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Deborah W. Denno\*

## **When Willie Francis Died: The “Disturbing” Story Behind One of the Eighth Amendment’s Most Enduring Standards of Risk\*\***

*I reckon dying is black.  
Some folks say it’s gold.  
Some say it’s white as hominy-grits.  
I been mighty close.  
I reckon it’s black.*  
Willie Francis, 1946\*\*\*

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\*\* James Marlow, *Francis Gets the Details of His Case*, RALEIGH TIMES, Jan. 16, 1947, at 5 (noting that Justice Felix Frankfurter stated that Willie’s “whole situation was very ‘disturbing.’”). For purposes of clarity, this Chapter generally refers to Willie and his numerous family members by their first names only because most share the same last name.

\*\*\* Elliott Chaze, *‘Plumb Mizzuble’ Covers Willie Francis’ Idea of Electric Chair*, DAILY ADVERTISER (Lafayette, La.), July 1, 1946, at 1.

## INTRODUCTION

On May 3, 1946, in St. Martinville, Louisiana, Willie Francis, a black youth of seventeen years, sat in the state's electric chair, strapped in, ready to die. Willie was just like many convicted murderers throughout the country awaiting their punishments—poor minority teenagers stuck in a criminal justice system offering few of the legal protections available today. Like Willie, some of the condemned would have been only fifteen at the time of their purported crimes.<sup>1</sup> Yet in a matter of minutes Willie would be plucked from the masses. He would survive the electrocution in a way no one else had—an event that would take him from the front of the execution line to front-page news. In a country just recovering from the Second World War, time and again, Willie's experience would be called a “miracle,” a “blessing from God,” or “divine intervention” by layperson and lawyer alike.

Whatever role the “hand of God” played in saving Willie that day, eventually it would withdraw. Immediately after the attempted execution, the State sent Willie back to jail, thereby prompting a year-long personal and legal battle concerning Willie's fate. That struggle would go all the way up to the United States Supreme Court with *Louisiana ex rel. Francis v. Resweber*,<sup>2</sup> and then right back down to St. Martinville again after the Court affirmed the State of Louisiana's decision to execute Willie rather than give him life imprisonment. On May 9, 1947, the State finally did execute Willie for the murder of Andrew Thomas, St. Martinville's popular white pharmacist.

There are many stories to tell in the course of examining both the life and death of Willie Francis—stories about racism that look small-town and southern but are really nationwide in scope; stories about the risks of penal and technological debacles that appear antiquated but in fact have troubling parallels to the potential for botched electrocutions and lethal injections decades later. And, of course, there are the intimate stories about religious faith and the people surrounding Willie and his family.

The following pages bring together Willie's life narrative—often framed by the themes of race, risk, and religion—based on correspon-

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<sup>1</sup> See DAVID C. BALDUS, GEORGE G. WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 249–53 (1990); Death Penalty Information Center, Executions in the U.S. 1608–2002: The Espy File, <http://www.deathpenaltyinfo.org/executions-us-1608-2002-espy-file> (last visited Jan. 9, 2009).

<sup>2</sup> 329 U.S. 459 (1947).

dence, interviews, and accounts that have never been revealed elsewhere, as well as court documents, case law, and interdisciplinary literature.<sup>3</sup> Particularly compelling are numerous letters that people from all over the country wrote Willie while he was waiting in jail. These writers discussed many topics, including their reflections on racial injustice in America and the need for religious redemption, not only for Willie but also for his judges and this country. Yet a number of letters were deeper, more private. Willie, it seems, was not only an imprint of the social and legal times, but also a projected muse of sorts to whom individuals could confide their heartfelt thoughts and wishes—about God, death, health, hopes, family, even romance. Indeed, many of the personal and legal bits of Willie’s experiences are intertwined far too tightly to extricate. Willie’s life and execution are as much an account about him and society at that time as they are depictions of where this legal system has been and how the precedent of *Resweber* prompts where the legal system is going.

The precedential aspects of *Resweber* are critical to consider in context. As the facts of Willie’s alleged crime and first attempted execution unfold, some modern lawyers may be astonished that Willie was ever destined for the death penalty. While Willie confessed to Andrew’s murder and, from all told, never recanted, those acts were viewed far more definitively in 1947 Louisiana than they would ever be today. New scientific research, for example, can explain the behavior of some of the most ardent, yet factually innocent, confessors of crime. In addition, the Court decided *Resweber* fifteen years before it held that the Eighth Amendment’s Cruel and Unusual Punishments Clause applied to the states.<sup>4</sup> Attempting to operate under such constitutional constraints, the *Resweber* Court based its conclusion about Willie on a guideline developed prior to the incorporation of the Eighth Amendment into the Fourteenth Amendment’s Due Process Clause. As a result, the Court only hastily assumed the Eighth Amendment’s applicability—primarily to ensure that the Court’s plurality opinion received sufficient votes. Even more significant in retrospect is the Court’s 2005 holding in *Roper v. Simmons* that offenders can no longer be executed for crimes committed when they were juveniles under age eighteen.<sup>5</sup> Because of Willie’s youth at the time of Andrew’s murder, he could not be executed today. In sum, the passage of six decades has heralded these developments and other massive changes in criminal law and procedure that cast a troubling light on the use of *Resweber* as modern guidance.

This Chapter explores *Resweber*’s history and force over the years with a particular focus on the defendant at the core of such a key case.

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<sup>3</sup> The following two works in particular were very helpful in terms of their storytelling, research, and resources: GILBERT KING, *THE EXECUTION OF WILLIE FRANCIS: RACE, MURDER, AND THE SEARCH FOR JUSTICE IN THE AMERICAN SOUTH* (2008) and ARTHUR S. MILLER & JEFFREY H. BOWMAN, *DEATH BY INSTALLMENTS: THE ORDEAL OF WILLIE FRANCIS* (1988).

<sup>4</sup> See *Robinson v. California*, 370 U.S. 660, 666–67 (1962).

<sup>5</sup> 543 U.S. 551, 578 (2005).

The discussion begins with an overview of Willie’s life in St. Martinville, including what is known of his childhood, family, and personality, to provide perspective for examining the social and racial underpinnings of Willie’s legal foray—from his arrest, trial, and conviction up to his death sentence. But it is the electric chair’s transcendent botch that momentarily saves Willie and leads his lawyers into an Eighth Amendment wilderness. While Willie perished, *Resweber* lives on, hampered by an outmoded pre-incorporation standard: a burning reminder that Supreme Court case law can emanate from the very societal ills this country perpetually struggles to discard.

## I. WILLIE’S LIFE AND TIMES

### A. St. Martinville, Louisiana

The small city of St. Martinville, where Willie lived, is located in southwestern Louisiana in St. Martin Parish, the middle of Acadian (Cajun) country.<sup>6</sup> Founded in the eighteenth century as the military Poste des Attakapas, the city lies along the Bayou Teche, a slow-moving, “once-vital” waterway that earlier catalyzed agricultural commerce. Although impoverished today, St. Martinville is rich in history.

During the 1700s and 1800s, St. Martinville became the destination for many French-speaking immigrants. A large number of these settlers were exiled Acadians, Roman Catholic peasants, who, by 1632, became the dominant cultural group in the French colony of Acadia, a territory in northeastern North America encompassing what is now known as Nova Scotia. Others included Royalists fleeing the French Revolution and, later on, adherents of Napoleon. In its prime, the city was referred to as “le Petit Paris.” St. Martinville featured opera, theater, and luxurious hotels for its renowned visitors who affirmed and escalated the city’s lush existence. Over the years, however, the French and other groups in St. Martinville assumed social superiority over the Acadians, who never seemed to lose their peasant status. Eventually this social hierarchy would change. Paralleling developments throughout the United States involving other immigrant groups, the status of the Acadians

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<sup>6</sup> The historical discussion that follows draws from the following sources: Interview with Thomas Nelson, Mayor, St. Martinville, La., in St. Martinville, La. (June 12, 2007); Interview with James Akers, Historian and Tour Guide, Acadian Memorial, in St. Martinville, La. (June 12, 2007); Interview with Nary Smith, Assistant Chief of Police, St. Martinville Police Department, in St. Martinville, La. (June 13, 2007); LAWRENCE CAPUDER, 1896 IN LE PETIT PARIS: TURNING THE CENTURY IN SOUTHWEST LOUISIANA 18, 20 (1999); CHARLES LARROQUE, MEMORIES OF ST. MARTINVILLE 2 (1999); CARL A. BRASSEAU, ACADIAN TO CAJUN: TRANSFORMATION OF A PEOPLE, 1803–1877, at 4 (1992); CARL A. BRASSEAU, THE FOUNDING OF NEW ACADIA: THE BEGINNINGS OF ACADIAN LIFE IN LOUISIANA, 1765–1803, at 2–5, 91, 150–52, 167, 192–93 (1987); WILLIAM FAULKNER RUSHTON, THE CAJUNS: FROM ACADIA TO LOUISIANA 127–29 (1979); BONA ARSENAULT, HISTORY OF THE ACADIANS 11, 189 (1978); and LEONA MARTIN GUIRARD, ST. MARTINVILLE: THE LAND OF EVANGELINE IN PICTURE STORY 4 (1950).

would eventually rise due to the arrival of African slaves who would come to occupy the bottom rung of society.

In the middle of the nineteenth century, disease and natural disasters greatly diminished St. Martinville's prosperity; whatever chance the town had for recovery was destroyed by the Civil War and its aftermath. The culture of le Petit Paris would never exist again. Yet a number of St. Martinville residents have claimed over the years that there were additional reasons for the decline, specifically, that a wrongful lynching of a black man long ago had put a "curse" on the city—a hex of sorts that Willie Francis's own unjust execution simply perpetuated.<sup>7</sup>

During the 1940s, St. Martinville showed little evidence of overcoming the fate to which it had fallen.<sup>8</sup> The city's population of about 4,000 residents (roughly two thirds of whom were white), was poor economically and educationally relative to both the United States as a whole and the state of Louisiana, which itself was deprived. According to data from the 1940 census, for example, Louisiana had the lowest literacy rate in the United States, and St. Martin Parish (which houses St. Martinville) had the lowest literacy rate in Louisiana. Blacks especially suffered. This was the era of Jim Crow laws and de jure segregation that preceded *Brown v. Board of Education*<sup>9</sup> and the Civil Rights Laws of 1964.<sup>10</sup>

While the entire country was rethinking race relations, a focus on St. Martinville provides background on the cultural influences that encompassed Willie's life and case.<sup>11</sup> As Willie noted in his own personal

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<sup>7</sup> According to Gilbert King's research and interview with James Akers, who is considered St. Martinville's historian, the curse went into effect in the 1890s, when Louis Michel, a black man, was wrongly accused of killing a white mother and her daughter in St. Martinville. KING, *supra* note 3, at xii-xiv. Moments before Michel was hung, he proclaimed his innocence and put a curse on the city so that it would not flourish. *Id.* at xiii. The real killer was eventually found and convicted, thereby confirming Michel's assertions. *Id.* Willie's case revived talk of the curse among the city's residents. *Id.* at 166. Many today still believe it exists. *Id.* at 288.

<sup>8</sup> The statistical information referred to in this paragraph can be found in LOUISIANA ALMANAC: 2006–2007 EDITION 245 (Milburn Calhoun & Jeanne Frois eds., 2006); U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, COUNTY AND CITY DATA BOOK 1952: A STATISTICAL ABSTRACT SUPPLEMENT 210–11 (1953); U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1951, at 112, 271 (1951); U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, COUNTY DATA BOOK: A SUPPLEMENT TO THE STATISTICAL ABSTRACT OF THE UNITED STATES 186 (1947); Paul C. Young, *Can They Read?*, WKLY. MESSENGER (St. Martinville, La.), Aug. 10, 1945, at 3; and *20,000 Children Do Not Attend School in Louisiana*, WKLY. MESSENGER (St. Martinville, La.), Aug. 3, 1945, at 2.

<sup>9</sup> 347 U.S. 483 (1954).

<sup>10</sup> Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (codified as amended in scattered sections of 5, 28, and 42 U.S.C.).

<sup>11</sup> The following discussion of race in St. Martinville draws from, among other sources, WILLIE FRANCIS AS TOLD TO SAM MONTGOMERY, MY TRIP TO THE CHAIR (1947); GUIRARD, *supra* note 6, at 34; Tom Gillen, Jr., *Around the Capitol*, WKLY. MESSENGER (St. Martinville, La.), Nov.

story, St. Martinville in 1947 was “just a little town where everybody knows everybody else.” But, the city had “two sections, one for the white people and the other for the colored. . . . The white tend to their own business and the colored tend to theirs.” By law, “any person of either sex of the white race who shall habitually loiter around or frequent or reside in private or public places owned by negroes or frequented by negroes” was guilty of vagrancy.

Racial issues were prominent in the city’s newspaper, *The Weekly Messenger*. Founded in 1886, the *Messenger’s* coverage of whites and blacks was usually physically segregated, even including separate announcements for white and “negro” inductions into the armed services. Marcel “Blackie” Bienvenu, the editor and manager, seemed to go out of his way to insert the word “nigger” into the paper, frequently referring to one regular contributor as the paper’s “Nigger–French columnist” and even describing slingshots as “nigger shooters.” Bienvenu used his *This & That* column to insult African Americans, suggesting, for example, that they do not want to work, and stating that racial animus existed throughout the country, not just the south.

Reported differences in the education of whites and blacks were striking. The St. Martin Parish School Board noted, matter-of-factly, without apology, that there were no high schools for blacks and that white teachers were paid roughly twice as much as “negro” teachers. Veiled references to school segregation and the surrounding political controversy were not uncommon. Indeed, an occasional *Messenger* column discussing Louisiana state political news frequently focused (along

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22, 1946, at 3; *In the News at the Capitol*, WKLY. MESSENGER (St. Martinville, La.), Nov. 15, 1946, at 4; *Capitol Highlights*, WKLY. MESSENGER (St. Martinville, La.), Nov. 15, 1946, at 3; Tom Gillen, Jr., *Around the Capitol*, WKLY. MESSENGER (St. Martinville, La.), Nov. 1, 1946, at 3; Tom Gillen, Jr., *Around the Capitol*, WKLY. MESSENGER (St. Martinville, La.), Oct. 11, 1946, at 1; Tom Gillen, Jr., *Around the Capitol*, WKLY. MESSENGER (St. Martinville, La.), Sept. 27, 1946, at 9; “Blackie,” Editorial, *This & That*, WKLY. MESSENGER (St. Martinville, La.), Sept. 6, 1946, at 1; “Blackie,” Editorial, *This & That*, WKLY. MESSENGER (St. Martinville, La.), Sept. 7, 1945, at 1; *Proceedings of the St. Martin Parish School Board*, WKLY. MESSENGER (St. Martinville, La.), Aug. 24, 1945, at 3; “Blackie,” Editorial, *This & That*, WKLY. MESSENGER (St. Martinville, La.), May 18, 1945, at 1; *5 Colored Men Inducted in Service Wednesday*, WKLY. MESSENGER (St. Martinville, La.), Mar. 2, 1945, at 1; *9 From Parish Inducted Into Armed Services*, WKLY. MESSENGER (St. Martinville, La.), Mar. 2, 1945, at 1; “Blackie,” Editorial, *This & That*, WKLY. MESSENGER (St. Martinville, La.), Nov. 17, 1944, at 1; Political Advertisement, *Help Elect Louis J. Michot*, WKLY. MESSENGER (St. Martinville, La.), Sept. 8, 1944, at 3; Political Advertisement, *Keep Politics Out of Schools!*, WKLY. MESSENGER (St. Martinville, La.), Sept. 1, 1944, at 6; *Proceedings of the St. Martin Parish School Board*, WKLY. MESSENGER (St. Martinville, La.), Aug. 18, 1944, at 3; *Coxe Summarizes School Legislation*, WKLY. MESSENGER (St. Martinville, La.), July 21, 1944, at 4; *Proceedings of the St. Martin Parish Police Jury*, WKLY. MESSENGER (St. Martinville, La.), May 26, 1944, at 3; and *Proceedings of the St. Martin Parish School Board*, WKLY. MESSENGER (St. Martinville, La.), Jan. 14, 1944, at 2.

with other such columns) on the case of a young “negress” applying to Louisiana State University Medical School in New Orleans—at one point heralding “the suggestion . . . that Louisiana could solve all of its problems—and suits—concerning higher education by placing Southern University under LSU [Louisiana Southern University], as a ‘colored’ division.”

The *Messenger’s* content during 1944–1947, however despicable by today’s standards, had power in 1940s St. Martinville. These were the years encompassing Willie’s trial and punishment. Those reading and writing in the *Messenger* constituted Willie’s judge and jury. They determined if he would live or die.

### B. Willie’s Childhood

Key components of Willie’s story are his personal experiences and perspectives on life, particularly with his family. Unfortunately, little is known of either. Willie was, after all, just a teenager when he was executed. As Willie himself explained from his jail cell, “A lot of people write to me and ask me to tell them something about what I did when I was young. I am only eighteen now, so I guess they mean when I was very young.” What is available about Willie is derived primarily from books, letters, newspaper articles, interviews, and especially Willie’s own brief account in a pamphlet entitled, *My Trip to the Chair* (“*The Chair*”).<sup>12</sup> *The Chair* was written in the spring of 1947 when Willie and a local resident, Sam Montgomery, collaborated to document Willie’s experiences during the first attempted electrocution. The effort was also designed to garner sales to help fund Willie’s Supreme Court appeal. Willie made clear that he agreed to write *The Chair* story on the condition that he not be expected to discuss Andrew Thomas’s murder. While a reader can get some sense of Willie’s personality from the pamphlet, the writing appears edited and formalized by his collaborator, so the extent of Willie’s voice is unclear. But the facts of Willie’s life speak for themselves.

Willie was born on January 12, 1929, to Frederick Francis and Louise Taylor Francis. Baptized a month later as “Willie Francis” at St. Martin Catholic Church, he became the youngest in a family of thirteen

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<sup>12</sup> This Section draws mainly from Willie’s pamphlet, FRANCIS AS TOLD TO MONTGOMERY, *supra* note 11. Other sources include Certificate of Baptism of Willie Francis, St. Martin Catholic Church, St. Martinville, La. (Aug. 7, 1945) (available at St. Martin Parish Courthouse, St. Martinville, La.); Funeral Services Program for Junius (Blue) A. Francis, Notre Dame Catholic Church (July 31, 1993) (copy on file with author); Interview with Keith Landry, Willie Francis’s grandnephew, in St. Martinville, La. (June 10, 2007); Interview with Thomas Nelson, *supra* note 6; KING, *supra* note 3, at 265, 286; MILLER & BOWMAN, *supra* note 3, at 149 & n.1; Elliott Chaze, *Willie is Ready; Mother Isn’t*, TIMES-PICAYUNE (New Orleans, La.), May 9, 1947, at 2; and Jessyl Taylor, *Was This an Act of God?*, WORLD’S MESSENGER, July 1946, at 5, 20.

children, six boys and seven girls.<sup>13</sup> The Francis household resided “in the colored section” of St. Martinville at 800 Washington Street. Their “little house” was filled with children “running through it all the time.” Despite their numbers, they were “happy” and “got along fine together because [they] had to.” Willie “was pretty much the family pet until he got in trouble with the law.”

Like most St. Martinville residents, Frederick, Louise, and their children were devout Roman Catholics. They all regularly attended services at Notre Dame de Perpetual Secours Church, a place of worship for the city’s blacks. Religion was a dominant force in the family’s life. Frederick was employed in a sugar cane factory during the caning season and performed “odd jobs,” making enough to feed the family. In an already poor city, the Francis family was poorer still. Louise was a housewife whom Willie depicted as being immaculately well organized and efficient, running “everything.” “I don’t know how she did it,” Willie commented, although “things got better and mother had more rest” as the children grew older and could help at home.

According to Willie’s personal account, he “used to like to play jokes” and make people laugh; “my friends used to tell me I could make almost anyone laugh when I said or did something.” He and “a bunch of kids who went around together a lot” would spend much of their time at the bayou, either fishing or swimming or eating watermelon and figs. Occasionally, the group would play marbles, a game at which Willie was “pretty good,” and at other times a “little baseball” using “a broomstick for a bat.” Periodically, the group would engage in mischief—“snitch[ing]” the figs they so enjoyed eating, for instance, or spending the day swimming in the bayou without anyone’s knowledge, acts for which Willie would get “spanked” when he got home. “It’s something to laugh at now,” he explained in his jail cell, “but we didn’t like the whipping at the time.”

Willie’s life was not just school and play, however. He also worked for Andrew Thomas and others in town. His employment with Andrew was not “steady.” On occasion Willie would deliver packages or sweep the floor in Andrew’s drugstore or rake and clean Andrew’s yard. Years later, another employee at Andrew’s store would describe Willie as a “‘nice boy.’” Indeed, most people depicted Willie as pleasant and “co-operative.”

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<sup>13</sup> The six boys were Junius (Blue) Francis, Early Francis, Joseph Francis, Wilbert Francis, Adam Francis, and Willie Francis; the seven girls were (using their married names) Emily Branch, Amelia Washington, Marie Neal, Scerita McCauley, Beulah Fuzee, Mae Ella Landry, and Cecile Gage. Funeral Services Program for Junius (Blue) A. Francis, *supra* note 12. Emily Branch and Amelia Washington, the oldest of the siblings, were twins. Interview with Keith Landry, *supra* note 12.

### C. Willie's Mental Aptitude

Willie's mental aptitude was characterized in vastly different ways depending on who was doing the describing and when.<sup>14</sup> His intellect became a focus in attempts to explain why he may have killed Andrew or, alternatively, why he may have consistently confessed to a crime he never committed at all. Depictions of Willie's abilities ranged along a continuum, all the way from "mentally deficient," the characterization provided by James Akers, an historian and tour guide for St. Martinville's Acadian Memorial, to not "bright," in the eyes of Willie's loyal pastor, Father Maurice Rousseve, to "normal" based on the arresting sheriff's testimony, up to "intelligent," the account given by a journalist writing for a black newspaper who interviewed Willie while he was in jail. Indeed, Willie's press quotes describing his first attempted electrocution so greatly impressed the executive secretary of the National Association for the Advancement of Colored People ("NAACP") that he wrote about it in his column: "What a miracle that a virtually illiterate (but far from ignorant or untalented) boy should think in imagery as deeply moving and beautiful as any contemporary poet."

Willie did have a serious stutter that may have affected the way that others perceived his capabilities. According to one St. Martinville resident, for example, Willie "walked kind of funny and didn't seem very bright by the way he talked." Willie was also described as a bit of a light-hearted prankster who acted younger than his age, an image he projects in *The Chair*. At the same time, Willie avidly corresponded with a myriad of people while he was in prison, demonstrating an ability to both read and write that defied St. Martinville's illiteracy rate.

On May 8, 1947, the evening before Willie's execution, Associated Press reporter Elliott Chaze provided a particularly intimate view of Willie through the eyes of his mother. Chaze described Louise Francis as

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<sup>14</sup> The discussion in this Section draws from the following sources: Transcript of Hearing Before Louisiana Board of Pardons, Testimony of Gilbert Ozenne, Sheriff, New Iberia (May 31, 1946) (copy on file with author) [*hereinafter* Pardons Board Testimony of Gilbert Ozenne]; Transcript of Hearing Before Louisiana Board of Pardons, Testimony of E.L. Resweber, Sheriff, St. Martin Parish (May 31, 1946) (copy on file with author) [*hereinafter* Pardons Board Testimony of E.L. Resweber]; Interview with James Akers, *supra* note 6; Interview by Jeffrey Bowman with Bertrand de Blanc, Esq., in Lafayette, La. (Sept. 25, 1982); Letter from Doris McClain, Houston, Tex., to Willie Francis (May 10, 1946) (copy on file with author); KING, *supra* note 3, at 145, 265; RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 233-34 (2008); Chaze, *Willie is Ready; Mother Isn't*, *supra* note 12; Walter White, *How It Feels*, CHI. DEFENDER, Aug. 31, 1946, at 15; Taylor, *supra* note 12, at 20; Fred Atwater, *Louisianans See Hand of God in Francis Execution Failure*, CHI. DEFENDER, June 8, 1946, at 9; *Willie Francis Gets Second Reprieve; Case to Supreme Court Now*, LA. WKLY. (New Orleans, La.), June 8, 1946, at 1; and "Scoop" Jones, *Mystery and Intrigue Surround Youth Who Survived the Electric Chair; Believe Francis to be Insane*, LA. WKLY. (New Orleans, La.), May 18, 1946, at 9.

“a gentle, gray-haired Negro woman,” unable to comprehend the impending execution of her youngest child the next day in a jail just five blocks away from the Francis family’s home. “‘I used to walk by that jail,’” Louise explained. “‘Never thought my baby’d be going there to die.’” “‘My Willie was always kind. He used to play with little children, even when he was a big boy he used to play with ’em. There wasn’t no bad in him. I just don’t understand.’”

Willie had a gift for entertaining himself. “‘You know, Willie was a funny boy. Times he’d sit here on the floor and play with clothes pins, rubbin’ ’em and stackin’ ’em on top of one t’other. He’d make little fences and pig styes with ’em, and he smiled a lot when he was doin’ it.’” Louise was clearly amused by Willie’s playthings. “‘Sometimes I’d get wonderin’ how Willie could have himself such a time with those old clothes pins. I believe his mind would run off places. Not bad places, but places.’”

Louise also stressed how much Willie differed from other children, especially boys. Oddly, her account varied substantially from what Willie writes about himself in *The Chair*. “‘He didn’t like no baseball or football. Didn’t even shoot marbles. Most times he was around the house when he wasn’t in school, and he was the Lord’s own blessing when it come to helping his mama.’” Indeed, Louise’s account makes it seem as though Willie eschewed a masculine role. “‘That child could cook and make a bed as good as women folks.’”

In any family, no matter how close, it is never clear how well the parents know their children. In one of many letters Willie received while in jail, for example, the writer, Doris McClain from Houston, Texas, consoled Willie about the fact he had not heard from his girlfriend. Mrs. McClain explained that “‘maybe she [the girlfriend] is sick or something like that.’” Putting herself in the place of the girlfriend, Mrs. McClain empathetically insisted, “‘I wouldn’t stop writing you just because you were in jail, I really would stick closer than every thin [sic].” “‘After all you schould [sic] know her better than I,” Mrs. McClain continued. In all the accounts of Willie so far, this letter is the first to mention that Willie had a girlfriend. Perhaps she was known to his family, perhaps not. Like anyone else, Willie had his own private moments.

Closer to the time of Willie’s execution, stories seemed to exaggerate Willie’s purported oddities, perhaps in an effort to provide the kind of defense he never had. One article concluded, for example, that Willie demonstrated “‘indications of insanity” based on two pieces of evidence—Frederick and Louise’s admissions that Willie “never had the tendencies of a normal child” as well as accounts by “[n]eighbors, friends and other members of the community” of Willie’s “harmless pranks that he has played from childhood.” Another story also questioned Willie’s mental

acuity—saying many believed Willie was “mentally subnormal.” Willie’s own sister, Emily Branch, had stated that Willie “‘is not quite normal.’” Indeed, there were statements that Willie “never seemed actually aware that he was on trial for his life” and “appeared to be cocky and acting like a kid who was playing a game.” One newspaper reported that the NAACP was considering filing a brief on Willie’s behalf before the State Lunacy Board, although it appears the NAACP did not follow through. Of course, without more evidence available regarding Willie’s mental abilities, such random descriptions do not seem to support an argument for insanity; yet they were able to feed a journalist’s conclusion that “Willie Francis should have never been sentenced to die.” And they would raise concerns that a conscientious modern attorney would investigate.

Despite all the disparate depictions of Willie, however, two clear and consistent traits emerge—his extraordinarily low level of emotional maturity, even for his young age, as well as his desperate need to please everyone and anyone no matter what the cost, personally or legally. Time and again Willie proved to be highly suggestible and compliant to others—whether it was the pastor who insisted, the first time around, that the electric chair would only “tickle” when in fact it really caused acute pain, the stranger writing to ask Willie to donate his eyes for her blind brother until Willie’s family insisted no, or the sheriff who wanted Willie to confess to a murder and then die for it. It seemed, to a self-sacrificing fault, that Willie wanted to gratify them all.

Not surprisingly, Willie’s attributes epitomize the three general characteristics of juvenile offenders that the Supreme Court targeted in *Roper v. Simmons*<sup>15</sup> to demonstrate that juveniles have diminished culpability and that consequently they “cannot with reliability be classified among the worst offenders.” Relative to adults, juveniles are (1) more immature and irresponsible, (2) vulnerable to negative pressures from their peers and environment, and (3) fragile and unstable in their identities. These differences not only heighten the likelihood that juveniles will engage in impulsive thinking and conduct, they also provide an explanation of why the crimes of juveniles, however heinous, may be less indicative of the offender’s character or intent. Research also shows that the same kind of vulnerability and immaturity make it far more likely for juveniles to confess to crimes they never committed.<sup>16</sup> With far fewer

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<sup>15</sup> 543 U.S. 551 (2005).

<sup>16</sup> In an interview with Jeffrey Bowman in September of 1982, de Blanc acknowledged having thought of the possibility that Willie’s age and immaturity had something to do with his agreeing to sign two confessions:

Q. I guess that’s what I was thinking with Willie. I mean, you’ve got a 15 or 16-year-old black kid, gets arrested, they find a wallet on him, and then, I’m not sure how they

legal protections sixty years ago, Willie faced an even greater risk of injustice.

It is unlikely that Willie knew the lore of St. Martinville's curse that had seemingly so befallen the city. He did, however, feel that he had a jinx of his own. "I guess from the first minute I was born I gave people something to worry about." Willie's misfortune centered on the number thirteen. "Maybe you will think I am superstitious," he commented. "I guess I am because I have a lot of reasons to be." Willie was the thirteenth child in his family, he was convicted of murder on September 13, 1945, and the Supreme Court denied his appeal on January 13, 1947. Yet Willie would end up suffering from another scourge far more powerful than the number thirteen—that of an incompetent criminal justice system. That system also gave people something to worry about. It still does.

## II. THE MURDER OF ANDREW THOMAS

Curse aside, St. Martinville was rarely a place that created excitement.<sup>17</sup> But as much as Andrew Thomas's murder caused great sadness in the community, it also brought gossip and intrigue.

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arrive at the confession, but scared, wondering what's going to happen. I mean uh not to bring up, you know, racial tensions, but a 15 or 16-year-old black kid with the white sheriffs around him that's pretty scary and plus A. Oh yeah it is scary I tell you it is scary. Q. Plus, the second confession apparently was given on the two-hour ride back to St. Martinville. You know, black kid surrounded by these you know the white sheriffs, "Did you do it, Willie?" "Yeah, let me sign on the dotted line." I don't you know, I'm just thinking aloud here. It's . . . A. It's conjective. I don't know. But then . . . I thought about all those things, but then I said, "Don't leave the main thing. Get busy on that. No man should go to the chair twice." Of course, you can talk to people about a confession, all the evidence being circumstantial. Maybe he didn't confess; maybe it was forced, but . . .

Interview by Jeffrey Bowman with Bertrand de Blanc, *supra* note 14.

<sup>17</sup> The discussion that follows regarding Andrew Thomas and his murder draws from the following sources: FRANCIS AS TOLD TO MONTGOMERY, *supra* note 11; Transcript of Coroner's Inquest Held Before Dr. S.D. Yongue, Coroner of St. Martin Parish, La., Re: Death of Andrew I. Thomas (Nov. 8, 1944) (copy on file with author); Pardons Board Testimony of E.L. Resweber, *supra* note 14; Interview with James Akers, *supra* note 6; Interview with Allan Durand, Attorney, Perrin, Landry, de Launay & Durand, in Lafayette, La. (June 13, 2007); Interview with Thomas Nelson, *supra* note 6; Interview with Velma Johnson, Tour Guide, St. Martinville Cultural Heritage Center, in St. Martinville, La. (June 12, 2007); Interview with Edmond L. Guidry, Jr., Retired Chief Judge, Louisiana Court of Appeals, in St. Martinville, La. (June 12, 2007); Certificate of Baptism of André Isidore Thomas, Church of St. Martin de Tours, St. Martinville, La. (Aug. 25, 2008) (copy on file with author); Indictment, State v. Francis, No. 2161 (16th Jud. Dist. Ct. La. Sept. 5, 1945), *reprinted in* Transcript of Record at 1–2, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (No. 142); KING, *supra* note 3, at 63, 66–67, 264–65; Bob Hamm, *The Man Who Cheated the Chair . . . for Awhile*, DAILY ADVERTISER (Lafayette, La.), Apr. 25, 1993, at D1; *Negro Murderer to Die Here Today*, WKLY. MESSENGER (St. Martinville, La.), May 3,

Andrew was the fifty-three-year-old white Cajun owner of Thomas Drugstore, St. Martinville's primary pharmacy in 1944, located in the heart of the city on Main Street. Like many of St. Martinville's stores today, the building is abandoned, having housed a number of businesses after Andrew's death. In the 1940s, however, Thomas Drugstore was a popular "hang out" for young people. Andrew himself, "a handsome, educated bachelor with his own successful business," was "well loved in [the] community by all who knew him." "Besides enjoying a host of friends and relatives he was loved by all the children and youths of the community who affectionately called him 'Drew.'" As the *Messenger* emphasized, "no one can think of an enemy that he ever had."

Andrew never married, but he did have five brothers and two sisters. The Thomas family was prominent in the city, and two of his brothers held significant positions of power: Claude Thomas was Chief of Police and R.L. ("Zie") Thomas was Secretary-Treasurer of the St. Martin Parish Police Jury, which helped govern St. Martin Parish. "[E]verybody . . . want[ed] to know who" killed Claude and Zie's brother.

#### A. The Murder

Testimony indicated that Andrew was murdered at his home late on the night of November 7, 1944. He was found the next morning by Zie, and by his sister-in-law, Mrs. R.L. Thomas, informally known as "Mrs. Zie." A local storeowner, Lucien Bienvenu, had noticed that the normally punctual Andrew had not yet arrived to open his drugstore by 8:45 a.m. After calling Andrew at his home and getting no answer, Bienvenu called Mrs. Zie, suggesting she investigate. Mrs. Zie then picked up her husband before driving to Andrew's home.

When Zie and Mrs. Zie arrived at Andrew's address, located on the edge of the city, they saw Andrew's dead body splayed on the ground "about half way between the garage and the steps" of his home. After a doctor from the hospital had examined the body, Dr. S.D. Yongue, the Coroner of St. Martin Parish, and a coroner's jury convened to determine officially the cause of Andrew's death.

During the inquest, Alvin and Ida Van Brocklin, Andrew's neighbors and the only witnesses to the murder, testified. According to the Van Brocklins, on November 7, between 11:30 p.m. and midnight, both were awakened by gunshots, "fast one after the other." Thinking that the shots were coming from Evangeline State Park, directly across the

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1946, at 1; *No Arrest Made Yet in Thomas Murder Case*, WKLY. MESSENGER (St. Martinville, La.), Nov. 17, 1944, at 1; *Andrew Thomas Killed at His Home Here Tuesday Night*, WKLY. MESSENGER (St. Martinville, La.), Nov. 10, 1944, at 1; and "Blackie," Editorial, *This & That*, WKLY. MESSENGER (St. Martinville, La.), Nov. 10, 1944, at 1.

street, Alvin walked out onto his porch while Ida stayed in bed and looked out the window toward Andrew's house. According to Ida, a car was parked in front of Andrew's house with its lights on; but, feeling afraid, she stopped looking and therefore did not know how long the car stayed or any other information.

Evidence later revealed that Andrew had been dining that evening with nearby friends. Andrew arrived home, parked his car in the garage, and started toward his house when somebody jumped him. According to the *Messenger*, Andrew had been shot five times after "a terrific struggle." The coroner's jury concluded that two shots were on his left side, two entered his back, while the fifth penetrated his right eye socket. The weapon was a .38 caliber pistol or rifle, and any of the shots that hit Andrew would have caused death. His pockets had been emptied, leading the police to believe the motive was robbery.

#### B. The Murder's Aftermath

Andrew's murder was more than just a mystery; for the city of St. Martinville it was "one of the most tragic crimes [the] community ever had." The residents of St. Martinville reacted to the murder with shock and terror: the killer was unknown. After Andrew's November 9 funeral at Saint Martin de Tours Catholic Church, however, fear was accompanied by gossip about the murderer's identity. Long before the shooting, Andrew was known as a "ladies' man." Speculation in the town grew that perhaps Andrew was not robbed but rather killed by a jealous husband or boyfriend. Alvin Van Brocklin testified before the coroner's jury about such rumors and confirmed that he had seen Andrew's car parked in front of two women's homes: Bea (Mrs. Louis) Nassans and Henrietta (Mrs. Homer) Duplantis. Both Bea and Henrietta lived with their families in Pine Grove, a separate St. Martinville neighborhood located directly across the Bayou Teche, which divides the city. And both women's husbands were away for long periods of time because they worked in the oil industry.

Alvin's testimony helped little. Interviews with the two women's husbands, Louis Nassans and Homer Duplantis, revealed no evidence of a revenge killing much less any credible tie to Andrew's death. Besides, the Parish's sheriff, Leonard (E.L.) Resweber, had never handled a murder case before and had no training in homicide investigations. Nor did he have any viable leads. Although Police Chief Thomas and Sheriff Resweber had found bullets at the scene of the crime, they discovered no murder weapon, fingerprints, or witnesses other than the Van Brocklins.

For seven months—from November 24, 1944, through June 8, 1945—each issue of the *Messenger* ran a reward notice of \$500.00 sponsored by Sheriff Resweber and the Thomas family for "information

leading to the arrest and conviction” of Andrew’s murderer.<sup>18</sup> As the months went by and no other murders or violent robberies occurred, the city’s rumors again increasingly centered on the belief that romantic revenge had caused Andrew’s demise.

During my 2007 visit to St. Martinville, James Akers told me that the continuing rumors greatly affected the reputations of Bea Nassans and Henrietta Duplantis. He said that shortly after the murder, Henrietta had written a letter to the *Messenger*, apparently never published, “thanking” the community for “ruining her life” by gossiping she was an adulteress. Henrietta also told Akers that Andrew was gay, and that it was ridiculous that people suspected Andrew was having affairs with women. She explained that some of the mothers in St. Martinville invited Andrew to dinner to show their gratitude for allowing them to acquire their medicine on credit from his store—an enormous gift to them during the World War II years when many drugs had restricted availability.

Henrietta’s daughter, Genevieve, who was sixteen at the time of Andrew’s murder and had worked in Andrew’s store, further confirmed years later that Andrew and Henrietta were not lovers. According to Genevieve, Andrew was “‘a family friend’” who would often attend baseball games in New Iberia with her and her parents. Because Bea and Henrietta had a lot of flexible time, they would spend many an afternoon talking and drinking sodas at Andrew’s drugstore. Indeed, Andrew’s amorous reputation was fueled in part by his enthusiasm over seemingly innocuous activities, such as instructing women on how to use the popular facial creams sold in his store.

While Akers’ account is, of course, hearsay, it emboldened me to ask a few of the people I interviewed if they had heard Andrew was gay. Nobody contradicted that interpretation. Allan Durand, an attorney and lifelong St. Martinville resident, informed me that homosexuality was not a topic that was openly discussed at the time Andrew was alive; indeed, many members of the community would not have understood the meaning of the concept. After learning more about Andrew, it becomes clear that his relationship with Willie was one of a number of unaddressed matters that could have been potentially relevant to Willie’s defense.

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<sup>18</sup> WKLY. MESSENGER (St. Martinville, La.), Nov. 24, 1944, at 6; Dec. 1, 1944, at 3; Dec. 8, 1944, at 3; Dec. 15, 1945, at 2; Dec. 22, 1944, at 8; Dec. 29, 1944, at 2; Jan. 12, 1945, at 2; Jan. 19, 1945, at 2; Jan. 26, 1945, at 2; Feb. 2, 1945, at 2; Feb. 9, 1945, at 2; Feb. 16, 1945, at 2; Feb. 23, 1945, at 2; Mar. 2, 1945, at 2; Mar. 9, 1945, at 14; Mar. 16, 1945, at 2; Mar. 23, 1945, at 2; Mar. 30, 1945, at 2; Apr. 6, 1945, at 2; Apr. 13, 1945, at 2; Apr. 20, 1945, at 2; Apr. 27, 1945, at 2; May 4, 1945, at 2; May 11, 1945, at 2; May 18, 1945, at 2; May 25, 1945, at 2; June 1, 1945, at 2; June 8, 1945, at 2.

### III. WILLIE'S ARREST AND DETENTION

#### A. The Arrest

In July of 1945, several months after Andrew's murder, Sheriff Resweber had so exhausted any leads on the case that he started to turn elsewhere.<sup>19</sup> Resweber asked Claude W. Goldsmith, the Chief of Police of Port Arthur, Texas—an industrial city less than two hundred miles west of St. Martinville—if Goldsmith's force could detain “any man” from St. Martin Parish who appeared in Port Arthur.

On the evening of August 3, 1945, Police Chief Goldsmith and another officer were at the Port Arthur train station expecting to apprehend a suspected drug dealer. When a questionable-looking man with a suitcase got off the train, the two policemen pursued him. At just that time, Willie, who was visiting his sister's home close by, took a pre-dinner stroll around the block. When Willie saw the two white officers running his way, he attempted to hide, only to be taken into custody on the presumption that he was the suspected drug dealer's accomplice.

When questioned back at the police station, Willie appeared nervous and began to stutter. (It would later become known that Willie stuttered habitually.) His interrogators quickly determined that Willie was from St. Martin Parish, not Port Arthur, and discovered that Willie was in possession of a wallet and an identification card belonging to Andrew Thomas. Willie was apparently able to convince the officers that he was not involved with the suspected drug dealer they had chased earlier, but within “two or three or five minutes,” the officers obtained Willie's written confession to Andrew's murder. They also managed to extract Willie's confession to another, unrelated crime—the robbery and assault of an elderly man in Port Arthur.

Willie's police interrogation occurred twenty years before *Miranda v. Arizona*,<sup>20</sup> a decision requiring police to inform suspects questioned while

<sup>19</sup> The following discussion draws from the following sources: FRANCIS AS TOLD TO MONTGOMERY, *supra* note 11; Transcript of Hearing Before Louisiana Board of Pardons, Address of L.O. Pecot, District Attorney, Iberia, St. Mary, and St. Martin Parishes (May 31, 1946) (copy on file with author) [*hereinafter* Pardons Board Address of L.O. Pecot]; Pardons Board Testimony of E.L. Resweber, *supra* note 14; Pardons Board Testimony of Gilbert Ozenne, *supra* note 14; Voluntary Statement While in Custody by Willie Francis (Aug. 5, 1945) (on file with St. Martin Parish Courthouse, St. Martinville, La.); Undated Confession by Willie Francis to the Murder of Andrew Thomas (on file with St. Martin Parish Courthouse, St. Martinville, La.); Minutes, State v. Francis, No. 2161 (16th Jud. Dist. Ct. La. Sept. 6, 1945); Letter from E.L. Resweber, Sheriff, St. Martin Parish, to M.E. Culligan, Assistant Attorney General (Oct. 25, 1946) (copy on file with author); Indictment, *supra* note 17; KING, *supra* note 3, at 68–69, 73, 78; NICHOLAS LEMANN, OUT OF THE FORTIES 93 (1983); *Andrew Thomas' Murderer Found*, WKLY. MESSENGER (St. Martinville, La.), Aug. 10, 1945, at 1; and *9-Month-Old St. Martinville Slaying Mystery is Cleared by Arrest Here*, PORT ARTHUR NEWS (Port Arthur, Tex.), Aug. 6, 1945, at 1.

<sup>20</sup> 384 U.S. 436 (1966).

in custody of their rights to counsel and silence before attempting to acquire confessions. Sixteen-year-old Willie faced his inquisitors alone, without the advice and support of a lawyer, a family member, or a friend. In another case decided three years after Willie's arrest,<sup>21</sup> the Supreme Court reversed a murder conviction based on a fifteen-year-old defendant's confession garnered during five hours of questioning while the defendant was alone with the police. As the Court recognized,

[t]hat which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. . . . [W]e cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him.

The Court no longer holds that a juvenile is entitled to special protections during questioning because the requirements of *Miranda* apply to both children and adults.<sup>22</sup> Willie, of course, was not so shielded.

#### B. Willie's Confessions

Willie's Port Arthur confession of August 5, 1945 ("first confession") was one sheet. The top third of that sheet consisted of a typed statement provided by Police Chief Goldsmith asserting that the Port Arthur police did not coerce Willie to confess.<sup>23</sup> The bottom two thirds in Willie's handwritten scrawl stated:

I Willie Francis now 16 years old I stole the gun from Mr. Ogise at St. Martinville La. and kill Andrew Thomas November 9, 1944 or about the time at St. Martinville La it was a secret about me and him. I took a black purse with card 1280182 in it four dollars in it. I all so took a watch on him and sell it in new Iberia La. That all I am said I throw gun away .38 Pistol

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<sup>21</sup> *Haley v. Ohio*, 332 U.S. 596 (1948).

<sup>22</sup> See *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004) ("Our Court has not stated that a suspect's age or experience is relevant to the *Miranda* custody analysis. . . .").

<sup>23</sup> The statement provided by Goldsmith reads as follows:

I, Willie Francis, being in the custody of Claude W. Goldsmith, Chief of Police of the City of Port Arthur, Jefferson County, Texas and having been warned by E. L. Canada, Justice of the Peace, Jefferson County, Texas, the person to whom the hereinafter set out statement is by me made, that I do not have to make any statement at all, and that any statement made by me may be used in evidence against me on my trial for the offense concerning which this statement is made, do here make the following voluntary statement in writing to the said, E. L. Canada, towit [sic]:

Voluntary Statement While in Custody by Willie Francis, *supra* note 19.

## Willie Francis

[Witnesses to the statement: E. L. Canada, Justice of the Peace, Jefferson County, Texas; Claude W. Goldsmith, Chief of Police, Port Arthur, Texas]

“Mr. Ogise,” one of the names Willie referred to in his first confession, was the phonetic spelling for “Mr. August,” the first name of August Fuselier, the deputy sheriff of St. Martinville whose gun Willie allegedly stole. Purportedly, in September 1944, two months before Andrew’s murder, Fuselier had reported his Smith & Wesson .38 caliber gun missing from his car; yet there was no evidence of such a report other than the district attorney’s memory.

Willie would write another confession (“second confession”) the next day, August 6, 1945, while being transported back to St. Martinville by Sheriff Resweber. This time, the confession was far less formal, penciled on a small piece of filmy white paper with no date and no typed paragraph assuring its voluntariness. This confession, again in Willie’s scrawl, read as follows:

Yes Willie Francis confess that he kill Andrew Thmas on November 8, 1944 i went to his house about 11:30 PM i hide backing his garage about a half hour, When he came out the garage i shot him five times. That all i remember A short story

Sinarely Willie Francis

Both confessions have perplexing content. Some of the language resembles stilted legalese that another person seemingly provided for Willie. The first confession’s phrases, “I Willie Francis now 16 years old” and “or about the time,” seem unlikely to have come from an untutored Willie. In the second confession Willie mixes up pronouns. He starts with the phrase, “Yes Willie Francis confess that *he* kill Andrew Thomas” but later writes, “*i* shot him.” This confusion may be due to Willie’s own ambiguous accounts. Initially, he said he had two accomplices to the crime, but he later recanted and said that he acted alone. There is an additional discrepancy concerning the date of the crime: the first confession indicates Andrew was killed on November 9, 1944, while the second confession gives the date as November 8. Andrew was actually killed either during the late evening of November 7 or the very early morning of November 8.

## C. Willie’s Pre-Trial Incarceration

Willie’s arrest generated “widespread attention.” As a result, a decision was made to incarcerate him immediately nine miles away, in the Iberia Parish jail, because Willie would not be safe in the St. Martinville jail. The two men in charge of the New Iberia Parish jail,

Sheriff Gilbert Ozenne and Deputy Gus Walker, had such a reputation for treating blacks violently that FBI Director J. Edgar Hoover had ordered a civil rights investigation of them by the Department of Justice. While Willie would be protected from the possible mayhem of uncontrolled St. Martinville residents, ironically, he faced a potentially more daunting threat of injury by those now in authority.

Willie was interrogated repeatedly in the Iberia Parish jail during the months preceding his trial—all the while being described as an accommodating inmate, an account he confirmed. It was during several investigatory trips at this time that Willie provided the evidence that District Attorney L.O. Pecot stated was sufficient to convict him. According to Sheriff Resweber, on one trip to St. Martinville, Willie supposedly took law enforcement officers to an area near the railroad tracks a couple of blocks north of Andrew Thomas's house where Willie said he had dumped the murder weapon. Apparently, a town resident had found a .38 caliber pistol in the same spot soon after Andrew's death, and someone else had discovered a gun holster close by that matched August Fuselier's description. On a different trip to New Iberia, Resweber said that Willie led him and his deputies to the Rivere Jewelry Store, where Willie informed the owner, Mr. Rivere, that he had sold him a particular watchcase with initials on it for \$5.00. Although Rivere claimed he did not remember Willie, his records documented the purchase. While Resweber stated that Willie confessed to having two "colored boys" as accomplices to the murder, Resweber concluded that their names were fictitious and that Willie had acted alone.

At no time was Willie represented by an attorney during his confessions or the investigation conducted during his pre-trial incarceration. Willie could not afford a lawyer or bail, nor was Willie eligible for court-appointed counsel during this period because Sheriff Resweber did not have him indicted until a month after his arrest. This strategy was no accident. "Detentions such as Willie's were in direct violation of a state statute, but they were 'the custom throughout Louisiana for generation upon generation.'" Although Willie had been jailed uncharged since August 6, 1945, he never met with a lawyer until September 6, 1945, less than a week before his trial for first degree murder.

#### IV. WILLIE'S TRIAL

Willie was tried at the St. Martin Parish courthouse in St. Martinville.<sup>24</sup> Because no transcribed record of the trial was taken,<sup>25</sup> knowledge

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<sup>24</sup> The discussion of Willie's trial and possible motive draws from Brief in Behalf of Petitioner at 9, *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (No. 142); Brief in Opposition to the Writ Granted at 26, 30–31, *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (No. 142); Minutes, *State v. Francis*, No. 2161 (16th Jud. Dist. Ct. La. Sept. 6, 12–14, 1945); Affidavit of L. Charles Willis, Clerk of Court, St. Martin Parish, *State v.*

of what occurred is based on a few limited sources, including journalists' accounts and, in particular, the terse minutes taken by the deputy clerk of court. These sources alone, however, show the disturbing nature of what took place.

#### A. Troubling Proceedings

On September 6, 1945, Willie's judge, James Dudley Simon, appointed James Randlett Parkerson and Otto J. Mestayer, two lawyers with well regarded reputations, to represent Willie. Yet the lawyers' efforts were inept on every level. They never questioned the indictment, nor did they make a motion for change of venue, despite the widespread publicity about the murder of a beloved white member of a small community by a black youth. Even worse, defense counsel's first move was to request permission to withdraw Willie's original plea of not guilty—a strategy that would have ensured a quick death for Willie under Louisiana's then mandatory death penalty provision for convicted murderers.<sup>26</sup> Ultimately, Willie's plea was not changed, but there was more legal irresponsibility to come. Counsel did not object to Willie's September 12 trial date, even though it allowed them less than six days to prepare. Nor did they preserve any exceptions at trial.

On September 12, at the suggestion of defense counsel, Judge Simon ordered the sheriff to summon forty men to be considered for jury service. All forty of the potential jurors were white—a perturbing outcome given that five years earlier the Supreme Court had decried such a practice:<sup>27</sup> “If there has been discrimination [resulting in a totally white jury pool], whether accomplished ingeniously or ingenuously, the conviction cannot stand.” Regardless, twelve white men were selected to be

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Francis, No. 2161 (16th Jud. Dist. Ct. La., Received & Filed Apr. 4, 1946); Pardons Board Address of L.O. Pecot, *supra* note 19; KING, *supra* note 3, at 82–86, 90–91, 94, 153, 156, 266–67, 282–83; LEMANN, *supra* note 19, at 93; Taylor, *supra* note 12, at 5–6; *Negro Lives to Tell Death Chair Story*, WKLY. IBERIAN (New Iberia, La.), May 7, 1946, at 1; and *Jury Finds Murderer of Andrew Thomas Guilty*, WKLY. MESSENGER (St. Martinville, La.), Sept. 14, 1945, at 1.

<sup>25</sup> The matter of there being no trial transcript was later raised on appeal to the U.S. Supreme Court. In arguing that the Supreme Court of Louisiana had erred in holding that Willie was not denied due process of law, Willie's attorneys noted that the U.S. Supreme Court could “never know the full story of the trial of Willie Francis because *no stenographic record was taken at the trial.*” Brief in Behalf of Petitioner, *supra* note 24, at 9. It appears, however, that the practice of creating a verbatim record of trial proceedings was not common in Louisiana. According to the respondents, “in thousands of criminal cases in Louisiana, no stenographic notes of the testimony of witnesses is [sic] taken for the legal reason, and no other, that under the Constitution of Louisiana, . . . there can be no appeal on the facts.” Brief in Opposition to the Writ Granted, *supra* note 24, at 26.

<sup>26</sup> LA. CODE CRIM. L. & PROC. ANN. art. 740–30(2) (1943).

<sup>27</sup> *Smith v. Texas*, 311 U.S. 128 (1940).

Willie's jury after the attorneys entered challenges (the details of the challenges are not known). Despite District Attorney Pecot's claim that no juror came from St. Martin Parish, Gilbert King's research shows that at least three were from St. Martinville, and that a number of the other jurors were from a neighboring town in St. Martin Parish. In addition, nine jurors "bore surnames that appeared on Judge Simon's family tree."

Willie's trial was just two days long. The gun supposedly used in the murder, and the bullets recovered from the crime scene, were never introduced as evidence. They had been lost—reportedly on the way to the FBI for analysis. As King suggests,

Perhaps the intent was, in fact, to lose the ballistics evidence at the behest of someone in St. Martinville who had the ability, motivation, and opportunity to arrange its disappearance, thus leaving a poor, uneducated black youth and his hapless (or worse, complicit) public defenders in the awkward position of having to convince twelve white jurors and Judge Simon that the law enforcement officials in their town were corrupt and incompetent.

Moreover, there was no evidence of fingerprints taken from the gun and no clear proof that the bullet wounds in Andrew Thomas's body had actually derived from a .38 caliber bullet, much less the Smith & Wesson stolen from August Fuselier. In addition, the owner of Rivere's Jewelry Store was not present to testify that Willie had sold Andrew's watch to the store. "Without the alleged murder weapon, bullets, fingerprints, or the wristwatch as evidence, the bulk of [the district attorney's] case rested exclusively on confessions obtained by police while the teenaged Willie Francis was in custody and without legal counsel."

After District Attorney Pecot introduced the State's case against Willie by reading the grand jury indictment and presenting his opening statement, defense counsel "waived the right of their opening statement but reserved the privilege of making such statement at the conclusion of the State's case." Counsel never did present such a statement in defense of Willie nor did they call a single witness. When the State rested its case, the defense informed the court that it "had no evidence to offer on behalf of the accused and rested its case." Therefore, the jury was never informed that: (1) the murder weapon and crime scene bullets no longer existed, having been lost in the mail; (2) Willie's fingerprints were never found on the gun because the police never checked for fingerprints; (3) there were inconsistencies in the dates and other aspects of Willie's confessions; (4) rumors abounded that someone's husband or lover may have killed Andrew given his reputation for being a bachelor-around-town and visiting married women; and (5) Andrew's neighbor, Ida Van Brocklin, had testified before the coroner's jury that she saw a car

parked in front of Andrew's house with its lights on after she heard the gunshots, thereby refuting Willie's account that Andrew's car was in the garage at the time of the killing and supporting the suspicion that others were involved. Nor did the jury hear the suggestion that the State's evidence was planted and Willie's confessions were coerced.

There were other unanswered questions. How did Willie succeed in stealing a gun from a sheriff's deputy much less use it with the extraordinary precision that would have been required of the shooter? Willie had never owned a gun nor learned how to fire one. Shy stammering Willie, who had no record of violence, did not strike residents as a killer who had the ability to engage in a "terrific struggle" with Andrew. The town talk was that Willie had been framed and his confessions forced. Nevertheless, his attorneys never investigated the possibility that Willie's statements, made without a lawyer or family member present, were involuntary despite heavily documented, nationwide evidence of police force being used against minorities.

It appears from the trial minutes that defense counsel presented a closing argument, but there is no record of what that may have been. Regardless, the jury reached their verdict the very same day (September 13, 1945): Willie Francis was guilty. He was sentenced to death the next day. According to the *Messenger*, "Throughout the trial the negro was uninterested and showed very little emotion." With all that had been bungled during the trial, perhaps even Willie, a non-lawyer, could sense his fate. He may not have shown emotion but surely he must have felt it—terror perhaps, depression most certainly, and then, resignation.

#### B. Motive

Among the trial's unanswered questions was one of the most intriguing: Willie's alleged motive for murdering Andrew. In an interview after the attempted electrocution, Willie stated that he considered Andrew a "'pretty good boss'" and a "'swell guy'": he "didn't have a grudge against him nor was he after money." In *The Chair*, Willie described Andrew as "a very fine fellow." As Gilbert King notes, if the motive was robbery, then the timing seemed odd. During the two months following Willie's alleged theft of August Fuselier's gun, there were no reported instances of robbery at gunpoint in St. Martinville. Further, Willie had other nonviolent opportunities to steal from Andrew, either by breaking into his home or his store.

There was talk that at some point an "altercation" had taken place between Willie and Andrew. Additional speculation was that a "white person," presumably August Fuselier, had learned of the altercation and then given Willie his gun to use. After all, according to Father Rousseve, Fuselier himself had once threatened to kill Andrew, warning him to

stay away from his wife or there would be repercussions. Although married, Fuselier was also said to have had girlfriends; therefore, his threat to Andrew may actually have pertained to a purported consort, Lena Foti, who managed a saloon that Fuselier frequented. Fuselier's gun was reported to have been stolen from his car while it was parked in front of the saloon.

Recent interviews by Gilbert King uncovered another possible motive. Before Andrew's murder, one of his employees, Stella Vincent, abruptly and inexplicably quit her job, insisting to her sisters that she no longer wanted to work for Andrew. Soon thereafter, she moved to Florida. Thirty years later, on her deathbed, Stella told her sister Edith why she had left. Stella explained that she "had witnessed something at the [Thomas] drugstore that had so disturbed her she could not bear to return." In one of the rooms in the back of the store, Stella had seen "'an incident'" between Andrew and fifteen-year-old Willie that ended with Andrew "yelling and lashing out at the boy." Stella had been so affected by what she saw that she kept her experience a secret for decades.

Perhaps this "incident" helps explain the most mysterious phrase in Willie's first confession—"it was a secret about me and him." It is not certain, however, which "him" Willie was referencing—Andrew Thomas or August Fuselier ("Mr. Ogise"). Any secret between Willie and Andrew supports the idea that the two may have had a sexual relationship, coerced or not. As far as can be determined from my interviews and those of Gilbert King, this possibility was raised only decades after the crime, not before, when Willie was on trial or awaiting execution. The alternative theory—that the secret was between Willie and Fuselier—suggests that Willie had conspirators and that Fuselier was one of them.

Regardless, what becomes clear is that there were a number of potential theories in this case that were never fully investigated. Willie's attorneys, for example, could have pointed inculpatory fingers at other residents of St. Martinville, based on the jealousies aroused by Thomas's roving reputation. Or his attorneys could have introduced mitigating evidence or a provocation defense that might have resulted in a manslaughter rather than a murder conviction. As it turns out, Willie's attorneys never presented any evidence whatsoever to the jury. Willie's guilt would remain the only focus of the investigation.

### C. The Post-Trial Period

After Willie's conviction, there is no documentation that his lawyers ever contacted him, much less attempted to appeal either his verdict or his death sentence.<sup>28</sup> Legal help may have been offered by another

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<sup>28</sup> The discussion in this Section draws from FRANCIS AS TOLD TO MONTGOMERY, *supra* note 11; Affidavit of L. Charles Willis, *supra* note 24; Letter from Michel A. Maroun, Wilson &

source, however. On November 9, 1945, an attorney from a law firm in Shreveport, Louisiana, wrote Sheriff Resweber explaining that the firm had “been employed to represent [Willie] in his petition to the Pardon Board for commutation of sentence,” and asked for an account of Willie’s behavior in prison. Likewise, Willie mentioned learning about the possibility of a second trial in a February 15, 1946, letter to Resweber. However, there is no verification that a second trial was attempted or that anything more was done on Willie’s behalf during the six-month period after Judge Simon sentenced Willie to death but before Willie received his execution date.

At the same time, the contents of Willie’s February 15, 1946, letter to Resweber are disturbing. Willie’s basic purpose was to satisfy Resweber’s execution goals, so much so that he told Resweber that he did not want a second trial and that he was willing to die. Willie’s desire to accommodate, as well as the racial differences between him and Andrew, were foremost in Willie’s mind:

*I’m a negro, I killed A white man.*

*I know that you are trying to give me a death penalty.*

*I don’t mind at all.*

After a few months in jail, then, Willie seemed to have become a death penalty volunteer, possibly offering to forego any further trials or appeals on his behalf. If there was little-to-no movement on Willie’s case at this time, it may have been due, in whole or in part, to Willie’s lack of interest. Hopelessness and despair are common feelings among death row inmates. Although Willie was visited by family and friends who brought books and magazines for him to read, Willie’s position must have been disheartening.

Willie’s account in *The Chair* gives some perspective on his state of mind when he was returned to the New Iberia Parish jail. Although he was told that the “the death cell [was] bigger and more comfortable” than a comparable cell in St. Martinville, to Willie, “[i]t didn’t make much difference.” “They hadn’t said when they were going to kill me, so I didn’t care where they put me.” It was probably during this period that, according to Sheriff Resweber, Willie threatened suicide with a safety razor. No matter, Willie’s time would soon come. In early April,

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Abramson, to Sheriff, St. Martin Parish (Nov. 9, 1945) (copy on file with author); Unsigned Letter from Willie Francis to E.L. Resweber (Feb. 15, 1946) (on file at St. Martin Parish Courthouse, St. Martinville, La.); Letter from L.O. Pecot, District Attorney, 16th Judicial District of Louisiana, to E.L. Resweber, Sheriff, St. Martin Parish (Apr. 5, 1946) (copy on file with author); Death Warrant, Executive Department, State of Louisiana (Mar. 29, 1946) (copy on file with author); John H. Blume, *Killing the Willing: “Volunteers,” Suicide and Competency*, 103 MICH. L. REV. 939, 963 (2005); and *Willie Francis Shows Little Interest in Fate*, DUNKIRK EVENING OBSERVER (Dunkirk, N.Y.), Jan. 14, 1947, at 1.

Willie received the final word: the State issued a death warrant, establishing May 3, 1946, as his execution date.

## V. THE EXECUTION FAILS

Apart from his family and friends, the person who was perhaps closest to Willie during this period was Father Charles Hannigan, a fifty-nine-year-old Irish Catholic and a member of a religious order called the Holy Ghost Fathers.<sup>29</sup> Father Hannigan had visited Willie in the New Iberia jail throughout Willie's incarceration and was particularly helpful on May 2, 1946, the morning preceding Willie's attempted execution. Father Hannigan explained that in many ways Willie was "lucky" because, unlike most people, he knew when he was going to die and he could "prepare" for his fate. Also, the electric chair would only "tickle" for a short time. Father Hannigan encouraged Willie to show that he "was able to die like a man," because, in Father Hannigan's view, "[i]t is one of the hardest things to make yourself learn how to die right." One of Willie's greatest concerns was that he not act like a "cry-baby" on his execution day. At the same time, he wondered "why the chair was called the 'hot seat' " if it would only " 'tickle' " him.

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<sup>29</sup> The following discussion of Willie's execution and executioners draws from FRANCIS AS TOLD TO MONTGOMERY, *supra* note 11; Transcript of Hearing Before Louisiana Board of Pardons, Testimony of Captain E. Foster (May 31, 1946) (copy on file with author) [*hereinafter* Pardons Board Testimony of E. Foster]; Transcript of Hearing Before Louisiana Board of Pardons, Testimony of Vincent Venezia, Inmate, Angola Penitentiary (May 31, 1946) (copy on file with author) [*hereinafter* Pardons Board Testimony of Vincent Venezia]; Transcript of Hearing Before Louisiana Board of Pardons, Testimony of Dr. S.D. Yongue, Coroner, St. Martin Parish (May 31, 1946) (copy on file with author) [*hereinafter* Pardons Board Testimony of Dr. S.D. Yongue]; Pardons Board Testimony of Gilbert Ozenne, *supra* note 14; Affidavit of Louie M. Cyr (Mar. 19, 1947) (copy on file with author); Affidavit of Ignace Doucet (Apr. 3, 1947) (copy on file with author); Affidavit of Sidney Dupois (May 23, 1946), *reprinted in* Brief in Behalf of Petitioner, *supra* note 24, at 20–21; Affidavit of Rev. Maurice L. Rousseve (May 25, 1946), *reprinted in* Brief in Behalf of Petitioner, *supra* note 24, at 16–17; Affidavit of Harold Resweber (May 23, 1946), *reprinted in* Brief in Behalf of Petitioner, *supra* note 24, at 18–19; Affidavit of Ignace Doucet (May 30, 1946), *reprinted in* Brief in Behalf of Petitioner, *supra* note 24, at 17–18; Affidavit of Willie Olivier (May 24, 1946), *reprinted in* Brief in Behalf of Petitioner, *supra* note 24, at 15–16; Interview with Thomas Nelson, *supra* note 6; Interview with Winfield Ledet, Faculty Member, Pearl River High School, Pearl River, La., in St. Martinville, La. (June 14, 2007); Photographs from the Mary Alice Fontenot Papers, University Archives and Acadiana Manuscripts Collection, University of Louisiana at Lafayette, Collection 97, Box 7, Folder 15; KING, *supra* note 3, at 7, 9, 11–12, 19, 28, 220, 245; MILLER & BOWMAN, *supra* note 3, at 11; Deborah W. Denno, *Is Electrocutation an Unconstitutional Method of Execution? The Engineering of Death over the Century*, 35 WM. & MARY L. REV. 551, 608 (1994); *Defense Attorney to Seek Commutation of Sentence on 'Double Jeopardy' Plea*, LA. WKLY. (New Orleans, La.), Nov. 16, 1946, at 1; and Elliott Chaze, *'Plumb Mizzuble' Covers Willie Francis' Idea of Electric Chair*, DAILY ADVERTISER (Lafayette, La.), July 1, 1946, at 1.

Willie was still housed in a New Iberia Parish jail cell with “bright pink” walls. On May 3 an inmate came to Willie’s cell to shave his head to ensure maximum electrical conductivity for the 2,500 volts of electricity that would flow through the wires attached to Willie’s head and leg. In Willie’s account of this episode the tone was light; people were trying to joke to make him feel better, even the inmate-barber: “ ‘Well, Willie, I guess that’s one hair-cut you won’t have to pay for.’ ” Everyone laughed. On Willie’s cell wall a journalist noticed a phrase Willie had written about a month earlier: “Of Course I Am Not a Killer.” Yet no one at the time would ever comment on what the phrase possibly meant.

In shackles, Willie got into a black sedan that took him to the St. Martinville jail—driving first through the city and even past his house on Washington Street. En route, a deputy commented: “ ‘Don’t worry, Willie—it won’t hurt you very much. You won’t even feel it!’ ” But at that point, pain was not Willie’s concern. “I wasn’t worried at all whether it would hurt me. I was more worried about the fact it was going to kill me.” After pulling up to the courthouse and proceeding through the crowd of spectators—“both colored and white”—a sheriff and deputy took Willie to the St. Martin Parish jail. A two-story redbrick building located behind the courthouse, the jail would be the site of Willie’s execution. It has since been demolished.

#### A. The Executioners

Unlike most states at that time, Louisiana did not execute prisoners in the state penitentiary. Instead, the State delivered a portable, hardwood electric chair to the town where the crime had been committed. This chair, “Gruesome Gertie,” was housed at the notoriously dangerous and deplorable Louisiana State Penitentiary in Angola, Louisiana.

Willie had two executioners: Ephie Foster, a captain at the Louisiana State Penitentiary, and Vincent Venezia, an inmate serving hard time there. Venezia was an electrician who worked as an assistant to U.J. Esnault, the prison’s chief electrician. Venezia managed the generator while Foster threw the switch. Evidence shows that en route to St. Martinville with Louisiana’s portable electric chair both men had spent the evening of May 2 drinking in bars in New Iberia and talking about Willie’s execution.

The next day, Foster drove the oak chair into the city in a large truck. Photographs taken of the delivery evoke contradictory images. The first photo of the truck winding through the street looks so ordinary—as though it is transporting household furniture, such as a couch or living room table. But, the additional photos showing the unloading of Gruesome Gertie indicate that the truck’s contents are anything but normal. Mayor Nelson, age ten at the time, told me that he and his

friends were intensely curious about the chair and all that was going on, while never fully comprehending the consequences. “I can remember the day of the execution when they set up the chair and everything. . . . I remember playing hooky from school, a bunch of us, to go watch the execution. . . . But we couldn’t, they ran us off. . . . We’d go back and they’d run us off. You see there was a wooden fence along the sidewalk, so you could look through the cracks. . . . [T]hey had the chair on the front porch” before moving it inside the jail. As Mayor Nelson explained, age ten in those days was a lot younger than it is today. He and his friends weren’t “that knowledgeable” about the meaning behind the events. But, their naivety aside, the young children saw Willie’s fate before he did.

Once Foster and Venezia unloaded Gruesome Gertie, they had to carry it to the second floor of the jail. They then ran the chair’s wires out of the window so that they could connect to the gasoline-powered generator, which was located in the truck. According to one eye witness, during this task, Venezia handed a flask of alcohol to Foster from which both men drank.

#### B. The Execution

When Willie arrived at the second floor of the jail, he entered the small L-shaped room where Gruesome Gertie had been set up. Shortly thereafter, Sheriff Resweber led him to a nearby cell, so that Willie could meet with Father Maurice Rousseve, the pastor of Willie’s church. Father Rousseve attempted to console him and said he would “take care” of Willie’s family; then Willie returned to the execution room. Everyone was ready. Willie’s time had come.

“[S]oaking with perspiration,” Willie was strapped to the chair. Someone in the room put a wet hood over Willie’s head that covered his eyes but not his nose, so that he could breathe freely. Not being able to see frightened him all the more. But the next step was even more terrifying. Willie heard an unfamiliar voice—Foster’s—state the last words he presumably would ever hear: “Good-Bye Willie.” As Willie would later recount, “It was funny the way he said it—like he was telling me good-bye and I was going off on a trip.” When the generator was finally turned on, the “sound was deafening” and could be heard for blocks. Willie described the details:

I wanted to say good-bye, too, but I was so scared I couldn’t talk. My hands were closed tightly. Then—I could almost hear it coming.

The best way I can describe it is: Whamm! Zst!

It felt like a hundred and a thousand needles and pins were pricking in me all over and my left leg felt like somebody was cutting it with a razor blade. I could feel my arms jumping at my

sides and I guess my whole body must have jumped straight out. I couldn't stop the jumping. If that was tickling it was sure a funny kind. I thought for a minute I was going to knock the chair over. Then I was all right. I thought I was dead. . . . Then they did it again! The same feeling all over. I heard a voice say, "Give me some more juice down there!" And in a little while somebody yelled, "I'm giving you all I got now!" I think I must have hollered for them to stop. They say I said, "Take it off! Take it off!" I know that was certainly what I wanted them to do—turn it off.

Amazingly, Willie was still alive after the first current subsided. Foster threw the switch again—asking Venezia to provide more current, juice that the generator did not have. With one final yell, Willie stuttered, "I am not dying." "Take it off! Take it off!" Quickly, Willie was unstrapped and walked away from the chair. As Willie would later explain, it took him a while to realize he was still alive; at first "it seemed like they were in an awful hurry to get me out of that chair so they could bury me."

Although Willie was silent during the medical examination immediately after the attempted execution, Dr. Yongue, the coroner, claimed he "found nothing wrong with" Willie apart from a fast pulse; there were no burn marks or burnt flesh. It appears, however, that Yongue never even asked Willie any questions. Sheriff Ozenne stated that Willie appeared "just a little nervous and shaky," but that Willie said he was "alright" when Ozenne asked him how he felt. Foster, the executioner, did not even feign concern about Willie. In fact, he was livid, yelling out as Willie exited the room, "I missed you this time, but I'll get you next week if I have to use an iron bar!"<sup>30</sup> Willie would later recount, "He [Foster] was plenty mad, I guess." But, of course, Willie was thrilled.

### C. The Reaction

Willie's survival was greeted with ecstatic delight by his family.<sup>31</sup> The moment was interpreted by many, including Willie, as a blessing

<sup>30</sup> The works of Gilbert King and Miller and Bowman describe Foster as threatening Willie with a "rock," not an iron bar. KING, *supra* note 3, at 28; MILLER & BOWMAN, *supra* note 3, at 11. Presumably the references to a "rock" follow from the March 19, 1947, affidavit of Louie M. Cyr, where Cyr claims that George Etie stated that the "drunken executor cursed Willie Francis and told him that he would be back to finish electrocuting him, and if the electricity did not kill him, he would kill him with a rock." Affidavit of Louie M. Cyr, *supra* note 29.

<sup>31</sup> The discussion in this Section draws from FRANCIS AS TOLD TO MONTGOMERY, *supra* note 11; Pardons Board Testimony of Dr. S.D. Yongue, *supra* note 29; Pardons Board Testimony of E. Foster, *supra* note 29; Pardons Board Testimony of Vincent Venezia, *supra* note 29; Pardons Board Testimony of E.L. Resweber, *supra* note 14; Pardons Board Testimony of

from God, even inspiring a published song mimicking Willie's words to explain what had happened: "De Lord Fool'd Around Wid Dat Chair." According to witnesses, Willie's first comments when he rose out from the chair were, "'The Lord was sho with me!'" Unfortunately, like everything else Willie experienced, such joy would be fleeting. Soon after the first failed attempt, Louisiana's Governor James (Jimmie) Davis decided that Willie would be executed again on May 9, 1946—six days later.

That week would turn into eight months and then, with the help of some extraordinary attorneys, into an entire year. Indeed, the failed event would mark the start of Willie's doomed fight to live. But it would be greatly downplaying the human side of this part of his story to view it only in terms of Willie's ultimate death by execution. The year would be filled with a national coalition of forces unlike that seen in any other case.

In many respects, Willie's story was a local one—specific to St. Martinville or to Louisiana—followed sporadically by the *Messenger*. On another level, however, the story was distinctly national—one that reporters and newspapers throughout the country covered because people everywhere were entranced by Willie's survival. As one paper noted, "Hundreds of letters from all parts of the country were received by Francis, the governor and Willie's lawyers, nearly all of them urging or hoping for clemency." Willie talked about the letters and support he got from people who were praying for him just days after the botched execution. "I felt just like a movie star, and didn't have any idea I had so many friends," Willie would comment. Over time, those "friends" included the likes of Fiorello LaGuardia, then mayor of New York City, and Herbert Lehmann, then governor of New York State, as well as the famed commentator Walter Winchell. Religion was often a strong theme

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Gilbert Ozenne, *supra* note 14; Brief in Opposition to the Writ Granted, *supra* note 24, at 4; Affidavit of Sidney Dupois, *supra* note 29; Affidavit of Rev. Maurice L. Rousseve, *supra* note 29; Affidavit of Harold Resweber, *supra* note 29; Affidavit of Ignace Doucet (May 30, 1946), *supra* note 29; Affidavit of Willie Olivier, *supra* note 29; Affidavit of Luke LaViolette (May 24, 1946) (copy on file with author); Telegram from J.H. Davis, Governor, La., to E.L. Resweber, Sheriff, St. Martinville, La. (May 3, 1946) (copy on file with author); KING, *supra* note 3, at 34, 120; Hamm, *supra* note 17; Tom Gillen, Jr., *Around the Capitol*, WKLY. MESSENGER (St. Martinville, La.), Jan. 31, 1947, at 4; *My Time Has Come, Says Willie, Facing Death Again*, TIMES-PICAYUNE (New Orleans, La.), Jan. 14, 1947, at 6; Taylor, *supra* note 12; *Negro Lives to Tell Death Chair Story*, *supra* note 24; Chaze, 'Plumb Mizzuble' Covers Willie Francis' Idea of Electric Chair, *supra* note 29; *Many Sought to Save Willie Francis*, LA. WKLY. (New Orleans, La.), May 18, 1946, at 9; *Court Rules Negro Must Go to Chair Again*, STATE (Columbia, S.C.), May 16, 1946, at 1; "Blackie," Editorial, *This & That*, WKLY. MESSENGER (St. Martinville, La.), May 10, 1946, at 1; *Comments on Fluke Execution Here*, WKLY. MESSENGER (St. Martinville, La.), May 10, 1946, at 2; and *Urge All Executions at State Pen*, Editorial, WKLY. MESSENGER (St. Martinville, La.), May 10, 1946, at 5.

in people's communications with Willie. "The people who wrote said they were sure the Lord had a hand in what happened . . . "

Many of St. Martinville's residents greatly resented such outside interference with a criminal justice process they thought fair. The local community was particularly irritated by the intense national reaction to Willie's unfinished execution as it was expressed in newspapers in other states. Several *Messenger* articles on May 10, 1946, one week after Willie's execution attempt, focused on this matter. According to Marcel Bienvenu, the *Messenger's* editor, "The large Northern papers played up the story so much that a flood of sympathetic letters have been reaching the Governor [of Louisiana] and other officials all asking for clemency of Francis." Another *Messenger* article derided *The Chicago Tribune* for assuming "an interest" in the case, calling it a "notorious South-hating sheet." As the article spewed, "You can generally count on the *Tribune* not to be up to any good." The *Messenger's* take on the "metropolitan press" was also cynical and distrusting.

Yet one May 10 *Messenger* editorial, reprinted from the *Shreveport Times*, showed that the State's portable electric chair had long been a known problem within Louisiana; the writer suggested legislation enabling executions to be carried out in a "permanent execution building at the state penitentiary." "[T]he Louisiana Police Jury association ha[d] been urging the adoption of such a statute" for several years. The jurors knew that the portable electrocution method had "serious defects." "Certainly capital punishment, if it is to be inflicted, should be imposed inexorably, not haphazardly." Also problematic was the barbaric interest of "the throngs which wait to hear the roar of the machinery that signals the exacting of the death penalty." For "sensitive natures," such an experience can cause "real distress," and the "effect of the proceedings on young minds . . . could hardly be called beneficial."

Of course, newspaper coverage also examined Willie's legal case. Whether or not any electrical current actually reached Willie would be a key matter of contention. Some sources stated that Willie had not received any current and appeared uninjured. According to one account, Willie had said that the chair only "kinda tickled a little." Yet reliance on such quotes from Willie was incredibly misleading. The "tickling" depiction was what Father Hannigan had told Willie to expect in an effort to make Willie feel less frightened and to be brave. After Willie survived the electrocution, Hannigan recalled that "Willie looked at me very seriously and said: 'Father, it tickled—but it hurt, too,'" a phrase Willie repeated in *The Chair*. Time and again, Willie attempted in his comments to juxtapose how people, especially Father Hannigan, told him the electrocution would feel and how it really did feel. "If that was tickling it was sure a funny kind," Willie lamented. In Willie's need-to-please world, the calculated opinions of others, who had never even sat

in an electric chair, were a far better characterization of Willie's experiences than his own unique reality.

In *The Chair*, Willie left no question that the execution attempt caused acute pain, even though some of Willie's accounts to journalists were so colorfully put it could be hard to tell. As Willie said to one reporter, "you feel 'like you got a mouth full of cold peanut butter, and you see little blue and pink and green speckles, the kind that shines in a rooster's tail.'" Willie insisted that "when the switch was thrown he got some of the current." Indeed, witnesses to the execution detailed Willie's extreme reaction to the current, noting that Willie's "lips 'puffed out' and he rocked the chair." While predictably the electrician in charge disagreed, the matter was surely ambiguous enough to litigate. If only Willie had a good lawyer this time.

## VI. MUCH TO DO IN LITTLE TIME

### A. Willie's New Lawyer

On May 3, 1946, after Willie's flawed execution, Frederick Francis visited the law office of Jerome Broussard, a St. Martinville attorney, asking if Broussard would take Willie's case.<sup>32</sup> Frederick had performed odd jobs for Broussard in the past and he was determined not to have court-appointed counsel represent Willie again. Although Broussard was aware of Willie's situation, as a business lawyer he possessed neither the expertise nor the financial flexibility to accept a complex criminal case with few prospects for remuneration. Instead, Broussard referred Frederick to Bertrand de Blanc, an attorney who worked next door. Recently returned from World War II, de Blanc was refurbishing a law practice he had started before he left. De Blanc's family had a long and prominent presence in St. Martinville, and, like the rest of the city, de Blanc was familiar with Willie's botched electrocution attempt. Indeed, Sheriff Resweber had asked de Blanc to witness Willie's execution on May 3, but de Blanc refused. Referring to Willie, de Blanc told Resweber, "I like that guy."

Frederick Francis informed de Blanc that "he had no money but he would work to repay him." De Blanc responded "it was all right," he would still take Willie's case. Money was not the issue. De Blanc believed

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<sup>32</sup> The discussion in this Section draws from the following sources: FRANCIS AS TOLD TO MONTGOMERY, *supra* note 11; Bertrand de Blanc, *Letter to the Editor*, WKLY. MESSENGER (St. Martinville, La.), May 17, 1946, at 6; Interview by Jeffrey H. Bowman with Bertrand de Blanc, *supra* note 14; KING, *supra* note 3, at 41-45; MILLER & BOWMAN, *supra* note 3, at 30; FRED W. FRIENDLY & MARTHA J.H. ELLIOTT, *THE CONSTITUTION: THAT DELICATE BALANCE* 166 (1984); LEMANN, *supra* note 19, at 90; *The Case of Condemned Negro is Story of Fighting Lawyer and His Aged Father Who Waits*, JEANERETTE ENTERPRISE (Jeanerette, La.), Jan. 16, 1947, at 1; and *Louisiana Stays Electrocution of Colored Boy*, MOBILE REG. (Mobile, Ala.), May 9, 1946, at 1.

that “[i]t’s not human” to make a man “‘go to the chair twice.’” “[T]he state fell down on its job.’ . . . ‘It made [Willie] suffer the torture of facing death without completing it.’” Married, age 35, and the father of three children, de Blanc would labor to save Willie from a second execution for an entire year, his only remuneration some vegetables given to him by Frederick. One news article about de Blanc stated that “[s]aving Willie has become a sort of obsession with him.”

Yet de Blanc also felt he had some explaining to do to the St. Martinville community. In a May 8, 1946, letter sent to the Editor of the *Messenger*, de Blanc acknowledged the criticism he faced from town members for representing Willie. He had “no apologies,” however, for accepting the case because, as an attorney, he had taken an oath to defend people; whether “rich or poor, black or white” everyone is “entitled to be heard.” At the same time, de Blanc wanted the community to know how “shocked” he was upon hearing of the “brutal murder.” He “was one of Andrew’s best friends.” As neighbors, de Blanc “spent a lot of time going to the drugstore just to talk to him,” and de Blanc’s children “spent most of their time” at the drugstore too. Andrew “liked them and they liked him.” De Blanc further urged that the matter was legal, not personal. While Willie should not be “set free,” neither should he die; the right course was that he be sentenced to life in prison. De Blanc then provided an eloquent end to his letter that succinctly summarized what would fuel him through the next year: “[M]y few critics will soon be dead and buried but the principles involved in this case of freedom from fear of cruel and unusual punishment and that of due process and double jeopardy will live as long as the American flag waves on this continent.”

### B. The Supreme Court of Louisiana

De Blanc realized he had only a few days left to block another execution attempt.<sup>33</sup> Therefore, on May 7, 1946, he filed a petition for a writ of habeas corpus in Louisiana state district court, arguing that Willie’s sentence had already been carried out and that a second electrocution attempt would deny him due process of law and constitute cruel and unusual punishment.<sup>34</sup> De Blanc knew that it was unlikely that Judge Simon, the judge considering the petition and the same judge who

<sup>33</sup> The discussion in this Section draws from *State ex rel. Francis v. Resweber*, 31 So. 2d 697 (La. 1947); Transcript of Record at 12, 17, 27, *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (No. 142); Brief in Behalf of Petitioner, *supra* note 24, at 3; Brief in Opposition to the Writ Granted, *supra* note 24, at 4–5; Reprieve, State of Louisiana, Executive Department (May 8, 1946) (copy on file with author) [*hereinafter* May 8, 1946 Reprieve]; KING, *supra* note 3, at 121; and *Lt-Governor Grants Negro Reprieve*, JEANERETTE ENTERPRISE (Jeanerette, La.), May 9, 1946, at 1.

<sup>34</sup> A second petition for a writ of habeas corpus was filed in Louisiana state district court the next day, May 8, 1946, by NAACP representatives A.P. Tureaud and Joseph R.

had presided over Willie's trial, would release Willie from jail; indeed, Simon denied the request the very same day. Two days later, on May 9, 1946, de Blanc appealed the decision by submitting a petition for writs of certiorari, prohibition, mandamus, and habeas corpus to the Supreme Court of Louisiana.<sup>35</sup> Realizing that the court would not have sufficient time to reach a decision before Willie's scheduled execution on May 9, 1946, the court's chief justice asked the acting governor to recall Willie's death warrant, which he agreed to do. Willie was granted a thirty-day reprieve, until June 7, 1946.

Willie and his family were elated, but the good feelings were short-lived. On May 15, 1946, the Louisiana Supreme Court refused to grant the writs de Blanc and two NAACP attorneys<sup>36</sup> had requested. The court concluded that, "[i]nasmuch as the proceedings had in the district court, up to and including the pronouncing of the sentence of death, were entirely regular," the Louisiana Supreme Court was not authorized "to set aside the sentence and release [Willie Francis] from the Sheriff's custody."<sup>37</sup> Indeed, the Louisiana Supreme Court also had "no authority to pardon [Francis] or to commute his sentence." Only the governor could pardon and commute, and this authority could "be exercised only upon the recommendation of the Board of Pardons" or any two of its three members.

With limited time remaining, de Blanc decided not to apply for a rehearing with the Louisiana Supreme Court and instead placed his hopes on the Pardons Board. Although the Board included Judge Simon,

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Thornton. *State ex rel. Francis v. Resweber*, 31 So. 2d 697, 698 (La. 1947); Brief in Opposition to the Writ Granted, *supra* note 24, at 4; *see also Supreme Court Rejects Plea for Willie Francis*, LA. WKLY. (New Orleans, La.), May 18, 1946, at 1.

<sup>35</sup> De Blanc also submitted a supplemental petition on May 14, 1946. Transcript of Record, *supra* note 33, at 17. De Blanc took Willie's case directly to the Supreme Court of Louisiana because Louisiana's intermediate appeals court did not hear criminal cases at that time. *See* A Brief History of the Louisiana Appellate Court System, <http://www.la-fcca.org/history.htm> (last visited Aug. 20, 2008); *see generally* John T. Hood, Jr., *History of Courts of Appeal in Louisiana*, 21 LA. L. REV. 531 (1961).

<sup>36</sup> NAACP representatives A.P. Tureaud and Joseph R. Thornton submitted a separate petition for writs of certiorari, mandamus, and prohibition on May 8, 1946, a day before de Blanc submitted his petition. Brief in Opposition to the Writ Granted, *supra* note 24, at 4–5. Tureaud and Thornton's petition was given docket number 38219, and de Blanc's was given docket number 38221. Brief in Opposition to the Writ Granted, *supra* note 24, at 5. The Louisiana Supreme Court combined the petitions and considered both in its May 15, 1946, decision. *See State ex rel. Francis v. Resweber*, 31 So. 2d 697, 697 (La. 1947) (listing two docket numbers—38219 and 38221).

<sup>37</sup> The Louisiana Supreme Court's decision was published under the date of May 15, 1947, but in reality the decision was handed down on May 15, 1946. *See* Transcript of Record, *supra* note 33, at 27; *State ex rel. Francis v. Resweber*, Nos. 38219, 38221 (La. May 15, 1946).

de Blanc was banking on the knowledge that it would also include two state officials who might be influenced by the rising public opinion in support of Willie.

### C. The Hearing Before the Louisiana Board of Pardons

On May 31, 1946, Willie's case was heard by the Louisiana Pardons Board, which consisted of Lieutenant Governor J. Emile Verret, Attorney General Fred S. LeBlanc, as well as Willie's trial judge, James Simon.<sup>38</sup> Despite previous scuffles over the territorial handling of Willie's case, de Blanc and the two attorneys associated with the New Orleans NAACP who had filed writs with the Louisiana Supreme Court—A.P. Tureaud and his associate, Joseph A. Thornton—agreed to work together at the hearing.<sup>39</sup> The three men were opposed by District Attorney Pecot, representing Sheriff Resweber. The transcript of the testimony would end up being invaluable to all because it is one of the few sources of documented information on Willie's case.

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<sup>38</sup> The discussion of the hearing before the Pardons Board draws from the following sources: Louisiana *ex rel.* Francis v. Resweber, 328 U.S. 833 (1946); Louisiana *ex rel.* Francis v. Resweber, No. 1302 (U.S. June 10, 1946); Pardons Board Address of L.O. Pecot, *supra* note 19; Transcript of Hearing Before Louisiana Board of Pardons, Testimony of U.J. Esnault, Chief Electrician, Louisiana State Penitentiary, Angola, La. (May 31, 1946) (copy on file with author); Transcript of Hearing Before Louisiana Board of Pardons, Testimony of Dennis D. Bazer, Warden, Louisiana State Penitentiary, Angola, La. (May 31, 1946) (copy on file with author); Pardons Board Testimony of E.L. Resweber, *supra* note 14; Pardons Board Testimony of Gilbert Ozenne, *supra* note 14; Pardons Board Testimony of E. Foster, *supra* note 29; Pardons Board Testimony of Vincent Venezia, *supra* note 29; Pardons Board Testimony of Dr. S.D. Yongue, *supra* note 29; Brief in Behalf of Petitioner, *supra* note 24, at 15–21; Brief in Opposition to the Writ Granted, *supra* note 24, at 53–101; Petition for Executive Clemency (May 13, 1946) (copy on file with author); Reprieve, State of Louisiana Executive Department (June 3, 1946) (copy on file with author); May 8, 1946 Reprieve, *supra* note 33; Letter from Bertrand de Blanc to Wilbert Rideau, Editor, *The Angolite* (July 9, 1979); Letter from Charles Elmore Cropley, Clerk, U.S. Supreme Court, to E.L. Resweber (June 11, 1946); KING, *supra* note 3, at 141–42; MILLER & BOWMAN, *supra* note 3, at 7, 42, 141; BARRETT PRETTYMAN, JR., DEATH AND THE SUPREME COURT 106, 108–11 (1961); Arthur S. Miller & Jeffrey H. Bowman, “*Slow Dance on the Killing Ground*”: *The Willie Francis Case Revisited*, 32 DEPAUL L. REV. 1, 14 n.81 (1983); Michael S. Bernick, *The Unusual Odyssey of J. Skelly Wright*, 7 HASTINGS CONST. L.Q. 971, 974–75 (1980); *New Prayer Book in Negro's Cell*, JOPLIN GLOBE (Joplin, Mo.), June 12, 1946, at 1; *High Court Erred; Negro Gets Stay*, N.Y. TIMES, June 12, 1946, at 10; *No Clemency in Francis Case is Board's Ruling*, DAILY ADVERTISER (Lafayette, La.), June 3, 1946, at 1; *Board Considers Fate of Slayer*, TIMES-PICAYUNE (New Orleans, La.) June 1, 1946, at 4; and *Execution of Francis Stayed 29 Days*, WKLY. MESSENGER (St. Martinville, La.), May 10, 1946, at 1.

<sup>39</sup> The State attached a portion of the Pardons Board hearing transcript to the brief it submitted to the U.S. Supreme Court, Brief in Opposition to the Writ Granted, *supra* note 24, at 53–101; but there are inconsistencies between this version of the transcript and a certified copy of the transcript found among de Blanc's papers. In de Blanc's copy both he and Tureaud question witnesses while Thornton is silent. In the copy attached to the State's brief, Tureaud and Thornton question witnesses while de Blanc is silent.

In his closing argument, District Attorney Pecot laid out the state's arguments against commuting Willie's sentence to life imprisonment:

[T]his case is a question as to whether or not this Board is going to follow the judgment of the jury of twelve men who listened most carefully to the evidence before bringing in their verdict, or whether or not because of an unfortunate happening due to no fault of anyone, but just a mechanical defect, the Board is going to say "for that reason we are going to extend this man an extra portion of mercy."

In order to show that the malfunction was accidental, two Angola prison employees testified: U.J. Esnault, the chief electrician, and Dennis D. Bazer, the warden. Warden Bazer had assigned Ephie Foster to Willie's execution. Both Esnault and Bazer asserted that they had never known the chair to fail before and that it operated properly after Willie's botched electrocution. Testimony designed to demonstrate Willie's guilt was provided by Sherriff Resweber and Sheriff Ozenne.

Willie's attorneys challenged the evidence of Willie's guilt. Tureaud had previously investigated the activities of Sheriff Ozenne and Gus "Killer" Walker—Willie's caretakers in the New Iberia Parish jail—who were known for their histories of coercion and violence; he questioned Resweber's account that Willie had offered full confessions without force. Indeed, the probing of witnesses before the Pardons Board accentuated the incompetence of Willie's trial attorneys.

In addition, the State produced witnesses to testify that Willie had not been harmed by the attempted electrocution because no (or only a minute amount of) electricity had entered his body. Both Ephie Foster and Vincent Venezia, Willie's executioners, agreed that electricity did not enter Willie. According to Foster, "There was a shortage—a little wire was loose and the current went back into the ground instead of going into the *nigger*," an account Venezia confirmed. Foster acknowledged, however, that Willie might have moved the approximately three-hundred-pound chair during the electrocution. The coroner, Dr. Yongue, testified that the chair moved two or three times right after Foster threw the switch but, upon examining Willie afterwards, he found that there was "no serious impairment and no burn marks."

Rather than focusing on Willie's trial, which de Blanc assumed would have little effect given societal attitudes and Judge Simon's presence, de Blanc emphasized Willie's torturous experience during the first attempted electrocution. Therefore, among de Blanc's first moves was to prove with affidavits from official witnesses that electricity did in fact reach Willie's body. Sidney Dupois, a barber, provided a typical description: "At that very moment [that the switch was turned on] Willie Francis' lips puffed out and he grunted and made the chair jump."

This approach meshed with de Blanc's additional argument that Willie should not face electrocution again because he had already "suffered the torture of death." To bolster his points, de Blanc listed historical examples of failed executions where the condemned individuals succeeded in having their sentences reduced as a result, thus avoiding the experience of another execution.<sup>40</sup>

De Blanc's arguments were as emotional as they were legal. Additional witnesses appeared before the Pardons Board, reflecting public sentiment against Willie's execution. De Blanc stressed that the State had never before given a death sentence to a fifteen-year-old. He raised examples of biblical stories and divine intervention as a way of making the point that God's law had interrupted Willie's execution, and that citizens should respect that law. And in an effort to bring back the theme of cruel and unusual punishment, de Blanc presented the Board with a photograph of Willie that Father Rousseve had taken at Willie's execution, just moments before Foster had pulled the switch. In de Blanc's view, it was "'a picture that speaks a thousand words.'" "[W]ere it not for a quirk of fate," Willie would be dead.

With Willie's picture before them, de Blanc's arguments stressed the future risks that Willie faced in another execution, and how religion, through "the hand of God," played into that risk. "'What assurance,'" de Blanc asked, "'does this boy have that he will go to his death in a humane manner, quickly and painlessly? Supposing that the chair doesn't work a second time? Suppose it doesn't work a third time? That could happen; it's happened once and it could happen again.'" De Blanc also emphasized how such risks could affect the country's acceptance of the death penalty generally. "'[U]nless this board sees fit to say that this boy will not suffer the torture of death again,'" "'the whole system of capital punishment . . . is in jeopardy because of the inhumane method in which it is being inflicted in this case.'" "'People all over America have written to me expressing their sincere belief that it was the hand of God that stopped the electrocution,'" de Blanc noted, referring to the national outpouring on Willie's behalf. But "'[f]ate acts in strange ways. I, for one, would want no part in his re-execution. When I meet my God face to face, I would not want the stain of his blood on my hands.'" "

De Blanc's arguments ended the session. If Willie's fate was in God's hands, it was also clearly in the hands of the Pardons Board. The approach also accentuated the contrasting ways that de Blanc and the

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<sup>40</sup> Miller and Bowman cite directly to the transcript of de Blanc's statement before the Pardons Board. Miller & Bowman, *supra* note 38, at 14 n.81. However, that transcript no longer appears to be available. The author conducted an extensive search for it but was unable to uncover an extant copy.

two NAACP attorneys framed Willie's case. For de Blanc, the cruel and unusual nature of the punishment was foremost in his mind; for Tureaud and Thornton, the gross problems with the trial and those handling it were most significant.

The Pardons Board deliberated quickly. On June 3, 1946, without providing any opinion, the Board unanimously refused to commute Willie's sentence. Willie was scheduled to be electrocuted again in only four days, at noon on June 7, 1946. Now de Blanc would have to take Willie's case to the U.S. Supreme Court, a contingency for which he was prepared despite his surprise at the Board's decision.

A friend had suggested that de Blanc contact James Skelly Wright, a former assistant U.S. attorney for Louisiana who, while New Orleans-born, was then practicing law in Washington, D.C. Shortly after the Pardons Board's decision, de Blanc wired Wright, asking that he file a petition for a writ of certiorari. As a result, Louisiana's Governor Jimmie Davis issued a reprieve: "in the interests of justice [Davis did] not desire to order the execution of said Willie Francis until final action by the Supreme Court of the United States."

Any optimism about Willie's future would soon be dashed, however. On June 10, 1946, the Supreme Court handed down an order denying the writ. Willie told reporters, "I'm praying harder than ever. Got myself a new prayer book. All I can do is wait."

Incredibly, the next day a Supreme Court clerk announced that a mistake had been made: the writ of certiorari had been granted, not denied, and the Court would hear arguments. Such a stunning development was thought to be "virtually unparalleled" in the Supreme Court's history. While Willie was reported as being "stoic about [the] series of ups and downs," de Blanc was much more "voluble." In the eyes of Willie's supporters, it must have seemed as if divine intervention had, once again, intercepted Willie's life path.

## VII. *LOUISIANA EX REL. FRANCIS v. RESWEBER*

The Supreme Court that would be hearing Willie's case was a tribunal in transition, situated between the "drama of the Roosevelt Court-packing plan [in 1937] and the nobility of the Warren Court's striking down racial segregation" in 1954.<sup>41</sup> Just six weeks before the

<sup>41</sup> The discussion of the Supreme Court that would hear Willie's case draws from, among other sources, MICHAL R. BELKNAP, *THE VINSON COURT: JUSTICES, RULINGS, AND LEGACY* 40 (Peter G. Benstrom ed., ABC-CLIO Supreme Court Handbook Series, 2004); MELVIN I. UROFSKY, *DIVISION AND DISCORD: THE SUPREME COURT UNDER STONE AND VINSON, 1941-1953* (1997); WILLIAM F. SWINDLER, *COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE NEW LEGALITY* 56-80, 137, 157-61 (1970); EUGENE C. GERHART, *AMERICA'S ADVOCATE: ROBERT H. JACKSON* 235-88 (1958); John P. Frank, *Fred Vinson and the Chief Justiceship*, 21 U. CHI. L.

Court granted certiorari in Willie's case, on April, 22, 1946, Chief Justice Harlan Fiske Stone fell ill on the bench and died later that day of a massive cerebral hemorrhage. Justice Stone left behind a feuding and fractured body, marked by its 4–4 decisions, and many dissents and “diverging concurrences.” (Justice Robert Jackson was away at the time, serving as the American prosecutor at the Nuremberg War Crimes Trial.) The strains reflected both jurisprudential disagreements and personal conflicts.

The opening for a Chief Justice heightened—and further revealed—tensions among the Justices. Finally, President Harry Truman decided to appoint as Chief Justice his close friend and Secretary of the Treasury, Frederick M. Vinson, in the hope that Vinson, “a skilled conciliator,” would be able to heal the divisiveness on the Court. As a result, in line for Willie's argument were nine Justices, including the new Chief Justice and Justice Jackson, who had returned from Nuremberg.

#### A. Skelly Wright's and Bertrand de Blanc's Arguments

Although all of the Justices hearing Willie's case had been appointed by Democratic presidents—seven by President Franklin Delano Roosevelt and two by President Harry Truman—the Court was not liberal in the modern sense of that word.<sup>42</sup> Both Justice Hugo Black, considered the leader of the liberal wing of the Court, and Justice Felix Frankfurter, considered the leader of the conservative wing, agreed on the importance of judicial restraint. In appointing Justices, Roosevelt's

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REV. 212, 241 (1954); *Vinson Excelled in Federal Posts*, N.Y. TIMES, Sept. 9, 1953, at 26; *Jackson Attacks Black for Judging Ex-Partner's Case*, N.Y. TIMES, June 11, 1946, at 1; Lewis Wood, *Vinson Expected to Bring Supreme Court Harmony*, N.Y. TIMES, June 9, 1946, at 10E; Felix Belair, Jr., *Vinson Named Chief Justice; Snyder to Head Treasury; Truman to Let OWMR Lapse; Forrestal Stays*, N.Y. TIMES, June 7, 1946, at 1; and *Chief Justice Stone of Supreme Court is Dead*, N.Y. TIMES, Apr. 23, 1946, at 1.

<sup>42</sup> The discussion that follows draws from the following sources: *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947); *State ex rel. Francis v. Resweber*, 31 So. 2d 697 (La. 1947); *In re Kemmler*, 136 U.S. 436 (1890); Application for Writ of Certiorari at 3, *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (No. 1302) (available at National Archives, Box No. 4661); Brief in Behalf of Petitioner, *supra* note 24, at 15–21; Brief in Opposition to the Writ Granted, *supra* note 24, at 53–101; Stanley F. Reed, Draft Opinion in *Louisiana ex rel. Francis v. Resweber* 2–5 (Jan. 1947) (available at Library of Congress); Letter from Charles Elmore Cropley, Clerk, U.S. Supreme Court, to Bertrand de Blanc (Feb. 14, 1947) (available at National Archives, Box No. 4661); BELKNAP, *supra* note 41, at 26, 47; UROFSKY, *supra* note 41, at 7, 153, 213, 215–19, 223; FRIENDLY & ELLIOTT, *supra* note 32, at 169; SWINDLER, *supra* note 41, at 137; Denno, *Is Electrocution an Unconstitutional Method of Execution?*, *supra* note 29, at 607; Jacob Balick, *Recent Cases*, 20 TEMPLE L.Q. 584 (1947); Norman L. Schatz, *Recent Decisions*, 31 MARQ. L. REV. 108 (1947); Elliott Chaze, *Francis Must Die in Electric Chair*, JEANERETTE ENTERPRISE (Jeanerette, La.), Jan. 16, 1947, at 1; Elliott Chaze, “Death My Neighbor But Lord Closer,” *Says Willie, Facing Electric Chair*, TIMES-PICAYUNE (New Orleans, La.), Jan. 15, 1947, at 4; *Killer to Face Chair 2d Time; Gives Up Hope*, CHI. DAILY TRIB., Jan. 14, 1947, at 1; and Wood, *supra* note 41.

primary concern was that they uphold the New Deal legislation Congress passed under his leadership. In *Louisiana ex rel. Francis v. Resweber*,<sup>43</sup> this belief in restraint made the Court reluctant to overrule the decisions of the Louisiana legislature and the Louisiana Board of Pardons. For Wright and de Blanc, then, the legal battle would be uphill.

When petitioning the Supreme Court of Louisiana, de Blanc had argued that subjecting Willie to a second electrocution would violate both the Louisiana state constitution and the Constitution of the United States. Now, before the Supreme Court of the United States, Wright and de Blanc could not point to the provisions of the state constitution that echoed the Fifth Amendment prohibition on double jeopardy and the Eighth Amendment prohibition on cruel and unusual punishment because a state's highest court is the ultimate arbiter of that state's laws and constitution. Instead, the attorneys either needed to convince the Court of the most controversial argument made on Willie's behalf before the Supreme Court of Louisiana—that these safeguards in the federal constitution applied to Willie's case—or that some other aspect of due process would be violated by a second execution. Indeed, the Supreme Court had previously held, in many different kinds of circumstances, that the Bill of Rights, including these provisions, did not apply to the states; therefore, defendants prosecuted at the state level did not have the federal protections available today concerning violations of double jeopardy and tortuous punishments. Nevertheless, Wright and de Blanc were compelled to argue in the petition for certiorari that Willie had been denied the protection of the Due Process Clause of the Fourteenth Amendment because of violations of both the Fifth and Eighth Amendments—that Willie was “being placed in jeopardy of life and liberty a second time for the same offense and that to subject [him] a second time to final preparation for his execution, and execution itself would be cruel and inhuman punishment.”

In the Supreme Court's first case dealing with the constitutionality of electrocution, *In re Kemmler*,<sup>44</sup> decided in 1890, the Court had refused to confront the petitioner's claim that New York's use of electricity to inflict death was cruel and unusual punishment under the Eighth Amendment. Instead, the Court had held that the Eighth Amendment did not apply to the states and therefore left unexamined the New York state legislature's conclusion that electrocution produced “‘instantaneous, and, therefore, painless death.’” Thereafter, a series of state courts relied on *Kemmler* to reject summarily challenges to the use of electrocution as an execution method. In 1915, the Supreme Court used New York's conclusion, citing *Kemmler*, to resolve an ex post facto provision

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<sup>43</sup> 329 U.S. 459 (1947).

<sup>44</sup> 136 U.S. 436 (1890).

challenge to electrocution in *Malloy v. South Carolina*,<sup>45</sup> ruling that South Carolina's implementation of death through electrocution rather than hanging (the state's prior execution method) did not increase the punishment for murder but only changed its mode.

Unlike *Kemmler* and *Malloy*, the issue in *Resweber* was not whether electrocution was unconstitutional per se or more cruel than hanging, but whether the State of Louisiana constitutionally could execute Francis after the electric chair had malfunctioned during the first attempt. Indeed, by the time Willie's case came before the Court, decades had passed since *Kemmler* and *Malloy* were decided. Wright and de Blanc must have hoped that Justice Black would be open to their argument because Justice Black believed the Due Process Clause of the Fourteenth Amendment incorporated the entire Bill of Rights, making them applicable to the states. Three other Justices in the liberal wing of the Court typically voted with Justice Black: William O. Douglas, Wiley B. Rutledge, and Frank Murphy. If these four Justices and only one additional Justice could be convinced, Willie would not suffer a second electrocution attempt.

Wright and de Blanc faced further hurdles. Willie's official record before the Court had no specifics concerning Willie's attempted execution; the Court could review only the evidence presented to the Louisiana state courts, and such information was limited. Thus, the attorneys were forced to provide evidence in other ways, including describing the details of Willie's experiences in their briefs and attaching affidavits of witnesses to the execution. Fortunately, additional details about Willie emanated from the partial record of the Louisiana Pardons Board hearings, which the State's attorneys attached to their brief; the State's evidence therefore included both testimony that Willie had not been harmed during the attempted electrocution and accounts of Willie's suffering. On November 18, 1946, Willie finally got his day in Court. Wright argued his case before the nine Justices who would now be the ones holding Willie's fate in their hands.<sup>46</sup>

The path of that fate, while never certain, would continue with startling twists and turns. On January 13, 1947, two months after oral arguments, Wright spoke with a Supreme Court clerk who informed him of the most extraordinary outcome: the Court had reversed the Louisiana Supreme Court's decision. Willie now had a chance. Thrilled, Wright headed over to the Supreme Court to read the Court's opinion to de Blanc over the phone. Yet in no time Wright's and de Blanc's expecta-

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<sup>45</sup> 237 U.S. 180 (1915).

<sup>46</sup> De Blanc was unable to argue Willie's case because he was not admitted to the U.S. Supreme Court Bar. Letter from Charles Elmore Cropley, Clerk, U.S. Supreme Court, to Bertrand de Blanc, *supra* note 42.

tions for Willie were quashed. Once again, a Supreme Court clerk had been mistaken. The Court had actually *upheld* the Louisiana Supreme Court's decision, 5–4. That same day, the Supreme Court released *Resweber*.

#### B. The Court's Decision

The *Resweber* Court's outcome defied prediction. In the plurality's view, Willie's execution presented "a unique situation" in which "[t]he executioner threw the switch but, presumably because of some mechanical difficulty, death did not result." However, the Court's conclusion that a second execution would be constitutional brought some surprises in the Justices' lineup. Justice Black, considered the leader of the liberal faction, voted to affirm the Louisiana Supreme Court's decision. In contrast, Justice Burton, whose "background gave him a 'generally conservative mindset,'" wrote the dissent. Justice Frankfurter concurred with the plurality's conclusion upholding the Louisiana Supreme Court's decision; but he wrote a separate opinion to accentuate his view that the Bill of Rights, and the Cruel and Unusual Punishments Clause in particular, do not apply to the states. Especially striking is the degree to which the plurality and Justice Frankfurter accepted the State's arguments that Willie's execution was properly conducted.

Today *Resweber* is primarily used as Eighth Amendment precedent; but, surprisingly, the plurality's decision was originally written as a Fourteenth Amendment due process analysis. When drafting the plurality opinion, Justice Reed began his legal analysis with the following sentence: "To determine whether or not the execution of the petitioner may fairly take place after the experience through which he passed, we examine the circumstances *in the light of the due process clause* of the Fourteenth Amendment." This sentence was followed by a footnote citing four cases—all of which hold that the Eighth Amendment and/or the Fifth Amendment do(es) *not* apply to the states. To persuade Justice Black to join the Court's opinion, however, Reed revised this draft sentence and added a phrase (italicized below) indicating that the Court would undertake its analysis in the same manner *as if* the Fifth and Eight Amendments were incorporated.

To determine whether or not the execution of the petitioner may fairly take place after the experience through which he passed, we shall examine the circumstances *under the assumption, but without so deciding, that violation of the principles of the Fifth and Eighth Amendments, as to double jeopardy and cruel and unusual punishment, would be violative* of the due process clause of the Fourteenth Amendment.

That Justice Reed's change was made hastily, without development of a Fifth or Eighth Amendment standard, is evidenced by the fact that,

despite the change from a Fourteenth Amendment due process standard to Fifth and Eighth Amendment standards, the text of the opinion and of the draft are almost identical. Even the draft's footnote citing four cases that hold that the Fifth and Eighth Amendments do not apply to the states was retained. In addition, when discussing the issue of double jeopardy the opinion still declares that "[a]s this is a prosecution under state law the *Palko* case is decisive." In *Palko v. Connecticut*,<sup>47</sup> the Court ruled that as a result of the Fourteenth Amendment "those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' " apply to the states, but *not* the Fifth Amendment. Because the *Resweber* plurality initially designed its cruel and unusual punishments guideline to apply to the Fourteenth Amendment under the belief that the Eighth Amendment would not be pertinent, *Resweber* never created a robust Eighth Amendment standard for future use.

While ultimately assuming the Eighth Amendment's incorporation, the plurality interpreted the Cruel and Unusual Punishments Clause as prohibiting only the "infliction of unnecessary pain" (or "the wanton infliction of pain") during the death sentence, not the suffering created by an "unforeseeable accident." This view held that even if Willie had actually experienced some electrical current during the first execution, "[t]he cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." The Justices thus accepted that State officials had "carried out their duties . . . in a careful and humane manner." "Accidents happen for which no man is to blame," the Court stressed. Using this accident analogy, the Court equated Willie's suffering to the "identical amount of mental anguish and physical pain" he would have experienced in any other accident, such as a fire in the cell block. No cruelty took place because there was "no purpose to inflict unnecessary pain nor [was] any unnecessary pain involved in the proposed execution." Ironically, a footnote in the opinion suggests that the Court's determination of the standard for cruel and unusual punishment under the Eighth Amendment is based on the *Kemmler* Court's understanding of the same clause in the New York constitution.

The plurality ended its brief opinion by dismissing another aspect of Willie's legal account—arguments that "the original trial itself was so unfair" and Willie's counsel so inadequate, that Willie's conviction should be reversed and a new trial granted. In the plurality's view, nothing in the original trial's record would "show any violation of [Willie's] constitutional rights."

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<sup>47</sup> 302 U.S. 319 (1937).

The plurality's conclusions were fervently countered by the four dissenting Justices. Using language that echoed Justice Frankfurter's anti-incorporation standard for the Due Process Clause of the Fourteenth Amendment, the dissent found that "[t]aking human life by unnecessarily cruel means shocks the most fundamental instincts of civilized man." Indeed, the dissent recommended issuing a stay of execution and remanding the case to determine not only the nature of the punishment already inflicted on Willie but also that which could be imposed.

In the dissent's view, Willie's case more clearly violated constitutional due process than "many lesser punishments prohibited by the Eighth Amendment or its state counterparts." Relying on *Kemmler*, the dissent also stressed the Court's determination that "'the application of electricity . . . must result in instantaneous, and consequently in painless death.'" Therefore, the "all-important consideration is that the execution shall be so instantaneous and substantially painless that the punishment shall be reduced, as nearly as possible, to no more than that of death itself." In determining whether the procedure is unconstitutional, "instantaneous death" must also be measured against the administration of "death by installments," which is caused when electric shocks are applied after one or more intervening periods to a victim who is conscious.

The dissent particularly questioned the plurality's requirement of intentionality on the part of State officials. Such an onus was irrelevant: "The intent of the executioner cannot lessen the torture or excuse the result." The State's statutory duty was to ensure a proper execution with a single, continuous, current; yet the steps followed in Willie's execution "contrast[ed] with common knowledge of precautions generally taken elsewhere to insure against failure of electrocutions." In addition, the Louisiana legislature and courts had never "expressed approval of electrocution other than by one continuous application of a lethal current," the standard stipulated in Willie's death warrant. In other words, the plurality's assertion that "[l]aws cannot prevent accidents" evaded the issue of the State's responsibility to administer executions properly.

For Justice Frankfurter the issues took on a somewhat different form; he was the only member of the Court who based his decision on a belief that the Bill of Rights should not be incorporated. Citing history and precedent, Frankfurter stressed his opinion of the proper role for the Due Process Clause. The Clause "did not withdraw the freedom of a State to enforce its own notions of fairness in the administration of criminal justice unless . . . 'in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Unlike the dissent, however, Justice Frankfurter

expressed his disbelief that Louisiana's "innocent misadventure" with Willie's execution would be found to "offend[] a principle of justice 'rooted in the traditions and conscience of our people.'" Rather, the "Court must abstain from interference with State action no matter how strong one's personal feeling of revulsion against a State's insistence on its pound of flesh." While Frankfurter conceded his shared "sentiments" with the dissenting Justice Burton, he also affirmed his convictions concerning the detrimental potential of the dissent's approach: "I would be enforcing my private view rather than that consensus of society's opinion which, for purposes of due process, is the standard enjoined by the Constitution." Such a stance did "not mean that a hypothetical situation, which assumes a series of abortive attempts at electrocution . . . would not raise different questions." But Willie's experience did not meet this standard. "Since I cannot say that [a second execution] would be 'repugnant to the conscience of mankind,' . . . I cannot say that the Constitution withholds it."

*Resweber* generated considerable legal commentary when it was released. Both the plurality and the dissent relied on *Kemmler*'s "torture or lingering death" standard for cruelty, thereby enabling that standard to be applied to the State of Louisiana. At the same time, the *Resweber* Court never reviewed evidence of any potential pain that an individual may suffer during electrocution. Even the dissent appeared to assume that, properly conducted, electrocution would be painless and instantaneous.

On January 13, 1947, the same day *Resweber* was released, Sheriff Ozenne informed Willie of the Court's decision. Willie had worried all along about the outcome, but he still was surprised and "'sat down hard on his cot.'" By all accounts, however, Willie's response was composed. De Blanc reported that Willie was "'a lot calmer than he was last May when he walked away from the chair. He's amazing.'" As before, a primary concern of Willie's was that he be "brave" and "die like the man [he] thought [he] was." He wanted to appear strong in the way that everyone around him was urging. Even during his final moments, Willie would abide by what others told him to do.

#### VIII. NATIONWIDE SUPPORT FOR WILLIE

The *Resweber* Court's decision belied the extraordinary level of public support for Willie "from all over the country" following his May 3, 1946, botched electrocution.<sup>48</sup> In an era decades before cheap, rapid

<sup>48</sup> The majority of the letters referenced in this Section were part of a collection of materials provided by Allan Durand. Other letters were found on file at the St. Martin Parish Courthouse in St. Martinville, Louisiana. Copies of all of the letters referenced in this Section are on file with the author. The discussion in this Section also draws from the following sources: FRANCIS AS TOLD TO MONTGOMERY, *supra* note 11; RIVERDALE CHILDREN'S

technological communications, Willie's case would become a national and international phenomenon. That force would spur intense news coverage as well as scores of letters, most destined for Willie while others went straight to de Blanc, Sheriff Resweber, the Louisiana Pardons Board, and Governor Jimmie Davis. Through it all, Willie attained a near-celebrity status<sup>49</sup> that de Blanc utilized with letters of appeal published in newspapers across the country garnering donations to Willie's defense fund.

When not answering his mail, Willie spent most of his time behind bars reading and awaiting visitors. The full content of Willie's feelings and conversations will, of course, never be known, but the letters people wrote to him speak for themselves. The de Blanc family (as well as the St. Martinville Courthouse) retained a cache of some of the correspondence that people sent Willie and those involved with his case. Through these writings, a separate story can be told, a narrative not just touching on Willie's experiences but also an expression of how people perceived their post-war world—their thoughts, their hopes, their fears. Willie's case, then, helped mirror a slice of American culture.

#### A. The Bonds Across Races

Many of the letters to Willie conveyed a degree of sympathy and outrage that made clear the public did not want him to endure the physical and mental anguish of the electric chair a second time. Willie's youth and circumstances were particularly inspirational for a number of Willie's correspondents, even those younger than he. Orphans from the

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ASSOCIATION, 120TH ANNIVERSARY, 1836–1956, at 2 (1956); Melinda Shelton, *Teen Twice Sent to Die in Electric Chair*, SUNDAY ADVOC. (Baton Rouge, La.), Sept. 8, 1985, at 1B; “Be Careful How Ye Spend Thy Days,” *Warned Willie Francis*, SHREVEPORT SUN, May 24, 1947, at 3; *Willie Francis To Be Electrocuted Friday, May 9*, SHREVEPORT SUN, May 10, 1947, at 5; *Willie Francis Doomed to Die*, ILL. TIMES, May 8, 1947, at 1; *Willie Francis Faces Electric Chair Again*, COLO. STATESMAN, May 3, 1947, at 1; *The Case of Willie Francis*, OKLA. INDEPENDENT, Feb. 28, 1947, at 1; *Willie Francis Fights Second Walk to Chair*, CHI. DEFENDER, Jan. 25, 1947, at 2; *Rehearing Plea Before U.S. Supreme Court Slated for Youth Electric Chair Didn't Kill*, COLO. STATESMAN, Jan. 18, 1947, at 1; Chaze, “Plumb Mizzuble” Covers Willie Francis’ Idea of Electric Chair, *supra* note 29; Taylor, *supra* note 12, at 20–22; *Negro Lives to Tell Death Chair Story*, *supra* note 24; Mary Barrow Collins, *Letters From Item Readers, What is Jeopardy?*, NEW ORLEANS ITEM, May 16, 1946, at 16; *Willie Hinges Fate on Faith*, DETROIT NEWS, May 16, 1946, at 9; and *Willie Francis, A Magic Name*, OKLA. INDEPENDENT, Mar. 21, 1946, at 1.

<sup>49</sup> As with any kind of celebrity, there were autograph seekers as one letter to Resweber revealed. See Letter from William E. Tolbert, Maugansville, Md., to Sheriff Leonard Resweber (May 8, 1946) (copy on file with author) (“I read about Willie Francis in the paper and I know this will be out of the ordinary but I will appreciate it more than you will ever know Sheriff Resweber if you could or rather if you will get Mr. Willie Francis to let me have one of his pictures and autograph it to me personally for my collection in my album in which I have quite a few famous people who have been kind enough to grant me my request.”).

Riverdale Children's Association in New York, "the first institution in the United States dedicated to the care of Negro children," collectively sent Willie messages of good will. "We are very sorry to hear that you are in jail," wrote one child, while another, Willis Price, hoped "that God will spare you as he did before." Alfred Jarvis informed Willie that "we have been praying to ask God . . . that you will not get the chair again." Carol Allen, a fourteen-year-old white girl from Pennsylvania, commended Willie on taking his death sentence better than anyone at any age, and wishing that he not endure electrocution a second time.

Mothers across the nation felt a maternal tie to Willie. Several wrote him and upon receiving a quick and personal reply, continued to write more often. "I can't hardly find words to write to express my sympathy with you," shared Margaret Dixon from Winston-Salem, North Carolina. "Willie it's amazing to think of the courage you have . . . I just wanted you to know that along with me, my family, and the world at large is thinking of you . . ." One Texas woman, who was a Christian "mother" to the boys and girls behind bars in her state, said she felt urged to include Willie among the "children" with whom she corresponded. Mrs. Nancy Lewis from Ohio, the mother of nine boys, four of them already dead and five who served in the army, wrote Willie to say that she felt toward him like she would one of her own. Mrs. Doris McClain from Houston, Texas, also corresponded with Willie, the depth of their relationship evidenced by Mrs. McClain's response to Willie's concerns about his girlfriend.

Ruth Kingcade, a thirty-five-year-old woman from Dayton, Kentucky, wrote to Willie at least four times throughout the month of May 1946, and Willie responded at least three times. Kingcade began one letter: "Honestly, I just had to answer your lovely letter right away," and, after telling Willie about her eighteen-year-old daughter, wrote "I don't have any more children so I'm going to borrow you (whether you like it or not! ha!)." In subsequent letters, something of a friendship appears to have emerged between the two; Kingcade conveys her thoughts about a variety of topics ranging from her health to the birth of her pet kittens. Willie, meanwhile, apparently told her about his family. Yet part of the tie between the two seemed based on Kingcade's knowledge that she too could die soon. Sick for fourteen years and bedridden for nine, the nearly deaf Kingcade informed Willie that she prayed for him but that she needed his prayers too. In awe of Willie's lack of fear, she claimed that she "could use a little of that courage. . . . So, trade me just a little prayer will you?" She also requested from Willie a picture as well as his mother's address. "Toodle doo for today. I will write again soon, just for a little chat. God Bless you dear Boy. Love, Ruth Kingcade."

Many writers mentioned to Willie that they felt a connection with him. Some expressed a paternalistic concern by calling him "son," while

others referred to him as a brother and friend. Empathy and sympathy abounded for his mother and his family. Although many of the people who wrote to Willie did not know much about him, they still claimed a link. "I have read and reread your letter to [Governor] Davis and really it seems as though I have known you and seem as if there was blood connections there somewhere," wrote Eleanor Smith of Houston, Texas. Another writer from Detroit, Michigan, made the following plea: "If for no other reason, then to [spare] the poor, innocent mother of this boy the tons of sorrows the Louisiana State authorities will heap . . . upon her head . . . if they take the life of her humble son Willie . . . I beg, that you will not forsake this boy and his parents in their darkest hours . . . in this great battle for young WILLIE'S LIFE."

One of Willie's most passionate and eloquent supporters was an English woman, Cicilie Taylor, who wrote a burning indictment of the American judiciary, blaming "white American prejudice" for "[t]his ghastly execution experience." Taylor's letter deplored the American attitude that blacks are "not supposed to be human," wondering if *Resweber* would have been decided differently if Willie's "judges had been born less fortunate" and "experienced [Willie's] unhappy plight." Perhaps through a shared background, the Justices could realize the "terrible life" blacks had to tolerate "because of a tradition that should never have existed in the first place." Taylor also reminded Willie of the black citizens who "fought and shed blood for Uncle Sam" and how the English "rated the Colored [American] soldiers higher in manners than the average white [soldier.]" Taylor ended her letter expressing her sympathies for Willie's parents and of course for him, emphasizing his age: "May the Lord continue to spare so young a life[,] a life that had only just begun."

#### B. The Bonds of Religion and Risk

Predictably, a number of letters were religious in nature. Some contained quotes from various parts of the Bible, and one letter had enclosed a few religious tracts for Willie to read. Others referenced the 23rd Psalm, the story of Daniel in the lion's den, and the three Hebrew children. Mrs. Miller from Fort Worth, Texas, who addressed her letter to "Willie Francis (Negro who survived death chair)," asked Willie to "please let me know immediately" if he was without a Bible. Other religious letters were more foreboding. Mr. A.G. Louis-Luecke of Clifton, New Jersey, warned Willie that men who do not believe that they have been saved by Jesus will "go to hell," then demanded to know: "Do you, Mr. Francis, believe this?" In another letter, marked "urgent," an unidentified individual from Detroit, Michigan, wrote: "I guess by now you realize how short life is compared to eternity. . . . Where are you going to Heaven or to hell. You know Willie God has wonderfully blessed

you by sparing your life for a few more days (which will seem like seconds). Are you saved Willie if you are you go to Heaven for *Eternity* if you aren't you know where you will go." Some writers simply wanted to let Willie know that someone was praying for him, that he was not alone.

At least two of the more religious letters were written in response to pictures of Willie clutching his prayer book. Other letters appeared to be responding to Willie's comment that, while he sat in the electric chair, he wondered what heaven and hell would be like. Arnold Drange, who introduced himself as "a veteran and a student at Augsburg College" in Minneapolis, Minnesota, wrote: "I have been deeply touched in reading the story of your being spared from death. . . . What touched me most, however, was that you said you wondered what hell is like." Drange then launched into a three-page letter providing his answer to that question. Mrs. R.S. Engel from Amsterdam, New York, wrote to Willie that she was "deeply concerned" upon reading that during the execution attempt, he was unsure as to whether he was going to heaven. "Evidently you have never thot of these things before," she wrote. "Will you go with me now to God's word and see what he has to say." Five pages of scripture and religious teachings followed.

The notion that God had spared Willie's life was a recurring theme. Many saw Willie's botched execution as a sign of divine intervention. "I ben reading the paper how God has delivered you from the electric chair and didn't allow the power of the electricity to harm you," wrote Sylvester Coleman from Winston-Salem, North Carolina, who identified his age as "around 20 years old." "The 'Good Master' saved you once as he will save you again," wrote Margaret Dixon, while Rosa Cole from Louisville, Kentucky, conjectured, "You are so young may be God wants to give you another chance."

Similarly, Willie's survival was viewed by many of his correspondents as something of a miracle. "Your miraculous escape from death several days ago has interested me greatly," began a letter from Laura Stephens of San Antonio, Texas, while Mrs. Ludwig Bergum of New London, Minnesota, declared her firm belief that "God has a purpose in sparing your life so miraculously." Evelyn Moyer from Wheeling, West Virginia, seemed to suggest that Willie would cheat death again when he returned to the electric chair, as long as he "believe[d] with all [his] heart." Dorothy Barbara Kingcade of Newark, New Jersey, echoed that sentiment: "If god don't want you to die in that electric chair you won't." A few letters, directed toward Willie's jailers, took on a more ominous tone, such as one addressed to Sheriff Ozenne from an unidentified individual in Chicago, Illinois: "I have heard when a person is saved from [the] chair it means he is not to go to his death. . . . If this boy is put to death again some thing will come of it. . . ." Estelle Hoffstadt of Los Angeles, California, went so far as to say "it is the

Lord's will that William Francis should be pardoned. . . . [I] would be afraid to try the death sentence again if I were those men."

If these statements encouraged Willie to hope that divine intervention might result in his sentence being commuted, his optimism was likely countered by letters from writers who were less certain of God's intentions. "A God who could save you from the electric chair is well able to save you from it again, *if it is His will*," wrote Mrs. William Sydow of Girard, Pennsylvania. "We must always pray 'Thy will be done.' Perhaps God wanted you to get better fitted for Heaven and then take you Home soon." "Received your letter and was glad to hear from you," began Lorena Hamm of Oak Park, Illinois. "We have talked about writing letters as you suggested; but we have prayed that the Lord should get His Will done. You see, He is Sovereign and He can put forth His hand to do that which is best." Rosa Cole of Louisville, Kentucky, approached the subject of Willie's possible death more delicately: "I believe that if you are given a chance you will try to make good. . . . If, however, it is your time to go pray hard that your soul may be saved if the body isn't."

Others felt God was not ready for Willie, at least not yet, for God had to prepare Willie's place in heaven. Heaven became the only future Willie and so many readers could look forward to in the midst of this not only cruel and unusual punishment, but cruel and unjust punishment. Willie should not be executed if for no other reason than the fact that Jesus had already died for the sins of others. Perhaps God had also prevented Willie's execution because Willie still had work to do here on this earth. Willie could improve prison morale, for example, or he could be a preacher; to condemn Willie is to "rob God."

Ministers, reverends, and priests from around the country tried to use their influence to spare Willie's life. As Father Flanagan of Boys Town, Nebraska, wrote the Louisiana Pardons Board, "Deeply interested in saving life of Willie Francis, would you, my dear Chairman, use your power of authority to commute the death sentence? May God direct you to do His Holy Will!" Yet, as letters and donations poured in, some simply wanted Willie to write them. They found comfort in corresponding with him as they faced their own fears of mortality. Ruth Kingcade in particular appeared at ease in communicating with Willie about her hopes for heaven and the role of risk in the future of their lives. "Funny things happen in this world and no one knows how anything will work out in advance, but the main thing for you to do and I know you are doing it, is to keep in your mind and heart that god is running the whole show, and everything happens for the best—even if we can't see it that way at the time."

### C. The Bonds of Punishment and Forgiveness

As the date of Willie's appeal to the Louisiana Pardons Board approached, he often asked his supporters to write letters to the Pardons Board on his behalf. It appears that most were happy to comply, although Mrs. W.H. Petersen of Downers Grove, Illinois, seemed to take some umbrage at his plea: "I received a letter signed by you yesterday, with the request that I write to your lawyer and to the Pardon Board, for a commutation of sentence. . . . I would have liked to receive a letter from you in answer to the one I sent you. Your soul's eternal salvation is of infinite more importance than to have your life spared." Notwithstanding her pique, however, Mrs. Petersen did send the letters that Willie requested.

Letters to the Pardons Board typically invoked Willie's suffering or God's will. "Put yourself in [Willie's] position and think how you would feel," implored Magnolia Milton of Los Angeles, California. "If God spared his life once from the chair why try to undo what God has done." Richard Hall of Haverhill, Massachusetts, asked the board to "consider the nerve wrecking strain of one time facing death," while Lillian Overy of Berkeley, Missouri, reminded them that "God knows best." George White of Harlem, Georgia, took a more cautious approach: "I would not like for it to be said at any time that I would condone crime, but under the existing circumstance I wish to make just this plea for Willie Francis, provided that you would feel that it is reasonable or justifiable, that you would commute his sentence to life imprisonment." Reverend L.H. Lewis, a Louisiana native serving in Madera, California, offered to accept responsibility for Willie: "Should you let him go free send him to me and I shall do all I can to help him to be a better boy and I shall make reports to you as often as you wish."

De Blanc also frequently received communications related to Willie. Forty-six students of criminology and penology at Temple University in Philadelphia wanted to help de Blanc by sending him a copy of their class textbook, calling his attention to pages "graphically describ[ing] the mental anguish experienced by one who is about to be executed" that they thought would be "of service to [him] in defending [his] client." They expressed concern for Willie and praised de Blanc for his efforts to save "that poor negro boy." One letter was unusual for its suggestion that Willie be "put to . . . sleep with some aneathetic forever" rather than be electrocuted, to prevent his corneas from burning. This proposal, made by Mrs. J.R. Nichols of Timpson, Texas, stemmed from Willie's publicized willingness to donate his eyes to a blind man after his death.<sup>50</sup>

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<sup>50</sup> It is evidence of de Blanc's dedication that, like Willie, he often responded personally to the letters he received. De Blanc wrote numerous notes thanking members of the public

Willie's culpability, or lack thereof, did not appear to have been a driving force among those who wrote in support of him. Some letter-writers professed a belief in his innocence, such as Sherman Green of New York City, who explained to Willie that "we are going to help you all we can because I feel like you are not guilty, of the crime that you are charge with." Many believed that Willie's sentence should be commuted to life in prison, and felt he had suffered enough. Others acknowledged the crime but nonetheless expressed support: "[S]o sorry that you did what you did but some times sin will make us do things that rong," wrote Mrs. White and Mrs. Wilson of Asheville, North Carolina. "[D]o hope that you can live," they continued. "Keep faith in God. Tell . . . your family we are deeply impressed." In a letter to Governor Jimmie Davis, an unidentified individual from Steubenville, Ohio, wrote: "Please do not electrocute the young man Negro. . . . He should not of kille either. Let this be a good lesson to him & all others." Hardy Hollingquest of Grambling, Louisiana, phrased a similar sentiment directly to Willie: "[I]f you get out of this let this be a lesson to you Willie. . . . We are praying to God for you to get a fair trial."

Other references to the crime were more oblique. Mrs. Wilbur Knight of Cokeburg, Pennsylvania, implored Willie to "call on Jesus to forgive you of any thing that you've done." Eleanor Smith of Houston, Texas, meanwhile, candidly informed Willie that she "w[ould] not say anything about [his] crime" in her letter. Indeed, many letters made no reference at all to the murder; it appears that Mrs. McAvena from Canada spoke for many of Willie's supporters when she expressed the belief that "[i]t matters not if you are guilty or not in the sight of God." Some wondered how any man of God could send a child to the electric chair in the first place, while others sent letters sharing their experiences or knowledge of the electric chair. Mrs. Mary Barrow Collins was perhaps most direct in her letter to the editor of the *New Orleans Item* challenging readers on the meaning of double jeopardy: "This letter is not prompted by pseudo-sentiment, although I do feel sorry for this poor, little, stuttering scrap of humanity, maybe more fit for a mental institu-

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for their support of Willie, often including a sentence similar to this one, from a letter addressed to Reverend D.W. Perkins of Troy, Alabama: "[W]hen this case is finally over, I want you to feel that you have done as much as any one in helping [Willie's] noble cause." Letter from Bertrand de Blanc to Rev. D.W. Perkins, Troy, Ala. (Feb. 26, 1947) (copy on file with author). In another letter, de Blanc's fervor compelled him to pressure even Father Hannigan: "A tremendous flood of criticism will arise against the Catholic Church if Willie Francis goes to the chair again. . . . Do, please, come out of your obscurity; you do not have to say anything; just, do please, be present. Please remember that you live in this vicinity and you will be branded a coward and it will harm your spiritual work in the future. In other words, my dear Father Hannigan, you are 'on a spot.'" Letter from Bertrand de Blanc to Rev. Charles Hannigan, New Iberia, La. (May 24, 1946) (copy on file with author).

tion. But my deep and abiding love for the Constitution of the United States, which is the supreme law of the land, is my reason for writing.”

Inspired by such Constitutional fervor, many letter-writers made tangible efforts to assist Willie. They offered to diagnose his speech impediment, sent him money, sponsored petitions, and, in several instances, volunteered legal advice, including evidence of other botched electrocutions. Through all these efforts, the same themes emerged, most particularly, the racial, legal, and moral/ethical issues of sending Willie back to the chair for the second time. These were matters that Willie’s family most of all would have to face.

#### D. The Bonds of Family and the Future

Willie’s family visited him throughout his year-long stay in jail. Those members of his family in Texas and California sent letters updating him on various friends and relatives, while encouraging him to continue praying.<sup>51</sup> Willie’s family would also get involved in addressing

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<sup>51</sup> The collection of materials provided by Allan Durand contained eight letters from various members of Willie’s family. See Letter from Beulah Francis, Los Angeles, Cal., to Willie Francis (May 14, 1946) (copy on file with author) (“You can image How glad I was to hear from you. It find me and my husband doing fine. I hope you are doing ok. . . . We are praying for you and every one in California is praying for you. Mrs. Fize said she is praying for you every night and morning. You must pray hard too.”); Letter from Beulah Francis, Los Angeles, Cal., to Willie Francis (Jan. 13, 1947) (copy on file with author) (“Had a letter from Cecelia telling me all the children was sick with a cold. I hope they are better now. I can image she have a time with tham because they are so bad. We really been having some nice weather. It really do remind me of the spring. It be so Sunny. We are still praying and hoping every thing will turn out fine.”); Letter from Mae Ella Francis, St. Martinville, La., to Willie Francis (May 7, 1946) (copy on file with author) (“every body is well. Mother feeling much better. Nonnelly Lee was here but she come Friday Evening.”); Letter from Doris Francis, Dallas, Tex., to Willie Francis (May 14, 1946) (copy on file with author) (“We arrived back home safely. All of the family is well in health but not in mind. You brother Joseph Nega says please don’t will your eyes to nobody forget about that and pray. If there is anything that you want anything that we can do let us know. We have all the churches over here praying for you. And we are fasting and praying ourselves. And don’t you for get to pray.”); Letter from Scerita Francis, Port Arthur, Tex., to Willie Francis (May 6, 1946) (copy on file with author) (“Sammie is the badest little thing you could see & he so fat. Mrs. Branch have a time with him. Willie I want you to contain praying & pray as hard as you could. You know God will answer all prayer.”); Letter from Emily Francis, Port Arthur, Tex., to Willie Francis (May 13, 1946) (copy on file with author) (“Every body over here are doing o.k. Sammie is bad as can be I cant do anything with Sammie. Willie I wont you to contained praying God will ans all pray is Is their a praying this is a time to pray.”); Letter from Emily Francis, Port Arthur, Tex., to Willie Francis (May 14, 1946) (copy on file with author) (“I’m sending your dollar. I have just wrote you a letter. So their is two dollar Susie is sending you one two. She send her best regard. Well keep on praying. Do you want your bible I will send it to you.”); Letter from Jane Gage, Beaumont, Tex., to Willie Francis (May 6, 1946) (copy on file with author) (“Bill just don’t what to say that why I havnt written befor now. So may God Bless You and keep you for us he save you once he is able to do it again You just rust in god I just cant write so pleas for give me Love Sis.”).

perhaps the most unusual collection of letters Willie received, those sent from Mrs. Wilmer Cox of Dallas, Texas. Mrs. Cox asked Willie if he would donate his eyes to her brother if Willie was forced to face the electric chair a second time. At first, Willie obliged. Willie's eagerness to pass along his sight may have been connected to the friendship he formed as a child with an elderly blind neighbor in St. Martinville. But, just as likely, Willie's acquiescence was also part of his continual and lifelong effort to satisfy just about any request made of him.

Mrs. Cox's request was not solely self-interested, however; she was clearly concerned about Willie. She contacted at least one newspaper to relay the news of Willie's offer and her desire that Willie be saved. She also sent petitions on Willie's behalf and, in a letter to de Blanc, expressed her belief that Willie was innocent. By that time, de Blanc had drawn up Willie's will in which he left nothing to anyone except his eyes to Mrs. Cox.

In the end, the gift was not carried out. It is unclear which party was responsible for breaking the deal. One view is that Willie's mother forced him to forego his promise to Mrs. Cox. While Willie fretted over withdrawing his commitment, in the end, as an obedient son, he listened to his mother and wrote Mrs. Cox a letter of apology for changing his mind. Another possibility is that Mrs. Cox broke the agreement and wrote to de Blanc explaining that she thought the operation was too risky.

Apart from such highly publicized exchanges, Willie's fame also came from his frequent jailhouse interviews. Of all the topics discussed, Willie's plans for the future, a life without fear of the death penalty, were among the most compelling. After telling an interviewer that " 'maybe God will save me again,' " Willie said he would " 'be satisfied with life imprisonment.' " When asked what he would do if he were freed, Willie replied "that he would go to Los Angeles and work there— 'any kind of work.' " Willie's sister lived in Los Angeles. To another paper, Willie stated that he would " 'be happy to be a cook in the pen[itentiary]. I use to cook for my daddy pretty good and he says I got a knack with mustard greens and sidemeat.' " Willie added that he would also "like to be a priest, 'and maybe ride a ferris wheel and go swimming sometime.' " As de Blanc himself noted in an interview nearly forty years after Willie's death, " 'I think [Willie] would have made a good citizen if his sentence had been commuted to life. Back then he would have gotten out after about 10 years for good behavior.' "

Of course, none of Willie's aspirations would ever be realized. While the entire country was writing Willie about their hopes and dreams, Willie would soon learn that the only future he faced was his own demise.

## IX. POST-RESWEBER DYNAMICS

## A. The Media's Views

*Resweber's* outcome gripped the press and public nearly as much, it seems, as the initial botched electrocution.<sup>52</sup> Many were strongly critical of the Court. Of course, some news accounts and commentary supported the Court's opinion, stressing that the decision was fair and the controversy costly. Predictably, a front-page article with a photograph of Willie in the January 17, 1947, *Messenger* declared that "[i]n St. Martinville . . . the verdict of the Supreme Court is looked on as just and favorable." Commentary by the *Messenger's* editor, Marcel Bienvenu, that same day, also leaves no ambiguity about the city's sentiments.

Everyone in St. Martinville will be glad when this Willie Francis case is finally ended with his execution. Most of us just can't see why all those big newspapers up North are playing him up to be such a repentant little boy when he's fully grown and a confessed murderer and from his own confession and reports from his arrest in Texas he was not about to stop being a tough and dangerous character.

Indeed, a *Messenger* commentary the following week complained that "this negro arch-murderer has been, and is being given an overdose of notoriety by the press—including the local press." The writer noted that the *Messenger* would have exhibited "better taste, had the picture of the late Mr. Thomas been given prominence instead of that of this negro." Regardless, the *Messenger* continued its coverage.

As would be expected, one group harshly critical of *Resweber* was the NAACP. The focus now was on Louisiana's governor, Jimmie Davis, to intervene. A.P. Tureaud, legal counsel to the Louisiana Conference of the NAACP who had appeared with de Blanc at the Pardons Board hearing, once again became involved with Willie's case. He wired Governor Davis urging him to follow the precedent set by a previous Louisiana

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<sup>52</sup> The discussion in this Section draws from, among other sources, KING, *supra* note 3, at 224–29; MILLER & BOWMAN, *supra* note 3, at 123–24; Bob Hamm, *Willie Becomes a Federal Case*, DAILY ADVERTISER (Lafayette, La.) Apr. 26, 1993, at B1; *Commutation of Sentence from Death to Life Term Sought by Atty. DeBlanc*, LA. WKLY. (New Orleans, La.), Feb. 15, 1947, at 1; Tom Gillen, Jr., *Around the Capitol*, WKLY. MESSENGER (St. Martinville, La.), Jan. 31, 1947, at 4; *New Plea Filed for Francis*, WKLY. MESSENGER (St. Martinville, La.), Jan. 31, 1947, at 1; P.L. Begnaud, *Breaux Bridge Chronicle*, WKLY. MESSENGER (St. Martinville, La.), Jan. 24, 1947, at 1; *Rehearing Plea Before U.S. Supreme Court Slated for Youth Electric Chair Didn't Kill*, *supra* note 48; *Counsel Seeks Rehearing, NAACP Urges Gov. Davis Commute Death Sentence*, LA. WKLY. (New Orleans, La.), Jan. 18, 1947, at 1; *Francis Must Die in Electric Chair*, WKLY. MESSENGER (St. Martinville, La.), Jan. 17, 1947, at 1; "Blackie," Editorial, *This & That*, WKLY. MESSENGER (St. Martinville, La.), Jan. 17, 1947, at 1; James Marlow, *Francis Gets the Details of His Case*, RALEIGH TIMES (Raleigh, N.C.), Jan. 16, 1947, at 4; and Editorial, *Willie Francis Case*, TIMES-PICAYUNE (New Orleans, La.), Jan. 14, 1947, at 8.

governor who had commuted to life imprisonment the capital sentence of a prisoner whose execution date the sheriff forgot. However, “[u]nder Louisiana law [Davis could] not extend executive clemency unless the Board of Pardons and Reprieves so recommend[ed].” So Davis did nothing.

Additional barbs were directed at Justice Frankfurter’s concurrence both in the form of public criticism as well as scores of heated letters sent to him personally. Commentary not only came from the syndicated news but also well known celebrities. Famed newspaper and radio commentator Walter Winchell and “most eastern columnists” demanded that Willie’s sentence be commuted. Prominent columnist James Marlow’s “Dear Willie”—a long open letter to Willie explaining the Court’s decision—was particularly poignant. Marlow closed his letter by focusing on Frankfurter.

Dear Willie—I thought you’d like to know how it was when nine men you never saw, sitting in a marble palace, talked about your future.

. . . .

[Justice Frankfurter] said the whole situation was very “disturbing.”

I bet you never dreamed in all your life that some day you’d be very “disturbing” to a Supreme Court justice.

But in the end he agreed with the other four justices, that sending you back to the chair isn’t cruel.

#### B. Justice Felix Frankfurter’s Response

In his concurrence Justice Frankfurter had suggested that the choice before the Court was whether mitigation of Willie’s death sentence should be left to Louisiana’s “executive clemency” or required by the Court.<sup>53</sup> Less than three weeks after *Resweber*—whether because of personal “revulsion against a State’s insistence on its pound of flesh” or in response to public criticism—Justice Frankfurter took secret action to induce that “executive clemency.” He wrote to his Harvard Law School

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<sup>53</sup> The discussion that follows regarding Justice Frankfurter draws from Louisiana *ex rel. Francis v. Resweber*, 329 U.S. 459 (1947); Letter from Felix Frankfurter, Justice, U.S. Supreme Court, to Monte W. Lemann (Feb. 3, 1947) (copy on file with author); Letter from Monte W. Lemann to Hon. James D. Simon (Apr. 19, 1947) (available at Library of Congress, Manuscript Division, The Papers of Harold H. Burton, Box 69, Folder 3); Letter from Felix Frankfurter, Justice, U.S. Supreme Court, to the Justices of the U.S. Supreme Court (Apr. 23, 1947) (available at Library of Congress, Manuscript Division, The Papers of Harold H. Burton, Box 69, Folder 3); MILLER & BOWMAN, *supra* note 3, at 127; Melvin I. Urofsky, *The Court at War, and the War at the Court*, 1 J. SUP. CT. HIST. 1, 2 (1996); Miller & Bowman, *supra* note 38, at 37; *Must Go to Chair Again: Willie Francis Loses Plea to Louisiana Pardon Board*, N.Y. TIMES, Apr. 23, 1947, at 52; and *Vinson Excelled in Federal Posts*, *supra* note 41.

roommate, Monte E. Lemann, a member of the Louisiana bar, to explore options. Ironically, in his letter to Lemann, Frankfurter used the same kind of “risk of error” language he applied to the *Resweber* case itself, albeit in the opposite direction; he had different goals now. Frankfurter argued that clemency would be likely “if leading members of the bar pressed upon the authorities that *even to err on the side of humaneness* in the Francis situation can do no possible harm and might strengthen the forces of goodwill, compassion, and wisdom in society.” Frankfurter also sent a “strictly confidential” copy of his letter to Justice Burton.

Two months later, Lemann responded by writing to Judge Simon, a former student of his at Tulane Law School, urging clemency for Willie based on Willie’s prior botched electrocution. The next day, without revealing his own role, Frankfurter sent a copy of Lemann’s letter (to Judge Simon) to each of his fellow Justices. Despite Frankfurter’s enthusiastic praise of Lemann’s letter, the attempt was unsuccessful. On April 22, 1947, the Pardons Board once again denied Willie’s appeal. Neither Frankfurter nor, it seems, Burton ever conveyed to their colleagues on the bench that Frankfurter had asked Lemann to help Willie.

If Frankfurter’s contemporaries had been aware of his attempt to save Willie, they might not have viewed his involvement in a political decision in the same manner it would be regarded today. Justices Douglas, Murphy, Jackson, and Frankfurter had all helped the Roosevelt administration “in many ways, from drafting speeches and legislation to suggesting” individuals to serve in “key roles,” before and during the recently concluded World War. Chief Justice Vinson offered private, bedtime “advice and counsel on many problems” to President Truman. Nonetheless, authors Arthur Miller and Jeffrey Bowman ask the right question: “If Frankfurter’s extrajudicial actions to try to save Willie’s life were proper for a Supreme Court justice, why the secrecy?”

### C. Wright’s and De Blanc’s Continuing Efforts

In the meantime, Wright and de Blanc pressed on.<sup>54</sup> On January 29, 1947 (a few days before Justice Frankfurter’s letter to Lemann), they

<sup>54</sup> The discussion in this Section draws from Louisiana *ex rel. Francis v. Resweber*, 329 U.S. 459 (1947); Louisiana *ex rel. Francis v. Resweber*, 330 U.S. 853 (1947); *Francis v. Resweber*, 331 U.S. 786 (1947); *State v. Francis*, No. 2161 (16th Jud. Dist. Ct. La. May 5, 1947); Affidavit of Louie M. Cyr, *supra* note 29; Affidavit of Ignace Doucet (Apr. 3, 1947), *supra* note 29; Petition for Rehearing, Louisiana *ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (No. 142); Motion for a New Trial, *State v. Francis*, No. 2161 (16th Jud. Dist. Ct. La. Apr. 23, 1947); Motion in Arrest of Judgment, *State v. Francis*, No. 2161 (16th Jud. Dist. Ct. La. Apr. 23, 1947); Notice of Intention to Apply for Writs, *State v. Francis*, No. 2161 (16th Jud. Dist. Ct. La. May 5, 1947); Application for Certiorari, Mandamus and Prohibition, *State v. Francis* (La. May 5, 1947) (available at St. Martin Parish Courthouse, St. Martinville, La.); *State v. Francis*, No. 38,578 (La. May 6, 1947); *State v. Francis*, No. 38,580 (La. May 7, 1947); Death Warrant, Executive Department, State of Louisiana (Apr.

filed a petition for rehearing with the Supreme Court focusing on a 1946 amendment<sup>55</sup> to the Louisiana electrocution statute. That amendment now specified that the “ ‘operator of the electric chair . . . shall be a competent electrician who shall not have been previously convicted of a felony.’ ” Neither the executioner, who “ ‘had no knowledge whatever of electricity,’ ” nor his assistant, who “ ‘was a convict from the state penitentiary,’ ” would have qualified under the amendment. As Wright and de Blanc asserted:

A study of the change [in the electrocution statute] shows that the legislature of the State of Louisiana believed that the failure of the execution of Willie Francis resulted from the incompetence of the execution officials. In other words, the State of Louisiana has publicly confessed her error and has made provision to eliminate a repetition thereof.

Supreme Court rules mandated that a petition for rehearing not be granted unless a Justice who agreed with the judgment of the Court “ ‘desires it, and a majority of the court so determines.’ ”<sup>56</sup> Knowing this, Wright and de Blanc referred directly to Justice Frankfurter’s concurrence in their petition. They argued that the plurality had erred by limiting the meaning “ ‘of due process under the Fourteenth Amendment to the Fifth and Eighth Amendments’ ” instead of considering “ ‘[p]rinciple[s] of justice rooted in the traditions and conscience of our people.’ ” In contrast, “[t]he concurring opinion of Mr. Justice Frankfurter recognizes the full and broad concept of due process in the Fourteenth Amendment, but does not and cannot apply those concepts to this case because the facts of this case are not before the Court.” Without “ ‘a hearing on the facts and circumstances attending the abortive execution,’ ” which the Louisiana courts had denied to Willie, there was no way to know whether the case fell within Justice Frankfurter’s “ ‘hypothetical situation.’ ” According to Frankfurter’s concurrence, such a situation might violate due process because it “ ‘would . . . raise different questions.’ ” Once again, however, Frankfurter declined the opportunity to

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28, 1947) (copy on file with author); KING, *supra* note 3, at 241, 246; MILLER & BOWMAN, *supra* note 3, at 132, 135–38; Lewis Wood, *Youth Due to Go to Chair Again Today as High Court Denies Plea*, N.Y. TIMES, May 9, 1947, at 1; *Francis to be Electrocuted Today*, WKLY. MESSENGER (St. Martinville, La.), May 9, 1947, at 1; *Final Plea for Willie Francis*, N.Y. TIMES, May 8, 1947, at 52; John LeFlore, *Continue Fight to Save Francis*, CHI. DEFENDER, May 3, 1947, at 1; *Execution of Francis Set for May 9*, WKLY. MESSENGER (St. Martinville, La.), May 2, 1947, at 1; John LeFlore, “*Drunk*” *Charge in Francis Case*, CHI. DEFENDER, Apr. 26, 1947, at 1; *Executioner “Drunk” Pardon Board Told*, N.Y. TIMES, Apr. 19, 1947, at 8; *Willie Francis’ Plea Set for April*, WKLY. MESSENGER (St. Martinville, La.), Apr. 4, 1947, at 3; and *Francis Ruling Blamed on Last-Minute Switch*, WASH. DAILY NEWS, Jan. 14, 1947, at 2.

<sup>55</sup> 1946 La. Acts 425.

<sup>56</sup> SUP. CT. R. 33 (amended Oct. 13, 1947).

vote to grant Willie relief. On February 10, 1947, the Court denied Wright's and de Blanc's petition.

Still, the attorneys refused to relent. De Blanc applied for yet another hearing before the Louisiana Pardons Board, which the Board granted. About three weeks before the hearing date, de Blanc received information that underscored the need for an investigation of the facts surrounding Willie's botched electrocution. Louie M. Cyr, a former New Iberia Parish city judge, paid a social visit to de Blanc. Upon learning that de Blanc was still working on Willie's case, Cyr lamented "that Willie had to suffer so much at the hands of the two drunken executioners." De Blanc was stunned. This was evidence he had never heard before. Cyr explained that the day after Willie's attempted electrocution, George Etie, a friend of Cyr's who had witnessed the execution, said that he and the executioners had been visiting bars in New Iberia only hours before the execution started. Etie blasted the inhumanity of the electrocution, stating that the two executioners "were so drunk that it was impossible for them to have known what they were doing." According to Etie, Willie also was in great pain, kicking and jumping so much he turned the 300-pound electric chair a quarter of the way around. Faced with the chair's failure, the executioner swore at Willie.

While Wright and de Blanc had contended that a full investigation of Willie's execution was necessary, such an investigation had never transpired. Unfortunately, too, Etie, for whatever reason, feared putting his account in an affidavit. Instead, Cyr stepped forward to provide an affidavit describing his conversation with Etie. Ignace Doucet, another witness to the flawed execution, also agreed to sign an affidavit stating that the two executioners had been "drinking during the whole last part of the morning."

With these two affidavits, de Blanc appeared before the Louisiana Pardons Board—once again asking that Willie's sentence be commuted to life imprisonment. But the move was to no avail. On April 22, 1947, the Pardons Board denied de Blanc's request, despite the many letters they had received supporting Willie's plea.

In desperation, de Blanc tried a different approach. The next day he filed a motion for a new trial in Louisiana district court based on the argument that crucial evidence existed that had not been presented during the first trial, specifically, Ida Van Brocklin's eye witness testimony about seeing a car with its lights on in front of Andrew Thomas's house. Because of the nature of her potential testimony, "the ends of justice would be served by the granting of a new trial." (De Blanc filed a motion for arrest of judgment at the same time.) Questioning Willie's guilt departed from de Blanc's prior strategy of focusing solely on the inhumanity of a second execution. At long last, de Blanc's thinking was

coinciding with the original arguments offered by Tureaud and the NAACP. The change in strategy was more risky for de Blanc, both legally and politically. In essence, he would be claiming that the all-white jury wrongly convicted a young black for the murder of a white man, a position that could cause Louisiana whites to view Willie with far more hostility.

Before de Blanc had an opportunity to argue in favor of the motion, Willie received his next death warrant; he was to be executed on May 9, 1947. Four days before this new execution date, on May 5, 1947, de Blanc and District Attorney Pecot appeared before Judge Simon. Simon denied both motions based on Louisiana law which required that "every motion for a new trial or in arrest of judgment must be filed and disposed of before sentence." Willie's original trial attorneys had never raised the issues. In response, de Blanc served notice that he intended to apply to the Louisiana Supreme Court. In his Application for Certiorari, Mandamus and Prohibition, de Blanc argued that because the execution statute under which Willie was sentenced had been repealed (and replaced with a statute requiring that the electrocutioner be a "competent electrician, who shall not have previously been convicted of a Felony"), Willie's sentence was "without force and effect." Therefore Willie had yet to be sentenced and the motions for a new trial and arrest of judgment were timely. The Louisiana Supreme Court denied the application on May 6, 1947. The following day the court denied a different application for writs including habeas corpus.

One more move remained for Willie's attorneys. While de Blanc was making his two now-denied requests in Louisiana, Wright had been devising a last-chance petition for habeas corpus to be filed with the Supreme Court. De Blanc flew to Washington, D.C. for oral argument on May 8, 1947. Once again the two attorneys planned to change Justice Frankfurter's mind. According to Wright, it appeared as though Justice Burton's dissent may at one time have constituted the majority opinion and that one change in vote, possibly Justice Frankfurter's, moved it to the minority opinion. Justice Frankfurter, therefore, was key.

In his habeas petition, Wright argued that "the executioner and other persons connected with carrying out the execution were so drunk that it was impossible for them to know what they were doing." The State was negligent because there was "only a convict" in charge and not a competent electrician. "The scene was a disgraceful and inhuman exhibition, that as soon as the switch controlling the current was taken off, the drunken executioner cursed Francis and told him he would be back to finish electrocuting him, and if the electricity did not kill him he would kill him with a rock." At the end, Wright expounded on the mental state of the executioners. According to Wright, the two men were propelled by "sadistic impulses and either willfully, deliberately or

intentionally applied less than a minimal lethal current, for the purpose of torturing the petitioner.’” Therefore, Willie was “cruelly, inhumanely and excruciatingly tortured.” Ultimately, Wright made two requests of the Court: first, stay the execution and, second, either select a special commissioner to research the facts behind the first attempted electrocution or order the Louisiana courts to mandate an investigation. In addition, de Blanc presented a separate petition asking the Court to review the denial of the Louisiana Supreme Court “to grant such a writ.”

The petitions arrived ten minutes before the beginning of oral arguments and a mere twenty-four hours before Willie’s scheduled May 9 execution. As a result of the rush, Chief Justice Vinson called an immediate recess for the Justices to meet together and address, yet again, Willie’s future. The conference lasted more than an hour, but at its conclusion Vinson announced that Willie’s petition had been denied because the petitioners had not exhausted all their lower court remedies before seeking habeas in the Supreme Court. Vinson, however, added an important phrase: “In view of the grave nature of the new allegations, set forth in this petition, the denial is expressly without prejudice to application to proper tribunals.”

Despite the denial, the Court’s recognition of the “grave nature” of the claims and the fact that the denial was “expressly without prejudice” gave Wright and de Blanc hope. They felt that the Court would be more receptive to their plea if the federal district court in Louisiana decided the petition first. They also realized that Willie could be executed even before their petition could be reviewed. On the evening of May 8, 1947, de Blanc left Washington, D.C. to return to New Orleans, all the while drafting the petition he intended to file with the Louisiana Supreme Court the next morning, May 9, Willie’s execution date.

#### X. WILLIE IS FINALLY EXECUTED

By the time de Blanc returned to St. Martinville, Willie’s execution was being readied.<sup>57</sup> Coverage in the *Messenger* was a reminder of the

<sup>57</sup> The following discussion of Willie’s final execution draws from KING, *supra* note 3, at 269, 276–77, 280–81; MILLER & BOWMAN, *supra* note 3, at 139, 141; Ron Wikberg & Wilbert Rideau, *The Deathmen*, ANGOLITE, Jan./Feb. 1991, at 29, 41, 43; *Willie Francis Goes to Electric Chair*, COLO. STATESMAN, June 10, 1947, at 1; *Willie Francis Pays Penalty*, TAMPA BULL., May 17, 1947, at 1; *LA. Boy Makes Second Trip To ‘Hot Seat’*, INDIANAPOLIS RECORDER, May 17, 1947, at 1; *‘Nothing at All’, Willie Francis’ Last Words; Goes To Death Smiling; Reprieve Attempts Failed Three Times*, SHREVEPORT SUN, May 17, 1947, at 1; *Willie Francis Goes to Death Without Fear*, CHI. DEFENDER, May 17, 1947, at 1; *Walks to the Chair*, SHREVEPORT SUN, May 17, 1947, at 1; Elliott Chaze, *Willie Francis Wears Sunday Pants for Trip to Heaven as Chair Takes Life on Second Try*, WASH. POST, May 10, 1947, at 5; *Francis Dies in Chair on Second Try*, NEW ORLEANS STATES, May 9, 1947, at 1; *Expert Set to Throw Switch on Willie*, LOWELL SUN (Lowell, Mass.), May 9, 1947, at 1; Flannery Lewis, *Willie*

times and of race relations in St. Martinville. From January 3 to May 16, 1947, for example, there were articles concerning a state politician's support for white supremacy and discrimination in schools, as well as a run of racist jokes and commentary questioning blacks' desire for higher education. Willie's date with death was also the talk of the town.

On the eve of Willie's second scheduled execution, an interview with Frederick Francis revealed that Louise Francis would not be present for Willie's execution. According to Frederick, "she couldn't stand bein' in this town today." That same evening, Willie was practicing his walk to the electric chair—his "last mile"—focused on the next day's events. As Willie had stated over a year ago, he wanted to fulfill his promise to Father Hannigan and behave "like a man" on his execution day. Indeed, Hannigan had been visiting Willie daily.

#### A. Execution Morning

On the morning of May 9, 1947, Willie dressed in his Sunday best to prepare for his electrocution—a sharp contrast from the prior year when he had gone to his execution in his prison uniform. An Associated Press photo showed Willie outfitted in dark formal slacks and shoes and a white shirt. He had grown considerably taller and larger over the year.

Trusting that Willie would not give him any trouble, Sheriff Ozenne allowed him out of his cell that morning without chains. Thereafter, journalist Elliott Chaze documented Willie's next moves, from his leaving the New Iberia Parish jail, to his getting into the car going to St. Martinville, to his arriving at the St. Martinville jail, where he would be executed. This time, Willie's father, Frederick, stayed at the family home with several of Willie's siblings, so that Frederick would be prepared to receive Willie's body and make burial arrangements. Before de Blanc arrived, several members of Willie's family visited Willie in his cell. When they left his cell and entered the jailhouse yard to exit, a looming crowd had already gathered. Knowing they were Willie's relatives, one

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*Francis Faces Death in Resignation*, NEW ORLEANS ITEM, May 9, 1947, at 1; *'I'm Gonna Die Like a Man,' Says Willie Francis, Due for Second Walk to Chair This Afternoon*, BEAUMONT ENTERPRISE, May 9, 1947, at 1; *Willie Hopes to Go Like Man at Second Death Try Today*, TIMES-PICAYUNE (New Orleans, La.), May 9, 1947, at 1; Elliott Chaze, *Willie Francis is to Face Electric Chair for Second Time at St. Martinville Today*, DAILY TIMES-NEWS (Burlington, N.C.), May 9, 1947, at 1; *Senator Overton Oppose [sic] Federal Aid to Schools*, WKLY. MESSENGER (St. Martinville, La.), Mar. 21, 1947, at 1; *Co-Operation Noted*, WKLY. MESSENGER (St. Martinville, La.), Feb. 21, 1947, at 4; WKLY. MESSENGER (St. Martinville, La.), Feb. 14, 1947, at 1; *Capitol Headlines*, WKLY. MESSENGER (St. Martinville, La.), Jan. 31, 1947, at 5; *Jimmy Morrison Announces for Governor*, WKLY. MESSENGER (St. Martinville, La.), Jan. 24, 1947, at 2; Tom Gillen, Jr., *Around the Capitol*, WKLY. MESSENGER (St. Martinville, La.), Jan. 24, 1947, at 5; and Tom Gillen, Jr., *Around the Capitol*, WKLY. MESSENGER (St. Martinville, La.), Jan. 3, 1947, at 4.

crowd member pressed into them hostilely: “ ‘They ought to do away with all the [niggers].’ ”

De Blanc arrived at the St. Martinville jail a little less than two hours before Willie’s noontime execution. Immediately, he informed Willie of his plans to petition the Louisiana courts, and of his optimism that, this time, the results would be different. But Willie had given up hope and wanted no more legal attempts on his behalf. He could not put his parents, especially his ill mother, through more stress. Willie emphasized that he was ready to die. De Blanc struggled with Willie’s decision but eventually relented. Sadly, he and Willie said their final goodbyes. Father Hannigan also visited Willie, letting him know that at noon sharp, the executioner would pull the switch and Willie would die immediately. Hannigan asked that, when Willie met with the Lord, Willie say good things about his family and his lawyer.

After Willie finished his last meal,<sup>58</sup> Father Rousseve arrived with another black priest to administer Willie’s last rites. At this point, the generator had started and, at noon, the bells of Notre Dame church across the street marked the time. Unseen by Willie, a quiet, orderly crowd of nearly five hundred people gathered outside the jail, mostly expressing their disdain for him. Inside the jail, Elliott Chaze and Police Chief Claude Thomas, Andrew’s brother, were among those present for the execution.

#### B. The Time Has Come

Willie concluded his thirteen-step walk to the electric chair at 12:02 p.m. Having practiced this walk, Willie informed Father Hannigan that he did not need his help, instead indicating to the priest that he should go first.

This time, the State had selected a purported “expert,” Grady Jarratt, to execute Willie, not the amateurs it had used before. Although Jarratt, a Texan, had been the operator of Louisiana’s electric chair since 1941, when the State switched from hanging to electrocution, he was apparently not available for Willie’s prior execution. Jarratt was known for his care and precision.

As soon as Willie sat in Gruesome Gertie, officials started strapping him in, while also cutting a slit in his left pant’s leg in order to attach the electrode. When Willie looked up, Elliott Chaze mouthed him a

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<sup>58</sup> Mrs. Paul Guilbeaux, the wife of Willie’s jailor, prepared his last meal. Although Willie’s favorite food was fried chicken, he requested fried fish and potatoes. The day of Willie’s execution was a Friday, and, as a practicing Catholic, he was prohibited from eating meat. Chaze, *Willie Francis Wears Sunday Pants for Trip to Heaven as Chair Takes Life on Second Try*, *supra* note 57.

“hello.” Willie also managed to ask Sidney Dupois about his son, and requested that Dupois “tell him to be a good boy . . . .”

When Jarrett asked Willie if there was anything he wanted to say, he replied, “nothing at all.” At 12:05 p.m., Jarratt pulled the switch, and the chair surged with 2,700 volts of electrical current. According to one account, Willie was “motionless,” and Jarratt applied another current as insurance. At 12:10 p.m. Jarratt announced that Willie was dead. It seemed that the chair worked this time, at least from the outside. It would never be known what happened to Willie on the inside.

Contrary to Frederick Francis’s statements, Louise Francis stayed in St. Martinville for Willie’s execution. One news account described her as “sobbing” amongst the crowd that had gathered outside the jail for Willie’s execution. There is little information available about the rest of the family’s immediate reaction.

Willie was able to have a funeral—from a fund donated by The Good Will Mutual Aid Association. Everyone attending walked with Willie’s casket through the streets until the group reached the Union Baptist Cemetery. Although de Blanc did not attend the funeral, Willie Francis’s saga would continue to affect both him and Wright for the rest of their lives.

### C. Wright and de Blanc in the Following Years

In their own way, both de Blanc and Wright achieved remarkable careers.<sup>59</sup> De Blanc became District Attorney for the parishes of Lafayette, Vermilion, and Acadia. In this capacity, he even became friendly with L.O. Pecot, the man who had prosecuted Willie; when Pecot died de Blanc was appointed to take over Pecot’s district until an election could be held. However, de Blanc would always remember Willie. After working as a District Attorney for many years, he became an indigent defender. In 1986, four decades after taking Willie’s case, de Blanc,

<sup>59</sup> The following discussion regarding the careers of de Blanc and Wright draws from the following sources: *Bush v. New Orleans Parish School Bd.*, 187 F. Supp. 42, 46 n.2 (E.D. La. 1960); Interview by Jeffrey H. Bowman with Bertrand de Blanc, *supra* note 14; ERNEST J. GAINES, *MOZART AND LEADBELLY: STORIES AND ESSAYS* 58–59 (2005); WILLIE FRANCIS MUST DIE AGAIN (KUHT/Houston PBS 2006); Louis F. Oberdorfer, *In Memoriam: Judge J. Skelly Wright*, 57 GEO. WASH. L. REV. 1037, 1038–39 (1989); Bernick, *supra* note 38, at 989–91; Shelton, *supra* note 48; Marjorie Hunter, *Judge J. Skelly Wright, Segregation Foe, Dies at 77*, N.Y. TIMES, Apr. 8, 1988, at D10; Claude Sitton, *U.S. Court Orders New Orleans to Start Pupil Integration in Fall*, N.Y. TIMES, May 17, 1960, at 1; Barbara Ann Worthy, *The Travail and Triumph of a Southern Black Civil Rights Lawyer: The Legal Career of Alexander Pierre Tureaud 1899–1972* (Jan. 30, 1984) (unpublished Ph.D. dissertation, Tulane University) (on file with author); and Senior Judge Louis F. Oberdorfer—U.S. District Court, Washington, D.C., <http://www.dcd.uscourts.gov/oberdorfer-bio.html> (last visited Nov. 3, 2008).

overcome by emotion while describing his experiences with Willie to novelist Ernest J. Gaines, put his head in his hands and wept.

Shortly after Willie's execution, Wright returned to his hometown of New Orleans as U.S. Attorney. In 1948 he became the youngest federal judge in the country when President Truman appointed him to a judgeship on the Federal District Court in New Orleans. With time, the careers of Wright and A.P. Tureaud would once again intersect. For many years, Tureaud had been bringing NAACP suits in the federal court in New Orleans to obtain equality for the black residents of Louisiana. One of these suits brought national attention to Judge Wright in 1960, when Wright created an integration plan for the New Orleans public schools after the school board refused to do so. However, because Wright was breaking racial barriers, within Louisiana he faced vilification and ostracism publicly and politically.

In 1962, President Kennedy nominated Wright for the D.C. Circuit Court, a promotion supported by southern senators because it would remove Wright from the controversial progress he was making in Louisiana. While on the D.C. Circuit Wright became good friends with Justice Hugo Black, whom he had always admired. In a memorial article following Wright's death, Judge Louis Oberdorfer, Justice Black's clerk for the 1946 term, referred to *Resweber* and Justice Frankfurter's concurrence in particular to pay Wright the highest compliment: "One reconstructing Judge Wright's faith may well find that Judge Wright tried to see to it that, unlike Justice Frankfurter, he never let such an unsupported assumption as the 'consensus of society's opinion' overcome his innate sense of justice." Of course, such a tribute to Wright revealed a longstanding acknowledgment that Justice Frankfurter's stance in *Resweber* was sorely misguided.

## XI. EPILOGUE

The epilogue to Willie's story, like his life and death, is both personal and legal. In contrast to the accounts provided for Wright and de Blanc, little information exists about Willie's immediate family after his execution. Yet my 2007 visit to St. Martinville uncovered a host of relatives and townspeople who helped piece together glimpses of how Willie's case affected them. The impact has reverberated over the decades during which time this country and St. Martinville have changed—albeit not sufficiently to provide minority youths, like Willie, with adequate legal protection.

### A. The Personal Story

With all of its deep South history and intrigue, present-day St. Martinville remains small and poor.<sup>60</sup> Numbering approximately 7,000 residents, it has nearly twice the population the city reported in the mid-1940s, with most of the increase having occurred during the 1950s. The racial makeup of the city is now the reverse of that of the 1940s, with nearly two-thirds of the population black and about one-third white.

Not surprisingly, the racial divisions are far less and different today. St. Martinville now spotlights its first black mayor, Thomas Nelson. And, in Sister Helen Prejean's renowned 1993 book, *Dead Man Walking*, the city is characterized as among the "friendliest, most hospitable places on earth"—a "place one would least expect" a murder to occur. Indeed, New Orleans residents who were evacuated to St. Martinville in 2005 because of Hurricane Katrina said that "the people there treated them like kings and queens" during their stay.

At the same time, a visitor would notice that modern-day St. Martinville is a scene of past Parisian glory, but present poverty, celebrated for its Acadian heritage and a few distinguishing features. One such feature, is the Evangeline Oak, made famous by Henry Wadsworth Longfellow's poem, *Evangeline*, and still growing beautifully alongside the Bayou Teche.<sup>61</sup> "Were it not for [Evangeline] and what America thinks of her, St. Martinville might be a forgotten spot on the map."

<sup>60</sup> The discussion that follows regarding present-day St. Martinville draws from the following sources: Interview with Keith Landry, *supra* note 12; Interview with Thomas Nelson, *supra* note 6; KING, *supra* note 3, at x, xiv; HELEN PREJEAN, *DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES* 4 (Vintage Books 1994) (1993); CAPUDER, *supra* note 6, at 152-53; HARNETT T. KANE, *THE BAYOUS OF LOUISIANA* 257 (1943); HENRY WADSWORTH LONGFELLOW, *EVANGELINE: A TALE OF ACADIE* (1847); LOUISIANA ALMANAC: 2006-2007 EDITION, *supra* note 8, at 245; U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, COUNTY AND CITY DATA BOOK: A STATISTICAL ABSTRACT SUPPLEMENT 210 (1953); U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, COUNTY DATA BOOK: A SUPPLEMENT TO THE STATISTICAL ABSTRACT OF THE UNITED STATES 186 (1947); U.S. Census Bureau, Population of St. Martinville, La., [http://factfinder.census.gov/servlet/SAFFPopulation?\\_event=Search&\\_name=st.+martinville&\\_state=&\\_county=st.+martinville&\\_cityTown=st.+martinville&\\_zip=&\\_sse=on&\\_lang=en&pctxt=fph](http://factfinder.census.gov/servlet/SAFFPopulation?_event=Search&_name=st.+martinville&_state=&_county=st.+martinville&_cityTown=st.+martinville&_zip=&_sse=on&_lang=en&pctxt=fph) (last visited Aug. 9, 2008); U.S. Census Bureau, 2000 Fact Sheet for Louisiana, [http://factfinder.census.gov/servlet/SAFFFacts?\\_event=&geo\\_id=04000US22&\\_geoContext=01000US@04000US22&\\_street=&\\_county=&\\_cityTown=&\\_state=04000US22&\\_zip=&\\_lang=en&\\_sse=on&ActiveGeoDiv=&\\_useEV=&pctxt=fph&pgsl=040&\\_submenuId=factsheet\\_1&ds\\_name=ACS\\_2006\\_SAFF&\\_ci\\_nbr=null&qf\\_name=null&reg=&\\_keyword=&\\_industry=](http://factfinder.census.gov/servlet/SAFFFacts?_event=&geo_id=04000US22&_geoContext=01000US@04000US22&_street=&_county=&_cityTown=&_state=04000US22&_zip=&_lang=en&_sse=on&ActiveGeoDiv=&_useEV=&pctxt=fph&pgsl=040&_submenuId=factsheet_1&ds_name=ACS_2006_SAFF&_ci_nbr=null&qf_name=null&reg=&_keyword=&_industry=) (last visited Aug. 9, 2008); and *Weekend Edition Saturday: New Orleans Braces for Gustav*, (NPR News radio broadcast Aug. 30, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=94140546>.

<sup>61</sup> According to a plaque under the Evangeline Oak in St. Martinville, Longfellow is believed to have learned about the Acadians in St. Martinville and "the geography and local color of the Teche country" from a native of St. Martinville, Emile Edouard (Edward) Simon. Edward was a Louisiana district judge and the grandfather of the judge who presided over Willie's trial. Celia R. Cangelosi, *The Simons: Six Generations of Legal Service (If You Count the Family's Belgian Patriarch!)*, 54 LA. BAR J. 427, 427-28 (2007).

Indeed, like sixty years ago, the St. Martinville of today appears insular. During my 2007 stay, it was difficult to locate a detailed street map of any kind—even from the city’s tourist office. Surely the residents would know the layout of such a small area, however, a visitor would not. The lack of a map was not just a metaphor for St. Martinville’s isolation but also a pragmatic reality. As writer Gilbert King concluded from his own visits, “St. Martinville is a whole different world.” Without question, Willie’s case helped shape that world.

I also learned during my visit that Willie’s house had been dismantled only a few months before I arrived. The destruction of the home was of no historic consequence to most St. Martinville residents and it revealed the dearth of knowledge regarding Willie. Only the older people I interviewed could answer questions about the Willie Francis saga; the younger residents either retained little or were totally unaware.<sup>62</sup> Willie’s obscurity is regrettable not only because of the injustice of his case but also because of the historic racism that fueled it. These are stories worth remembering.

Pictures help recall a story.<sup>63</sup> Willie’s grandnephew, Joseph Davis, Jr., provided me with the only known photograph of Willie’s remaining siblings and associated family members. The picture was taken in St. Martinville in April 1971, following Frederick Francis’s funeral. In the picture nine of Willie’s sisters and brothers, as well as a niece and nephew, are standing next to the Francis family home. The nephew, Allen Francis, age 64, is the only person in the picture who is still living today. Now burdened with a serious heart condition and a long history of hospital stays, Allen told me that for one year in the 1960s, he was Frederick’s caretaker in St. Martinville. Frederick, a diabetic amputee in his later years, had always insisted to Allen that Willie was innocent.

The matter of Willie’s execution was also troubling to other family members, so much so that they had difficulty talking about it. Hilda Henry, Willie’s niece and, until recently, the closest remaining relative,

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<sup>62</sup> Gilbert King reported a similar lack of awareness among St. Martinville’s residents of Willie’s trial or execution. KING, *supra* note 3, at x.

<sup>63</sup> See *infra* page 94 for a reproduction of the family photograph described in this Section. The following discussion of Willie’s family draws from the following sources: Letter from MaEsther Francis, Willie Francis’s niece, Port Arthur, Tex., to Deborah W. Denno, Professor, Fordham Law School, New York, N.Y. (Aug. 22, 2008) (copy on file with author); E-mail from MaEsther Francis, Willie Francis’s niece, to Deborah W. Denno, Professor, Fordham Law School, New York, N.Y. (Nov. 30, 2008) (copy on file with author); Telephone Interview with Hilda Henry, Willie Francis’s niece, in Beaumont, Tex. (June 13, 2007); Telephone Interview with Allen Francis, Willie Francis’s nephew, in Garland, Tex. (Sept. 28, Oct. 3, Nov. 26, 2008); Telephone Interview by Lisa-Sheri Torrence with MaEsther Francis, Willie Francis’s niece, in Port Arthur, Tex. (Aug. 11, 2008); and Interview with Joseph Davis, Jr., Willie Francis’s grandnephew, in St. Martinville, La. (June 14, 2007).

had initially agreed to meet with me for an interview in 2007 in her hometown of Beaumont, Texas; but she changed her mind at the last minute.<sup>64</sup> When I spoke with her on the phone about why she cancelled the visit, she explained that she was in her early seventies and had been ill for some time. She was only ten when Willie died. For Hilda, Willie's execution represented not simply the sorrow about his death but also a public humiliation and level of exposure that roused fear among the Francis family members left in St. Martinville.<sup>65</sup> Hilda started to cry after I had asked her only a few questions. I had to cut short the conversation; the weeping said it all.

MaEsther Francis, also a niece of Willie's, talked with me about Hilda's fear. Now in her late forties, MaEsther never knew Willie. But her father (Early Francis) told her about Willie's execution when she was a teenager. Yearning to learn more details, MaEsther conducted research about the execution during her college years. Like Joseph Davis, Jr., MaEsther found a blood association with Willie to be "a source of pride." Yet, when MaEsther tried to ask Hilda questions about Willie during a family reunion, Hilda became "extremely upset and began crying." "Through her sobbing" Hilda "said that [MaEsther] should not have brought up Willie Francis because [they] still had family members living in St. Martinville and the people who were actually responsible for Andrew Thomas's death and falsely accusing Willie were still alive and might try to hurt them if [the Francis family] started asking questions." Hilda ascribed to the belief held by others in town that Willie had been framed and used as a cover for Andrew's real murderers. As MaEsther recounted, Hilda's "tears were real, the trembling in her voice was real, and the fear in her eyes evident nearly fifty years later as long buried memories were brought to the surface." These were "[m]emories [Hilda] would have preferred to have left buried, memories that were taken to their graves by other family members, and memories that were never disclosed" to MaEsther.

Hilda died on September 11, 2008, but she did not take all of her memories to the grave. While Hilda informed me that she "couldn't go through" with our interview because Willie's execution was "too painful" to discuss, there was one statement she made to me firmly and with resolve: "Blame the white people of St. Martinville."

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<sup>64</sup> Willie Francis was the brother of Hilda Henry's mother, Marie Francis Neal. Interview with Keith Landry, *supra* note 12.

<sup>65</sup> Years ago, after Willie was executed, a Hollywood production company taped discussions with Willie's siblings in an effort to devise plans for a major movie production about Willie's case. However, by the end of the taping, Emily Branch, the oldest sibling, decided she had no interest in a movie nor in the recordings, and the effort was abandoned. Keith Landry, Willie's grandnephew, has a copy of the taped discussions, but he has never revealed them publicly. Interview with Keith Landry, *supra* note 12.

Race, risk, and religion—all were pervasive themes that others in St. Martinville revealed to me in interviews along with their own personal stories.<sup>66</sup> Velma Johnson, a tour guide at the St. Martinville Cultural Heritage Center, was nine when Willie was executed. She reminded me that as a black resident of St. Martinville, if she and I had conversed decades ago, she would have had to avert her eyes while talking to me, a white. Velma has always believed that Willie was never executed but rather secretly released by those recognizing his innocence. James Akers informed me that the fear linked to Willie's death extended even to the lower class whites in the city who were distinguished from the white "St. Martinville elite." For example, Akers's own white, working class parents had squelched family discussion of Willie's case or execution, explaining that they must as long as those associated with Andrew Thomas's murder were still alive—a concern over potential reprisal that paralleled Hilda Henry's own account. Akers claimed that as a young boy of four or five years, he remembers the lights blinking from the generator on the day of Willie's execution. St. Martinville's Mayor Nelson told me that the majority of people in St. Martinville, even those in the white community, did not believe Willie committed the murder. Some thought that Willie was protecting his family with his silence out of concern that something might happen to them if he professed his innocence.

More than anyone in St. Martinville, Allan Durand, an attorney and Bertrand de Blanc's grandnephew, has tried to revive the accounts of Willie's ordeal. In 2006, Durand produced and directed an award-winning documentary about Willie, *Willie Francis Must Die Again*, promoting the film to generate public discussion. Yet he too acknowledged the kind of disquiet and denial particular community members felt about Willie's case. Durand especially appreciated the legal hurdles de Blanc had faced.

### B. The Legal Story

The legal system also documents memories and life narratives, either through the reporting of the facts of a case, the use of precedent, the overturning of a decision, or other vehicles. Today, of course, Willie's story would have had a different ending. Because of the Court's recent decision in *Roper v. Simmons*<sup>67</sup> to bar the death penalty for juveniles, Willie would never have been executed. Regardless, even if Willie had been age-eligible for the death penalty, his future would still be unclear. Mandatory death sentences, like the one under which Willie was sen-

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<sup>66</sup> The remainder of this Section draws from the following sources: Interview with Velma Johnson, *supra* note 17; Interview with James Akers, *supra* note 6; Interview with Allan Durand, *supra* note 17; Interview with Thomas Nelson, *supra* note 6; WILLIE FRANCIS MUST DIE AGAIN, *supra* note 59.

<sup>67</sup> 543 U.S. 551 (2005).

tenced, are no longer constitutional.<sup>68</sup> Moreover, Willie would have been entitled to a reading of his *Miranda* rights. Present-day knowledge of the hazards of execution methods might have further prompted de Blanc to investigate the technical problems surrounding Willie's first attempted execution sooner rather than focusing on simply preventing Willie's subsequent execution.

There are numerous other ways to consider Willie's case from a "what if" perspective in light of the sea change in criminal law and procedure over the past decades. But that viewpoint is part of someone else's legal story, not Willie's. Willie was not afforded modern-day legal protections and he faced the death penalty, realities that are this Chapter's focus over and above musings of what might have been. Also unknown is precisely how Willie's experiences in the criminal justice system would be different today. Countless minority males still share many of Willie's challenges. Not nearly enough has been achieved to ensure them sufficient safeguards.

This country's continuing problems with botched execution methods exemplifies this point. While electrocution was once the dominant method, it is no longer used exclusively by any state; rather, lethal injection accounts for nearly all executions.<sup>69</sup> Initially, lethal injection was viewed as a more humane way of carrying out the death penalty; however, this new method also has proven to be a technical failure continually ripe for Eighth Amendment challenges.

### 1. From Electrocution to Lethal Injection

This country's turn to lethal injection reflects states' growing reliance on medicine as a response to philosophical, financial, and political pressures to eliminate the death penalty.<sup>70</sup> For example, New York

<sup>68</sup> *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

<sup>69</sup> On February 8, 2008, the Nebraska Supreme Court declared electrocution unconstitutional under the State's constitution. *State v. Mata*, 745 N.W.2d 229, 279–80 (Neb. 2008). At that time, Nebraska was the only state that used electrocution as its only method of execution. *Id.* at 257. So far, *Mata* has left a death penalty statute in place in Nebraska but no method to implement it.

<sup>70</sup> The following discussion of execution methods draws from *Provenzano v. Moore*, 744 So. 2d 413 (Fla. 1999) (Shaw, J., dissenting); *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996), *vacated and remanded*, 519 U.S. 918 (1996); *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994); *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion); *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam); *In re Kemmler*, 136 U.S. 436 (1890); STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 169–70 (2002); RICHARD MORAN, *EXECUTIONER'S CURRENT: THOMAS EDISON, GEORGE WESTINGHOUSE, AND THE INVENTION OF THE ELECTRIC CHAIR* 15–16 (2002); IVAN SOLOTAROFF, *THE LAST FACE YOU'LL EVER SEE: THE PRIVATE LIFE OF THE AMERICAN DEATH PENALTY* 7 (2001); CRAIG BRANDON, *THE ELECTRIC CHAIR: AN UNNATURAL AMERICAN HISTORY* 32–38 (1999); PHILIP ENGLISH MACKAY, *HANGING IN THE BALANCE: THE ANTI-CAPITAL PUNISHMENT*

State's increasing opposition to capital punishment in the early 1800s led to the abolition of public hangings in 1835. By the late 1870s, graphic newspaper accounts of hangings—many of them botched—fed the public appetite for sensationalism and led the State's governor to ask the legislature in 1885 “whether the science of the present day” could not find a less barbaric means to execute criminals. The legislature's appointed commission of three “well known citizens” ultimately selected the electric chair, following the commission's impressively detailed two-year study of every execution method used throughout history.<sup>71</sup>

New York's decision to enact electrocution spurred intense legal and scientific battles, momentarily resolved only when the Supreme Court decided that the Eighth Amendment did not apply to the states and that the State's statute was constitutional. In 1890, the murderer William Kemmler became the first person in the country to be electrocuted after the Court ruled against him. Kemmler's execution was a scene of confusion and horror, his slow death a spectacle of blood from ruptured capillaries and roasting flesh. This catastrophe did not dissuade states from adopting a method hailed as a scientific advancement. Electrocution was deemed superior to hanging or, at the very least, was far less visible.

The problems with electrocution increased with the passing decades, despite (or perhaps because of) enhanced scrutiny of the method's application. By the time Allen Lee Davis was executed in Florida in 1999, over a century after Kemmler, the tortuous issues surrounding the method appeared insurmountable: Davis suffered massive bleeding from

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MOVEMENT IN NEW YORK STATE, 1776–1861, at 118 (1982); N.Y. COMM'N ON CAPITAL PUNISHMENT, REPORT OF THE COMMISSION TO INVESTIGATE AND REPORT THE MOST HUMANE AND PRACTICAL METHOD OF CARRYING INTO EFFECT THE SENTENCE OF DEATH IN CAPITAL CASES 3, 18–77, 95 (1888); Marian J. Borg & Michael L. Radelet, *On Botched Executions*, in CAPITAL PUNISHMENT: STRATEGIES FOR ABOLITION 143 (Peter Hodgkinson & William A. Schabas eds., 2004); Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49 (2007); Atul Gawande, *When Law and Ethics Collide—Why Physicians Participate in Executions*, 354 NEW ENG. J. MED. 1221, 1222 (2006); Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 78–79 (2002); Christopher Q. Cutler, *Nothing Less Than the Dignity of Man: Evolving Standards, Botched Executions and Utah's Controversial Use of the Firing Squad*, 50 CLEV. ST. L. REV. 335, 413–14 & n.441 (2002); *Millions Flock to US Execution Site*, SCOTSMAN (Edinburgh, Scot.), Nov. 1, 1999, at 22; Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 364–70, 375 (1997); Denno, *Is Electrocution an Unconstitutional Method of Execution?*, *supra* note 29, at 604–07; and *Far Worse Than Hanging*, N.Y. TIMES, Aug. 7, 1890, at 1.

<sup>71</sup> The Commission consisted of its Chair, Elbridge T. Gerry, a New York City attorney, founder of the American Society for the Prevention of Cruelty to Animals, and founder and president of the American Society for the Prevention of Cruelty to Children; Dr. Alfred P. Southwick, a dentist from Buffalo who was a leading proponent of electrocution; and

the nose, deep burns on his face, head and leg, and partial asphyxiation from the mouth strap that belted him to the chair's headrest. Millions of people around the world viewed the results through the Florida Supreme Court's web site postings of Davis's post-execution color photographs—ultimately crashing the Florida court's computer system and intermittently disabling it for months. While the botched Davis execution did not halt electrocutions, it did prompt the Florida legislature to allow inmates to choose between electrocution and lethal injection.<sup>72</sup> By 2008, when the state of Nebraska found electrocution unconstitutional, the method was moving from a rarity to a relic.

Over time, other execution methods also showed obvious challenges. Like their predecessors, modern-day hangings risked being too long and cruel. Lethal gas, first enacted in 1921, has been judged to be the worst of all. In 1992, for example, Donald Harding's ten-minute execution and suffocating pain were so disturbing for witnesses that one reporter cried continuously, "two other reporters 'were rendered walking "vegetables" for days,'" the attorney general ended up vomiting, and the prison warden claimed he would resign if forced to conduct another lethal gas execution. While the firing squad has not been systematically evaluated, and may even be the most humane of all methods, it carries with it the baggage of its brutal imagery. This image has held despite the Court's 1878 conclusion in *Wilkinson v. Utah*<sup>73</sup> that the firing squad is not a cruel and unusual punishment under the Eighth Amendment.

In light of the troubling history of other execution methods, the quick popularity of lethal injection is understandable. When Oklahoma first adopted lethal injection in May 1977, one year after *Gregg v. Georgia*,<sup>74</sup> many states rapidly followed Oklahoma's lead. There was simply no other new and seemingly viable method on the capital punishment horizon. Besides, doctors had created the lethal injection formula incorporating chemicals applied in surgery. The procedure seemed to have the medical profession's stamp of approval.

With lethal injection, then, the law turned to medicine to rescue the death penalty. In due time, however, the humane veneer of lethal injection would start to crack as the method evidenced more and more flaws and inept application. Once again, as in past decades, execution problems would require the Supreme Court's response. But with such an underdeveloped Eighth Amendment caselaw pertaining to execution methods, the Supreme Court would have to turn to *Resweber* to rescue

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Matthew Hale, a prominent constitutional attorney from Albany. BRANDON, *supra* note 70, at 14–15, 51–53.

<sup>72</sup> FLA. STAT. ANN. § 922.105 (West 2008).

<sup>73</sup> 99 U.S. 130 (1878).

<sup>74</sup> 428 U.S. 153 (1976) (plurality opinion). The *Gregg* decision ended a four-year moratorium on the death penalty prompted by *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

the meaning of “cruel and unusual punishments.” Unfortunately, that rescue effort too has failed. As the next section discusses, *Resweber* has proven far too limited and inappropriate to take on the task expected by some members of the Court.

## 2. From *Louisiana ex rel. Francis v. Resweber* to *Baze v. Rees*

*Resweber*'s holding and history are controversial. Nonetheless, over the last sixty years of changing execution methods and incorporation status the decision has consistently served as precedent. Regrettably, some of this reliance has been erroneous or misleading. For example, of the 184 federal court opinions that have cited to one or more of the three opinions in *Resweber*,<sup>75</sup> twenty-two, or nearly twelve percent, cited the plurality opinion to support the proposition that the Eighth Amendment's prohibition on cruel and unusual punishments was incorporated into the Due Process Clause of the Fourteenth Amendment.<sup>76</sup> These courts cited *Resweber* even though, as a number of other opinions have noted, the *Resweber* plurality merely assumed, without deciding, that the Eighth Amendment was applicable to the states.<sup>77</sup> It would take the Court another fifteen years to hold explicitly (in a case not concerning an execution method) that the Eighth Amendment applied to the states through the Fourteenth Amendment's Due Process Clause.<sup>78</sup> While the federal courts have used *Resweber* in a variety of other ways,<sup>79</sup> not

<sup>75</sup> A search of LexisNexis yielded 184 federal court opinions citing *Resweber*. The opinions are listed and categorized in a memorandum on file with the author.

<sup>76</sup> See, e.g., *United States v. Georgia*, 546 U.S. 151, 157 (2006). In *Robinson v. California*, 370 U.S. 660, 666–67 (1962), the Supreme Court concluded that the Eighth Amendment applies to the states. Ten opinions cited *Resweber* along with *Robinson* for the proposition that the Eighth Amendment is incorporated into the Due Process Clause of the Fourteenth Amendment. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 560 (2005).

<sup>77</sup> See, e.g., *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 284 (1989) (O'Connor, J., dissenting).

<sup>78</sup> See *Robinson v. California*, 370 U.S. 660, 666–67 (1962).

<sup>79</sup> The federal courts have used the principal opinion in *Resweber* in the following ways: (1) Forty-nine opinions cited *Resweber* for its conclusion that the Eighth Amendment proscribes the purposeful infliction of unnecessary pain and is directed towards cruelty inherent in the punishment, not unforeseeable accidents in its administration, see, e.g., *Taylor v. Crawford*, 487 F.3d 1072, 1080 (8th Cir. 2007); (2) Twenty-six opinions cited *Resweber* because the decision implied that the death penalty (or electrocution specifically) was not per se unconstitutional, see, e.g., *Furman v. Georgia*, 408 U.S. 238, 284–85 (1972) (per curiam) (Brennan, J., concurring); (3) Three opinions cited *Resweber* to support the proposition that an otherwise constitutional sentence can be rendered unconstitutional if it is not carried out properly, see, e.g., *Ingraham v. Wright*, 430 U.S. 651, 670 n.38 (1977); (4) Three opinions cited *Resweber* to support the proposition that the need to apply more than one current of electricity does not violate the Eighth Amendment, see, e.g., *Williams v. Hopkins*, 130 F.3d 333, 337–38 (8th Cir. 1997); (5) Twenty opinions cited *Resweber* for its

surprisingly, three opinions cited *Resweber*, along with other cases, to support the position that Eighth Amendment jurisprudence is not clear,<sup>80</sup> a perspective consistent with this Chapter's viewpoint.

One of the more recent and prominent examples of the variability of *Resweber*'s use appears in the various opinions in *Baze v. Rees*.<sup>81</sup> In *Baze*, the Supreme Court considered whether the lethal injection protocol promulgated by the State of Kentucky violated the Eighth Amendment's prohibition of cruel and unusual punishments. In order to effect capital punishment Kentucky uses a series of three drugs: sodium thiopental, a common anesthetic for surgery that is intended to cause unconsciousness; pancuronium bromide, a total muscle relaxant that stops breathing by paralyzing the diaphragm and lungs; and potassium chloride, a toxin that induces cardiac arrest and permanently stops the inmate's heart-beat. The concern is that the second drug can cause an inmate excruciating pain and suffering if administered without adequate anesthesia. The inmate, while paralyzed and unable to cry out, would slowly suffocate from the drug's effects. Injection of the third drug only increases the agony. In 2005, two prisoners, Ralph Baze and Thomas C. Bowling challenged the constitutionality of Kentucky's lethal injection protocol, contending that it created an "unnecessary risk" of pain." The Kentucky trial and appellate courts rejected their arguments, and the Supreme Court granted certiorari—a dramatic move given that over a century had passed since the Court had agreed to review the constitutionality of a state's execution method. In a splintered 7–2 plurality ruling, the *Baze* Court upheld Kentucky's lethal injection protocol,

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discussion of double jeopardy, *see, e.g.*, *Burks v. United States*, 437 U.S. 1, 6 (1978); and (6) Four opinions cited *Resweber* for its discussion of equal protection, *see, e.g.*, *Camacho v. Bowling*, 562 F. Supp. 1012, 1026 (N.D. Ill. 1983). Moreover, ten opinions cited to Justice Frankfurter's concurrence in *Resweber* for his warning regarding judicial restraint and deference towards legislatures, *see, e.g.*, *United States ex rel. Hetenyi v. Wilkins*, 348 F.2d 844, 857–58 (2d Cir. 1965), and twenty-six opinions referred to one of the various Fourteenth Amendment Due Process Clause standards he sets forth, *see, e.g.*, *Arroyo v. Schaefer*, 548 F.2d 47, 50 & n.3 (2d Cir. 1977). The dissent in *Resweber* was cited in twelve opinions for its statement that "[t]aking human life by unnecessarily cruel means shocks the most fundamental instincts of civilized man." *See, e.g.*, *Jackson v. Bishop*, 404 F.2d 571, 576, 578 (8th Cir. 1968). The three opinions in *Resweber* have also been cited in support of a number of other less common propositions. *See, e.g.*, *Robinson v. California*, 370 U.S. 660, 675 (1962) (Douglas, J., concurring) ("The command of the Eighth Amendment, banning 'cruel and unusual punishments,' stems from the Bill of Rights of 1688.').

<sup>80</sup> *See* *Trop v. Dulles*, 356 U.S. 86, 99 & n.29 (1958); *Jackson v. Bishop*, 404 F.2d 571, 576, 579 (8th Cir. 1968); *Fierro v. Gomez*, 865 F. Supp. 1387, 1409 & n.24 (N.D. Cal. 1994).

<sup>81</sup> 128 S. Ct. 1520 (2008). The remainder of this Section draws on the following sources: *Baze v. Rees*, 128 S. Ct. 1520 (2008); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947); *In re Kemmler*, 136 U.S. 436 (1890); *Wilkerson v. Utah*, 99 U.S. 130 (1879); and Deborah W. Denno, Introduction, *The Lethal Injection Debate: Law and Science*, 35 *FORDHAM URB. L.J.* 701, 702 (2008).

concluding that the risk of severe pain associated with the protocol was not substantial when compared to known and available alternatives. Three of the seven opinions filed in *Baze* (those of Chief Justice Roberts and Justices Thomas and Ginsburg) cited *Resweber*.

*Baze* is broad and complex. This Chapter's focus is limited to the Justices' use of *Resweber* in their Eighth Amendment analyses. Such an application of *Resweber*, however, seems to be aimed more at compensating for the dearth of such precedent in the execution methods context rather than at providing a coherent foundation for problem solving. As Justice Ginsburg's dissent states most clearly (and the other *Baze* opinions seem to take as given), "The Court has considered the constitutionality of a specific method of execution on only three prior occasions."

Those three occasions were *Wilkerson*, *Kemmler*, and *Resweber*, and all are paltry guides for tackling the jurisprudential hurdles in *Baze*. None of the cases involved a review of execution methods evidence under the Eighth Amendment. In *Wilkerson*, the Court concluded that the firing squad is not a cruel and unusual punishment under the Eighth Amendment. However, the Court never reviewed evidence on the cruelty of shooting because the issue was never raised by the plaintiff. The plaintiff's contention was that because the method of execution was not specified by the statute, the trial "court possessed no authority to prescribe the mode of execution." The Court disagreed.

In *Kemmler*, the Court held that the Eighth Amendment did not apply to the states and deferred to the New York legislature's conclusion that electrocution was not a cruel and unusual punishment under New York's Electrical Execution Act. For this reason, the Court never conducted an Eighth Amendment analysis of electrocution, and whatever legal standards the Court employed "were made *en passant*."

In *Resweber*, the issue was not whether the method of execution—electrocution—violated the Eighth Amendment, but whether the State of Louisiana could constitutionally execute the appellant after the electric chair had malfunctioned during the first attempt. Because the question of electrocution's constitutionality was not presented, there were no facts or legal arguments in the record on this issue; therefore, the *Resweber* Court's assumption that electrocution passed Eighth Amendment muster was unsupported. Moreover, the *Resweber* Court's failure to actually incorporate the Eighth Amendment meant that the plurality did not need to fully develop an Eighth Amendment standard. Although a majority of the *Resweber* Court found that a second execution would not violate the Due Process Clause of the Fourteenth Amendment, only four Justices agreed that it would not violate the Eighth Amendment.

Justice Frankfurter, the necessary fifth vote to uphold the Louisiana Supreme Court, did not consider the Eighth Amendment at all.

### 3. The *Baze* Justices on *Resweber*

The three *Baze* opinions citing *Resweber* took a range of perspectives.<sup>82</sup> Most troublesome were Chief Justice Roberts's citations. His final reference to *Resweber*, a quotation from Justice Frankfurter's concurrence, bolsters Roberts's belief in judicial restraint: "One must be on guard against finding in personal disapproval a reflection of more or less prevailing condemnation." Yet Justice Roberts's other two *Resweber* references are not fully on point.

When articulating his Eighth Amendment standard, Roberts quotes from Frankfurter's concurrence referring to "a hypothetical situation" involving "a series of abortive attempts at electrocution" [that] would present a different case." Although Roberts accurately notes that the concurrence is based on the Due Process Clause, it might not be clear to a modern reader of the opinion that Frankfurter did not consider the appropriate Eighth Amendment standard because he did not believe that the Eighth Amendment applied to the states. In other words, Roberts never explains why Frankfurter's Fourteenth Amendment due process standard is pertinent to an Eighth Amendment cruel and unusual punishments analysis. A good argument can be made that Frankfurter's standard is not applicable.

In addition, Justice Roberts refers to the plurality opinion in *Resweber* for the proposition that "an accident, with no suggestion of malevolence, . . . [does] not give rise to an *Eighth Amendment* violation." However, the internal quote from *Resweber* is not discussing the Eighth Amendment but rather whether a second execution would violate the Fifth Amendment prohibition on double jeopardy. The sentence following the quoted phrase from *Resweber* reads, "We find no *double jeopardy* here which can be said to amount to a denial of federal due process in the proposed execution." Once again, Justice Roberts misses the Eighth Amendment trail.

Justice Thomas, by contrast, depends less on precedent than on his conception of the "original understanding of the Cruel and Unusual Punishments Clause" when determining the appropriate Eighth Amendment standard. Thomas uses the *Resweber* plurality's suggested standard of a "purpose to inflict unnecessary pain" to support his contention "that it was the original understanding and intent of the framers of the Eighth Amendment . . . to proscribe as 'cruel and unusual' *only* such modes of execution as compound the simple infliction of death with added cruelties or indignities." However, the *Resweber* Court never examined the mode of execution. The actual conclusion of the plurality was that the botched first execution attempt did not add to the cruelty of a second electrocution.

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<sup>82</sup> The discussion in this section draws from *Baze v. Rees*, 128 S. Ct. 1520 (2008) and *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).

Justice Thomas also stresses that the *Resweber* Court “was confronted in dramatic fashion with the reality that the electric chair involved risks of error or malfunction that could result in excruciating pain”; yet it still “concluded that the Constitution did not prohibit Louisiana from subjecting the petitioner to those very risks a second time in order to carry out his death sentence.” Although Justice Thomas is correct, it might be more precise to think of the *Resweber* Court’s conclusion as following a Fourteenth Amendment due process standard rather than an Eighth Amendment cruel and unusual punishment standard because the Court did not actually decide that the Eighth Amendment was applicable to the states. As previously noted, Justice Frankfurter, the necessary fifth vote to allow the second execution, determined that the Eighth Amendment is not incorporated; likewise, the plurality only considered the Eighth Amendment with respect to whether the botched first execution attempt would make a subsequent attempt unconstitutional, not whether the execution method itself was unconstitutional. Again, Justice Thomas fails to keep in mind the constitutional constraints and confusion the *Resweber* Court faced in a pre-incorporation legal world.

Justice Ginsburg fully comprehends these constraints. She points out that *Resweber* did not create a clear Eighth Amendment standard for determining the constitutionality of an execution method but rather used different guidelines. As Justice Ginsburg notes, “The plurality opinion in [*Resweber*] first stated: ‘The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence.’ . . . But the very next sentence varied the formulation; it referred to the ‘[p]rohibition against the wanton infliction of pain.’” Rather than turning to *Resweber* (or *Kemmler* or *Wilkerson*) as existing precedent, she believes the Court should develop an alternative guide.

Justice Ginsburg was also concerned with issues pertaining to risks of error—a common theme that *Resweber* addressed but never clearly or adequately resolved. Therefore, in Ginsburg’s view, *Baze* should have been vacated and remanded with instructions to consider whether Kentucky’s omission of safeguards used by other states “poses an untoward, readily avoidable risk of inflicting severe and unnecessary pain.” She recommended a balancing approach in which the Court would weigh the degree of risk associated with an execution method, the magnitude of pain associated with that risk, and the availability of alternatives. Such an approach reasonably complies with the kinds of legal, medical, and technical problems that execution methods challenges have recently raised.

In sum, *Baze* exemplifies a modern decision that relies heavily on *Resweber*, in various ways, none of which (besides Justice Ginsburg’s dissent) satisfies the doctrinal needs of a post-incorporation world accompanied by massive changes in criminal case law and standards. As Justice Ginsburg notes, in light of past precedent, the Eighth Amend-

ment must comport with “‘evolving standards of decency that mark the progress of a maturing society.’” By sharp contrast, the “society” surrounding *Resweber*—and Willie Francis—did not represent progress either legally or socially. Thus, in *Baze*, there was needless regression to a point in sociolegal history not worth reviving. The Court now has opportunities to create a more advanced and just Eighth Amendment standard.

### C. Willie’s Final Words

On May 24, 1947, *The Shreveport Sun* published a letter Willie wrote just a day before he was executed; in it, Willie says goodbye and cautions the public about what can happen if a person commits a crime.<sup>83</sup> Yet, the warnings about law-breaking and punishment stopped with Willie; those in charge of the criminal justice system offered no comparable notice to *Shreveport Sun* readers that they could be convicted for a crime they may never have committed, particularly if they had grossly inadequate counsel. Nor were the readers ever informed that they could get death for a crime that might never even be prosecuted if they were someone else. In his letter, Willie told people not to engage in evil acts, but no one alerted them to their potential legal fate simply because of who they were, evil or not.

While such warnings about the inequities of the present criminal justice system perhaps blare somewhat louder today, many still ignore them. And there are few cautionary concerns about the inadequacies of long past precedent such as *Resweber*. One value of telling a defendant’s story is to alert legal actors so they avoid repeating the past. Willie in particular seemed to have this goal in mind. “To every one, my best farewell wishes I send,” said Willie in his *Shreveport Sun* letter.<sup>84</sup> And then Willie completed the rhyme with words that could move in so many different directions: “[A]nd may none reach my dreadful end.”<sup>85</sup>

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<sup>83</sup> See “Be Careful How Ye Spend Thy Days,” Warned Willie Francis, *supra* note 48.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*



**WILLIE FRANCIS'S REMAINING SIBLINGS and  
OTHER FAMILY MEMBERS (April 1971)**

Courtesy of Joseph E. Davis, Jr.,  
grand-nephew of Willie Francis