "reliable" capital punishment statutes, many innocent individuals have been sentenced to death. ... His death sentence was subsequently overturned because of the unconstitutionality of the capital punishment statute then in use by Texas. ... After Richardson came within hours of being executed, his death sentence was commuted to life imprisonment by the decision in *Furman v. Georgia*. ... *The evidence being all too clear that our nation has, unfortunately, not undergone a new birth of infallibility, that we have not outgrown our need for full dual collateral review, we must now turn to the only other possible argument for compromising the traditions associated with the "Great Writ": the fear that we cannot afford freedom, the fear that crime has become such a threat that the only alternative*

to compromising our constitutional rights is surrendering to anarchy. ...

HIGHLIGHT: Till the infallibility of human judgments shall have been proved to me, I shall demand the abolition of the death penalty.

Marquis de Lafayette ¹

TEXT:

[*1005] Thirty-six states currently practice capital punishment. ² Approximately 2400 Americans now await death at the hands of their government. ³ Since the reinstatement of capital punishment in the late 1970's, at least 140 convicted criminals have been exterminated. ⁴ Yet many of us remain filled with doubt regarding the constitutionality, fairness, and morality of the death penalty. One point alone commands unanimous consent: for the state, operating under "color of law," to take the life of an innocent individual would be a horrendous event, a perversion of the cause of justice.

On the average, eight years elapse between conviction and the infliction of the ultimate penalty. ⁵ In recent times, with violent crime a steadily increasing [^{*1006}] concern, there has been a deafening clamor for more and speedier executions. Whether this agitation originates from anger, frustration, or fear, it has certainly been heeded by our elected leaders and the judiciary. Our national debate no longer centers on whether the state has the right to take life, or whether it would be wise to do so even if it had the right. Instead, the focus of our attention has shifted to whether the right to appeal capital convictions should be substantially curtailed.

With the approval ~ indeed, the urging — of Chief Justice William H. Rehnquist, ⁶ the Supreme Court has discovered ways to drastically limit or eliminate Death Row appeals. In recent decisions, the Court has arbitrarily narrowed the grounds on which the condemned can appeal ⁷ and severely limited the plaintiffs who can pursue such appeals. ⁸ Obdurate rules of procedure are being stringently enforced to bar judicial review of obvious errors. ⁹

Congress has also entered into the debate. Recently, the Senate approved an "anti-crime" bill which includes provisions that drastically shorten the federal appeals process following death penalty convictions. ¹⁰

There is a frightening aspect to this call for quicker executions. In our passion for the death penalty, we are losing our respect for the appellate process as a safeguard against miscarriages of justice. Lost in a wave of heated rhetoric and emotionalism, we have learned to view appeals as a "delaying" tactic employed by "criminals" or their (nearly as culpable, according to some) attorneys to thwart otherwise final judgments. The right to appeal now appears merely to be the right to erect unnecessary obstacles to justice. Fundamental fairness is no longer anywhere near the top of our list of concerns. We bear down on the offender to the exclusion of all else; the only demand that seems worthy of respect and attention is our frustrated cry for finality.

Our system of criminal justice is far from perfect. Yet, imperfections notwithstanding, it is a system of which we can be proud, provided we recognize and maintain a realistic sense of our own fallible nature. Our system of state and federal collateral review of criminal convictions represents one of our nation's most innovative contributions to the human race's experiments in the structures of criminal justice.

[*1007] If some feel it has become necessary to dismantle it, surely the burden is on them to show that they are not grasping for irrational remedies out of mere frustration with current social problems. Surely these would-be dismantlers of dual collateral review are obliged to substantiate their claim that our nation has reached such a peak of political and ethical maturity as to no longer to require such safeguards, or, alternatively, that our country has

plunged so deeply into the abyss of social chaos that the benefits offered by such safeguards are now outweighed by their drawbacks. The simple unexamined belief that some convicted murderers are circumventing the laws of thirty-six states is not a sufficient basis to undercut the process whereby we protect ourselves from wrongful criminal judgments. If we must have a death penalty, as **a majority seem to think we must**, then **we cannot** let our anger **blind us to our own fallibility**.

The Bill of Rights gives us the framework of our fundamental rights in criminal cases. The "Great Writ" of habeas corpus, guaranteed under all but the most extreme circumstances by **the explicit command of the Constitution**,¹¹ has been the method by which previous generations of Americans have sometimes succeeded in vindicating the guarantees of the Bill of Rights. When we cut back on the Great **Writ or "the eternal and unremitting force of the habeas corpus laws"**¹² and **deny selected individuals access to the federal courts**, it is tantamount to a declaration that we have lost faith in our ancestors and rejected our inheritance, that we now consider the Bill of Rights an impractical and Utopian dream.

It is true, as retired Associate Justice Lewis F. **Powell**¹³ and others have argued, that the delay occasioned by Death Row appeals does inconvenience the enforcement of state court criminal judgments. But one would be hard put to **argue that such delays totally foreclose the enforcement** of such criminal judgments as are finally **determined to be valid**. (Many capital convictions are later shown to have been invalid, sometime **for procedural reasons, and sometimes for the simple reason that the person convicted did not, in fact, commit the crime**.¹⁴) **To the extent** we have become convinced, despite the ambiguous nature of currently available evidence,¹⁵ that the death penalty carries more deterrent punch than any **constitutional** alternative punishment, **we may worry that** prolonging the appellate process may lose us this edge in deterrence. There are, however, much less objectionable ways to lessen the time taken up by **[*1008]** appeals. We could, for example, provide highly qualified, government-subsidized counsel from the initial trial stage on through state and federal direct and collateral appeals. We could also ease the congestion in our courts by **providing more judges to handle the ever-increasing tide of litigants, civil and criminal**.

Anyone attempting to "reform" **our system of safeguards must bear in mind the hard** historical fact that the **Bill of Rights has no power to protect itself**. The arguments put forth by those who want to speed up the pace of executions for the sake of finality are scarcely new. The inconvenience they complain of was recognized by Jefferson at the dawn of our **Republic**:

But tho [sic] [a bill of rights] is not absolutely efficacious under all circumstances, it is of great potency always, and rarely inefficacious. . . . There is a remarkable [sic] difference between the characters of the Inconveniencies [sic] which attend a Declaration of rights, and those which attend the want of it. The inconveniences of the Declaration are that it may cramp government in it's [sic] useful exertions. But the evil of this is shortlived, moderate. . . . The inconveniencies [sic] of the want of a Declaration are permanent, afflicting and irreparable: they are in constant progression from bad to worse. . . .¹⁶

When **we substantively foreclose any class of citizens from meaningful access to the Great Writ ~ even such a despised class as condemned prisoners -- we are not only circumventing** the original intent of the Bill of Rights, but practicing precisely the sort of discrimination that democratic government was instituted to prevent. Both of these aberrations, no matter how **well intended, mock the very essence of justice enshrined in the Constitution entrusted to us by our Founders**.

Has our criminal justice system become so infallible as to rule out the possibility of serious error? Have we outgrown the need for our traditional constitutional safeguards? Or **is it possible that** some of those we seek to execute are, in fact, innocent? **"Can it happen? It has happened!"**¹⁷ At least twenty-three people are now believed to have been wrongfully

executed in this country since the **turn** of the century. ¹⁸ **History provides hundreds of examples** — many of them extremely recent — of capital convictions tainted by serious factual errors. No careful student of the *reality* (as opposed to the *theory*) of capital punishment can cling for long to the notion that ours is an infallible system. On the contrary, we are admittedly fallible people struggling to approximate infallible judgments. As one noted capital punishment supporter has [***1009**] phrased it, "To say that someone deserves to be executed is to make a godlike judgment with no assurance that it can be made with anything resembling godlike perspicacity." ¹⁹

The inescapable risk of executing even one innocent individual should be reason enough to abolish capital punishment. To those who have persuaded themselves that our current procedures greatly minimize the risk of executing the innocent and who dismiss the remaining **risk in this area as negligible, I offer the following evidence.**

Just last year, four Supreme Court justices flatly stated that there remains "a **high incidence of uncorrected error**" in capital cases. ²⁰ **Even Justice Kennedy**, who concurred in the opposing opinion in the case in question, recognized that "a substantial proportion of these prisoners succeed in having their death sentences vacated in habeas corpus proceedings." ²¹

Furthermore, even under today's allegedly "reliable" capital punishment statutes, many innocent individuals have been sentenced to death. A wide variety of factors have been responsible **for such** miscarriages of justice. **These factors** include, but are not limited to: **misleading circumstantial evidence**, suppression of exculpatory evidence, **coerced or otherwise untrustworthy or false** confessions, perjury by prosecution **witnesses**, incompetent defense counsel, **mistaken eyewitness identification**, and **convictions largely motivated by community outrage.** ²²

The incidence of wrongful conviction and sentencing of innocent individuals shows no sign of decreasing. During 1987, 1988, and **1989**, at least a dozen men who had been sentenced to death were released as innocent. ²³ Consider the following three cases:

(1) **Joseph Green Brown**, after **spending** fourteen years on Florida's Death Row (at one point, **he was within fifteen hours of being executed**), **was released from prison as innocent.** It had come to light that the prosecution knowingly relied on false **testimony to obtain the conviction.** ²⁴

(2) In 1977, Randall Adams was convicted and sentenced to death for the murder of a Dallas police officer. His death sentence was subsequently overturned because of the unconstitutionality of the capital punishment statute then in use **by Texas.** In 1989, **Adams'** conviction itself was set aside after it was learned, among numerous **other things, that the** prosecution had prompted an alleged eyewitness to identify Adams in a line-up after the witness had initially [***1010**] identified another man. **Having spent twelve years in prison** for a crime he did not commit, Mr. Adams was released. ²⁵

(3) James Richardson was released in 1989 after spending twenty-one years in a Florida **prison.** **Richardson** was convicted of poisoning **his six children in 1968** and was sentenced to **death.** **After Richardson came within hours of being executed, his death sentence was** commuted to life imprisonment by the decision in *Furman v. Georgia.* ²⁶ Luckily for Richardson, volunteer counsel eventually succeeded in unearthing some crucial **evidence.** **In 1989, his conviction was overturned based** on judicial findings of prosecutorial misconduct and perjured testimony. ²⁷

But for the delay occasioned by the appellate process, these men would have been executed long before their innocence was discovered. This has been true in virtually *every case* in which the innocence of Death Row prisoners has been established. Many other examples could be cited to prove **that, regardless of what some would like to believe, the factual**

findings underlying our assignments of capital punishment remain stubbornly unreliable. The imposition of this ultimate sanction continues to require all the safeguards built into our government two centuries ago.

Our system remains so unreliable that innocence is often discovered either through totally fortuitous circumstances or when volunteer attorneys step in to reopen investigation, long after the state has declared its findings to be final. Take, for example, the case of Larry Hacker, who was convicted of robbery and murder in Georgia, and sentenced to death. Bobby Lee Cook, Hacker's attorney, believed him innocent. After the conviction and sentence had been affirmed at *all levels of appeal*, Cook's investigation was finally able to uncover evidence proving that the prosecution's star witness had been lying on the stand. Hacker was released after a federal judge found that Hacker had been framed.²⁸ Cook now opposes capital punishment because, as he succinctly puts it, "It's just too damn final."²⁹

The evidence being all too clear that our nation has, unfortunately, not undergone a new birth of infallibility, that we have *not* outgrown our need for full dual collateral review, we must now turn to the only other possible argument for compromising the traditions associated with the "Great Writ": the fear that we cannot afford freedom, the fear that crime has become such a threat that the only alternative to compromising our constitutional rights is surrendering to anarchy.

[*1011] We Americans have heard this threat in every generation since the Revolution. There always seems to be some sort of temporary emergency going on for the duration of which, we are told, our liberty must be limited or suspended. At many times during our history, seldom to our credit, we have believed those making this threat, and have compromised our constitutional inheritance.³⁰ At other times, however, we have remained unconvinced that social stability can be achieved only by compromising individual rights.³¹ We have, instead, relied on the theory that a government that *refuses* to compromise on individual rights will, in the long run, achieve stability by commanding the voluntary allegiance of its citizens. When threatened with civil disorder, instead of attempting to overcome the limits the Constitution places on us, we have tried to work *within* the Constitution to overcome the causal factors pushing our nation toward disunity. This latter approach is the one we need today.

Legal Topics:

For related research and practice materials, see the following legal topics:

[Constitutional Law > Bill of Rights > General Overview](#) 

[Criminal Law & Procedure > Eyewitness Identification > General Overview](#) 

[Criminal Law & Procedure > Sentencing > Capital Punishment > Stays of Execution](#) 

FOOTNOTES:

¹ Burleigh, *Confession Not Always To Be Trusted*, in VOICES AGAINST DEATH 97-98 (P. Mackey ed. 1976) (citing C. LUCAS, 2 RECUEIL DES DEBATS DES ASSEMBLEES LEGISLATIVE DE LA FRANCE SUR LA QUESTION DE LA PEINE DE MORT, pt. 2, at 42 (1831)).

² NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, DEATH ROW, U.S.A. 1 (quarterly update, Sept. 21, 1990). The federal government and military practice capital punishment as well. *Id.*

³ *Id.*

¶n4 *Id.*

¶n5 Powell, *Capital Punishment*, 102 HARV. L. REV. 1035, 1038 n.2.2 (1989) (citing E. CARNES & S. STEWART, SUMMARY OF POST-FURMAN CAPITAL PUNISHMENT DATA § II (1988) (unpublished report by the Alabama Assistant Attorneys General, available in Harvard Law School Library)).

¶n6 See Marcotte, *Rehnquist: Cut Jurisdiction*, A.B.A.J., Apr. 1989, at 22-23 (quoting Rehnquist, C.J.: "[T]o my mind, the flaw in the present system is . . . that litigation ultimately resolved in favor of the state literally takes years and years and years.").

¶n7 See, e.g., *Teague v. Lane*, 489 U.S. 288 (1989) (new, less strict rule, governing evidence required for prima facie case of racial discrimination in use of peremptory challenges held not to have retroactive effect).

¶n8 See, e.g., *Whitmore v. Arkansas*, 110 S. Ct. 1717 (1990) (second Death Row inmate lacks standing to challenge validity of death sentence when defendant has waived right to appeal).

¶n9 See generally *Butler v. McKellar*, 110 S. Ct. 1212 (1990) (new Fifth Amendment-based rule, barring police-initiated interrogations, held not to have retroactive effect); *Saffle v. Parks*, 110 S. Ct. 1257 (1990) (new Eighth Amendment-based rule, barring jury instructions against sympathy for defendant, held not to have retroactive effect); *Wainwright v. Sykes*, 433 U.S. 72 (1977) (failure to make timely objection to admission of inculpatory statements to police bars subsequent federal review).

¶n10 See S. 1970, 101st Cong., 1st Sess. § 2256-62 (1989).

¶n11 U.S. CONST. art. I, § 9.

¶n12 M. PETERSON, THE PORTABLE THOMAS JEFFERSON 429 (1986) (citing letter from Thomas Jefferson to James Madison (Dec. 20, 1787)).

¶n13 See Remarks of Lewis F. Powell, Jr., Associate Justice, Supreme Court of the United States, Eleventh Circuit Judicial Conference, Savannah, Georgia (May 8-10, 1983).

¶n14 See Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 56-64 (1987).

¶n15 See generally W. BOWERS, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982, AT 271-336 (1984) (the death penalty may actually provoke more homicides than it prevents); THE DEATH PENALTY IN AMERICA 93-180 (H. Bedau ed. 1982) (reality of deterrence is doubtful).

¶N16 M. PETERSON, *supra* note 12, at 439 (citing letter from Thomas Jefferson to James Madison (Mar. 15, 1789)) (emphasis added).

¶n17 M. MUSMANNO, IS IT POSSIBLE TO EXECUTE INNOCENT MEN? 1 (1940) (referring to execution of Sacco and Vanzetti) (emphases added). Musmanno's pamphlet was published by the American League to Abolish Capital Punishment.

¶n18 See Bedau & Radelet, *supra* note 14, at 72-75.

¶n19 W. BERNS, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY 178 (1979).

¶n20 Murray v. Giarratano, 109 S. Ct. 2765, 2778 (1989) (Stevens, J., dissenting).

¶n21 *Id.* at 2772 (Kennedy, J., concurring),

¶n22 See Bedau & Radelet, *supra* note 14, at 56-64.

¶n23 See Tabak & Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOY. L. REV. 59, 102 (1989).

¶n24 See Siegel, *Sentencing the Wrong Man to Die*, L.A. Times, May 10, 1987, § 1, at 1, col. 1.

¶n25 See Fricker, *Crime and Punishment in Dallas*, A.B.A. J., July 1989, at 52, 54; Applebome, *A Murder in Texas: 12 Years Later, Questions Linger About Justice System*, N.Y. Times, Oct. 31, 1988, at A13, col. 4.

¶n26 408 U.S. 238 (1972).

¶n27 See Malcolm, *Tainted Verdicts Resurrect Specter of Executing the Innocent*, N.Y. Times, May 3, 1989, at A18, col. 1; *21-Year Ordeal Ends in Release*, N.Y. Times, Apr. 27, 1989, at A16, col. 6.

¶n28 See Curriden, *Bobby Lee Cook: Georgia Maverick*, A.B.A. J., Mar. 1989, at 68, 71-72.

¶n29 *Id.* at 72.

¶n30 See, e.g., Korematsu v. United States, 323 U.S. 214 (1944) (upholding "exclusion" of U.S. citizens of Japanese ancestry from areas on West Coast).

¶n31 See, e.g., Miranda v. Arizona, 384 U.S. 436 (1966) (statements elicited under custodial interrogation inadmissible unless suspect either clearly and intelligently waived rights, or was notified (1) of right to remain silent, (2) that statements made might be used as evidence against him, and (3) of right to have attorney present, either retained or appointed).

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June 26, 2009

The Honorable Timothy M. Kaine
Governor of Virginia
Office of the Governor
P.O. Box 1475
Richmond, Virginia 23218

Re: Petition for Clemency for Joseph Giarratano

Dear Governor Kaine:

For 32 years, my practice and career has been chiefly devoted to criminal and capital defense and ~~plaintiff's civil rights~~ practice. During this time I have had many occasions to work with Joe Giarratano and to represent him in civil rights actions from time to time. It is with great pleasure that I inform you that I will be employing Joe as my legal assistant upon his release should you grant him clemency. I clearly foresee the benefits that will accrue to my clients and to the community by employing him. A substantial amount of my work is committed to *pro bono* help and Joe's assistance will allow me greater latitude in this pursuit.

I am keenly aware of Joe's legal acumen as evidenced by numerous cases that he has **handled** *pro se* during his years as an inmate in the Virginia Department of Corrections. Over the years, Joe has assisted many inmates with their habeas cases while also engaging in a wide variety of legal issues including visitation rights, access to inmates' lawyers, adequate prison medical care, and access to public information, to name a few. Joe is widely recognized throughout the legal community as an astute legal scholar and a prolific writer. Joe has written many legal briefs and legal articles and his writings have been published in numerous publications, including the renowned Yale Law Journal.

There are several cases of national significance that Joe spearheaded that clearly exemplifies his unique legal talents, but one case stands out that represents his efforts on behalf of those that are less fortunate. Joe was the named plaintiff in *Murray v. Giarratano*, 492 U.S. 1 (1989) in which he filed a *pro se*, class action complaint in federal district court involving the

The Honorable Timothy Kaine
June 26, 2009
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rights of death row inmates to have access to legal counsel in state collateral proceedings-a novel issue. He would later be represented in this case by Jerry Jerkin. Joe initiated this class action lawsuit on behalf of Earl Washington Jr., a mentally retarded man. Mr. Washington was scheduled to be executed even though he did not have an attorney that could pursue state collateral proceedings on his behalf.

Both the district court for the Eastern District of Virginia and the full court of the United States Court of Appeals for the Fourth Circuit found in Mr. Giarratano's favor, recognizing that Virginia's death row inmates had a constitutional right to counsel in state collateral proceedings. Even though the United States Supreme Court reversed the lower court decision in a 5-4 opinion, changes in the way the Commonwealth of Virginia delivered legal services to death row inmates were already in the making due to the unrelenting efforts of Joe Giarratano.

While pursuing the class action lawsuit in *Giarratano v. Murray*, 668 F. Supp. 561 (E.D. Va. 1986), Joe was finally able to secure counsel for Earl Washington Jr. As a result, new counsel was able to obtain a stay of execution, just nine days from Mr. Washington's scheduled execution date. After years of litigation, Mr. Washington was granted an absolute pardon from Governor James Gilmore III for the wrongful capital murder conviction that placed him on death row for almost 10 years. I know that you are personally familiar with Mr. Washington's civil rights struggle which would not have been possible without Joe's persistence and help.

I believe that Joe Giarratano will be a productive citizen in our community and an invaluable asset to my law practice. I look forward in working with Joe and also assisting him as he makes his transition back into the community.

If we can provide you with any additional information, please contact us.

Sincerely yours,



Steven D. Rosenfield

sdr/

cc: Stephen A. Northrup, Esq.
Anthony F. Troy, Esq.
Donald P. Salzman, Esq.
Allison Guagliardo, Esq.
Joseph M. Giarratano