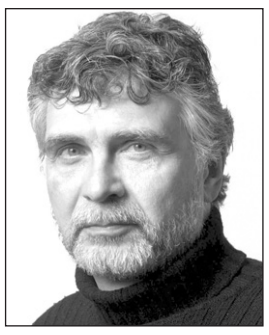
When the Innocent Are Sentenced to Death

By Maurice Possley

For three decades, Harry Connick Sr. was the district attorney in Orleans Parish, La., a state where wrongly convicted defendants have been exonerated at one of the highest per capita rates in the nation.

Eight men have been exonerated from death row and four of them were sentenced to death in Orleans.

The story of one of them, John Thompson, is revealed in a compelling book, "*Killing Time: An 18-year Odyssey from Death Row to Freedom*." Authors John Hollway and Ronald M. Gauthier take readers inside the mind and heart of Thompson from the moment of his arrest for the Dec. 6, 1984 murder of Ray T. Liuzza Jr., the son of an influential New Orleans executive, until Thompson's release from prison on May 10, 2003 when he was given back his 18-year-old clothes (which amazingly still fit) and $10 for bus fare.



Maurice Possley, a Pulitzer Prize winning former investigative reporter for the *Chicago Tribune*, is an investigator and researcher with the Northern California Innocence Project.

Thompson won a new trial after his defense team uncovered exculpatory evidence that had been hidden by the prosecutors in Connick's office.

The hiding of evidence against innocent defendants is not a new allegation against Connick's prosecutors.

In 1999, the *Chicago Tribune* published a five-part series on prosecutorial misconduct that revealed nearly 400 homicide convictions nationwide had been set aside by reviewing courts because prosecutors had either knowingly used false evidence or failed to disclose evidence suggesting the defendants' innocence.

The article (written by this author and fellow Tribune reporter Ken Armstrong) noted the case of Isaac Knapper who was convicted in 1979 of the murder of a tourist in New Orleans. Knapper won a new trial after the Louisiana Supreme Court held that prosecutors under Connick had suppressed a police report that showed three men had been arrested for a robbery five blocks from the murder and they were using the same pistol that killed the tourist.

Knapper was released after more than a decade behind bars at the state's infamous Angola penitentiary, one of the nation's toughest prisons.

By 1999, eight years later, the attorney who won Knapper's release, Laurie White, a former prosecutor in Connick's office, had gotten new trials for four other clients accused of murder and yet another accused of rape by demonstrating that prosecutors hid evidence. She convinced a judge in another case to toss out a murder charge by showing prosecutors had done the same thing.

At that time she told the *Tribune* she referred to prosecutors as "those lying, cheating bastards."

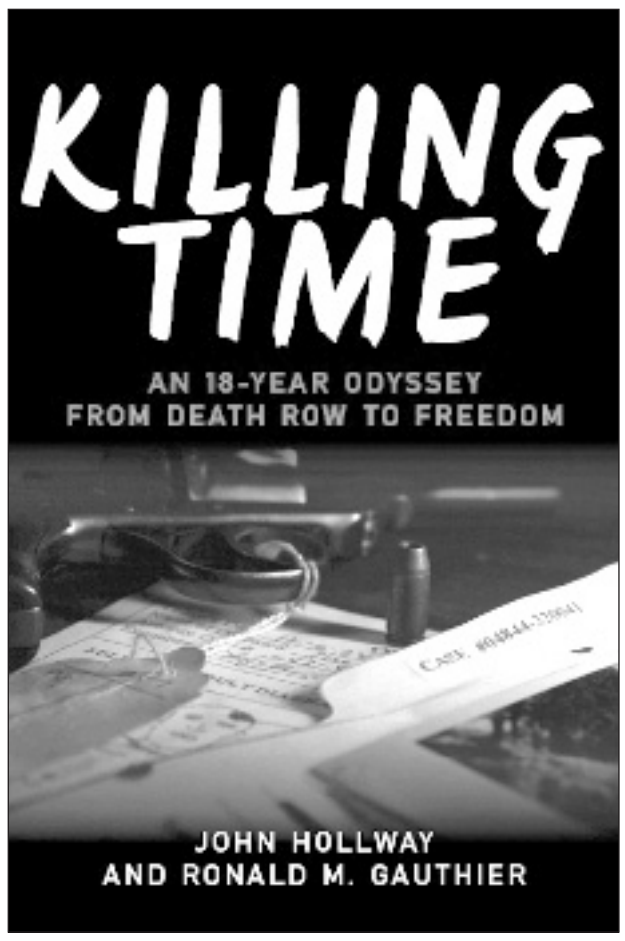
While Hollway and Gauthier don't use that vernacular in their telling of the agonizing and triumphant story of Thompson, their account is a story of an appalling injustice.

Four years after his acquittal, Thompson sued the district attorney's office and won a whopping $14 million damage award based on the egregious misconduct of prosecutors in withholding the evidence. That verdict was upheld by the U.S. District Court for the 5th Circuit and earlier this year the U.S. Supreme Court accepted the case.

It is fitting that as the lawyers in the case prepare to argue about whether prosecutors can be held accountable for damages for this type of conduct, a compelling book is being released that recounts the remarkable story of Thompson's battle for justice.

Hollway, an attorney living in northern California, and Gauthier, a librarian in Georgia who formerly was an adult literacy instructor for the Louisiana prison system, have woven a gripping narrative of how justice went awry for Thompson.

They take the reader into the courtrooms of New Orleans, behind the walls of Angola and into the offices of Philadelphia lawyers Michael Banks and Gordon Cooney, who took up Thompson's case to ensure he was accorded a proper appeal and instead came to believe and prove Thompson's innocence.



The book recounts a near-deathbed confession by a prosecutor, the agony of a man facing execution for a crime he did not commit, and the dogged persistence of a team of lawyers who fought through numerous rejections by judges and ultimately would prevail.

The event that would one day unravel Thompson's case and led to his freedom took place three weeks after Liuzza was robbed and shot to death outside of his New Orleans home. Three members of a New Orleans family reported a gunman tried to rob them while they were driving home from a basketball game at the Superdome.

During a struggle inside the car over the robber's gun, some of the attacker's blood wound up on the cuff of the pant leg of one of the victims. Police cut a piece of the pants with the blood on it for evidence.

On Jan. 17, 1985, when Thompson was charged with Liuzza's murder, the three — two brothers and a sister — saw Thompson's photograph in the newspaper and said he was the man who tried to rob them. Thompson was then charged with that crime as well.

Connick's prosecutors took Thompson to trial on the armed robbery charge, but never turned over the results of the blood test which showed the blood was type B. After he was convicted on the basis of eyewitness testimony, Thompson went to trial for the murder. The prosecution used the armed robbery conviction to help secure the murder conviction.

Eighteen years later and one month before Thompson's schedule execution, Thompson's investigators uncovered the results of the blood test. A test of Thompson's blood showed he was Type O.

The robbery conviction was tossed out and Thompson was retried for the murder. This time, Thompson's defense team had 13 pieces of evidence that had been suppressed by prosecutors the first time around. Hollway and Gauthier paint a vivid portrait of the tension that permeated the case as it wound to a close and evidence was closed, leaving only closing arguments and jury instructions left before the jury would begin deliberating.

The book recounts the moment just before defense attorney Michael Banks arose to address the jury.

"And so it was done. Michael hated this feeling. It was as if he had bet his life savings on a single roll of the dice. The dice had left his hand and were bouncing on the felt, caught suspended in the air so that he couldn't see whether he had won or lost".

The jury acquitted Thompson after just 35 minutes.

In 1963, the U.S. Supreme Court decided a case entitled *Brady v. Maryland*, which requires prosecutors turn over the type of evidence that Connick's prosecutors withheld and the type of evidence that led to the scores of wrongful convictions documented by the *Tribune* in 1999.

Nearly a half century later, such conduct continues, the result, many argue, of prosecutors' drive to convict instead of seeking justice and because prosecutors are not held accountable — they are immune from lawsuits as long as their misconduct occurs in the carrying out of their jobs as prosecutors.

The jury hearing Thompson's lawsuit decided that Connick had acted with "deliberate indifference" by failing to train his prosecutors in their responsibilities under the Brady decision.

The $14 million judgment, which has been accumulating interest in the three years since the verdict, should send a message to prosecutors that such misconduct is not to be tolerated.

Since his release from prison, Thompson has formed an organization called Resurrection after Exoneration, which helps wrongly convicted inmates re-enter society. A portion of the sales proceeds from the book goes directly to Thompson.

The rest of the story will play out later this year in the U.S. Supreme Court. For lawyers, judges and those who love an historic legal drama, "*Killing Time*" should be required reading.

Authors John Hollway and Ronald M. Gauthier take readers inside the mind and heart of Thompson from the moment of his arrest for the Dec. 6, 1984 murder of Ray T. Liuzza Jr., the son of an influential New Orleans executive, until Thompson's release from prison on May 10, 2003.

Arbitration: Altering the Legal Landscape

By Lawrence Waddington

In determining whether an arbitration clause is enforceable, the courts have used substantive contract law terms, i.e., "unconscionable," to serve in a non-contractual forum of deciding whether to order arbitration. Although the court applies state substantive law in determining whether to order arbitration, none of the *Armendariz* rules requiring neutral arbitrators, limited discovery, a "reasoned" award, mutuality of remedies and cost shifting onto the employer, constitute California substantive law. *Armendariz v. Foundation Health Psychcare Services Inc.*, 24 Cal.4th 938 (1995). The court cited no case or statute in support of its decision. In fact, no substantive contract law for these rules existed. The decision, even if equitable, is "policy."

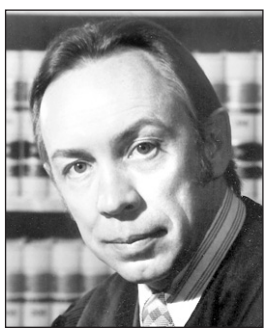
LAST IN A TWO PART SERIES

This article continues part one of *"Arbitration: Altering the Legal Landscape,"* which appeared May 19.

In employment cases, the courts invoke disproportionate bargaining power of the parties as a factor in determining "unconscionability." In consumer cases, individual plaintiffs could not economically litigate against service providers unless they could consolidate their claim with other plaintiffs in a class action. The *Gentry* court invoked the unconscionability rationale to invalidate an arbitration clause prohibiting a plaintiff from consolidating claims with other plaintiffs in class actions on grounds these parties could not vindicate their substantive law or statutory rights. *Gentry v. Superior Court*, 42 Cal.4th 443 (2007). But consolidation is a procedural mechanism to combine collateral litigation, not substantive state law of unconscionability. *Gentry* is also a policy decision.

In employment, consumer, franchise and other contract cases involving adhesive contracts, one can argue that judges are attempting to do "economic" justice by concentrating on the identity of the parties, their relationship between each other and the terms of the contract. Courts have invoked a form of "economic justice" in arbitration exemplified in the categories described above. In commercial arbitration, the parties negotiate their contract and the justification for *Armendariz* and *Gentry* inapplicable in the absence of fraud.

Yet even in commercial arbitration the California Courts of Appeal have also arguably exercised economic justice by clothing the dispute between parties in legal language. In *Parada v. Superior Court*, 176 Cal.App.4th 1554 (2009) the Court of Appeal reviewed a consolidated commercial arbitration case. Three plaintiffs sued a financial investment company for money losses in each of their investments.



Lawrence Waddington is a judge (Ret.) and author of www.ArbitrationADR.com, an Internet practice book on arbitration. He is also an adjunct professor at Pepperdine University Law School and a panel member of JAMS.

All plaintiffs had signed contracts containing an unquestionably enforceable arbitration clause agreeing to a panel of three arbitrators to resolve disputes. The trial court denied defendant's petition to compel arbitration.

The Court of Appeal, in writing the backstory of the case, describes the occupation of the three plaintiffs as a teacher, a janitor and a driver for a delivery service. On grounds the cost of a three person arbitration panel for several days of arbitration imposed an unacceptable financial burden on the plaintiffs disabling them from exercising their statutory rights, the court ruled the arbitration clause unconscionable. The identity of the parties and their respective employment explains this result, not the substantive law of contract.

The arbitration clause in *Parada* is adhesive in the absence of any negotiation between the parties sufficient to warrant a finding of procedural arbitrability but plaintiffs submitted no evidence of substantive unconscionability. The parties were given an opportunity to read the contract, were informed of the financial risks, and nevertheless signed their acknowledgment of having read the arbitration clause.

In arbitration, the courts have attempted to achieve a 'fair hearing' by introducing policy considerations, however beneficial, but arguably inconsistent with substantive law.

Parada is not an employment contract, consumer contract or a franchise contract, and the plaintiffs did not argue the unfairness of the terms. But sub rosa, the court inferred that these three plaintiffs were probably unsophisticated, indifferent to arbitration or litigation, and wanted profits from their investment. In other words, the status of the parties motivated the court to do "economic justice."

Parada is arguably a harbinger of future challenges to arbitration. Despite Code of Civil Procedure Section 1281 language permitting courts to refuse enforcement of arbitration on the same "grounds [as] exist for the revocation of any contract," federal and state courts have consistently applied substantive state contract law to interpret the arbitration clause; Code of Civil Procedure Section 1281. Unquestionably the cost of participating in arbitration is a major factor confronting employees, consumers, franchisees and others who have signed adhesive contracts. But *Parada* is not in any of these categories. And, in a claim filed by "individual business owners" against a corporate defendant, the 9th Circuit refused to enforce an arbitration clause on grounds the cost and fee shifting clause to the non prevailing party in arbitration exposed plaintiffs to a substantial financial risk; *Pokorny v. Quixtar Inc.*, 2010 WL 1542508.

All parties in an arbitration are entitled to an impartial agreement, a neutral decision-maker, and a process fundamentally fair. Litigation similarly aspires to assure the parties of a "fair trial" in conformity with substantive and procedural law reflected in the California codes. In arbitration, the courts have attempted to achieve a "fair hearing" by introducing policy considerations, however beneficial, but arguably inconsistent with substantive law.