

# CERTAIN BLOOD FOR UNCERTAIN REASONS: A LOVE LETTER TO THE VERMONT LEGISLATURE ON NOT REINSTATING CAPITAL PUNISHMENT

Michael Mello<sup>\*†</sup>

## INTRODUCTION: "CERTAIN BLOOD FOR UNCERTAIN REASONS"<sup>1</sup>

This is a love letter. It is a love letter to the Vermont Legislature. In it I hope to persuade the Legislature not to reinstate capital punishment.<sup>2</sup>

An old Chinese blessing (or curse, I've never been clear which) holds, "May you live in interesting times."<sup>3</sup> When it comes to capital punishment, we all live in interesting times. Whether this is a blessing or curse, I'm not certain.

Thirty-six states have capital statutes on the books. So does the federal government.<sup>4</sup> As of February 8, 2008, 3350 souls live on America's death rows: 45% white (1517), 42% black (1397), 11% Hispanic (359), and 2%

---

\* © Michael Mello, Professor of Law, Vermont Law School; J.D. 1982, University of Virginia School of Law; B.A. 1979, Mary Washington College. This Essay is derived from a statement I prepared for the Vermont Legislature in February 2006. My institutional affiliation is noted for identification purposes only; this Essay does not speak for Vermont Law School or for any other member of its community.

† I want to thank the staff and editors of the *Vermont Law Review* for organizing this excellent symposium and for inviting me to participate in it. I am also grateful to Laura Gillen, Judy Hilts, and Susan Elder for word processing this Essay, and to Harry Wiener, Lee and Alex Leon, and Ida Mello for reading and commenting helpfully on an earlier incarnation of this Essay; to Deanna Mello, Amanda Mowle, Cassandra Fenstermaker, Shayla Crenshaw, Kathryn Kent, John Weir, Erika Wright, Shokrey Abdelsayed, Peter Clark, and Joseph Griffio for providing invaluable research assistance.

This Essay is dedicated to my mother, Ida Mello. See generally Yvonne Shinhoster Lamb, *Virginia Woman's Warmth, Caring Knew No Boundary*, WASH. POST, Mar. 21, 2004, at C11.

1. TIM O'BRIEN, IF I DIE IN A COMBAT ZONE 135, 164 (1st Delta ed., Delta/Seymour Lawrence 1989) (1969). "[B]ut the war in Vietnam raced in and out of human lives, taking them or sparing them like a berserk taxi hack, without evident cause, a war fought for uncertain reasons. . . . Certain blood for uncertain reasons. No lagoon monster ever terrorized like this." *Id.*

2. Portions of text in the following work have been incorporated from the author's previously published works, including MICHAEL MELLO, DEATHWORK: DEFENDING THE CONDEMNED (2002) [hereinafter MELLO, DEATHWORK]; MICHAEL MELLO, THE WRONG MAN (2001) [hereinafter MELLO, THE WRONG MAN]; MICHAEL A. MELLO, DEAD WRONG (1997) [hereinafter MELLO, DEAD WRONG]. In some instances, the editors of the *Vermont Law Review* have added citations to these works for short quotations, but we have left longer excerpts unmarked in order to avoid disrupting the flow of the text or marring the layout of this essay.

3. Though commonly (or colloquially) known as a Chinese blessing or curse, the origin of this saying is a source of debate. BBC Edited Guide Entry, <http://www.bbc.co.uk/dna/h2g2/A807374> (last visited Mar. 3, 2008). The phrase may be entirely American. Ted Anthony, AP, *A Horrifying, Fascinating Week for Drained America*, PANTAGRAPH (Bloomington, Ill.), Feb. 10, 2008, at A1, available at 2008 WLNR 2649197.

4. DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 1 (2008) [hereinafter DPIC, FACTS], available at <http://www.deathpenaltyinfo.org/FactSheet.pdf>.

other (77).<sup>5</sup> All but two were sent to death row for homicide; the only exceptions are Patrick Kennedy and Richard Davis in Louisiana, who were condemned for capital rape of a child.<sup>6</sup> One thousand ninety-nine men and women have been put to death in the modern era of capital punishment.<sup>7</sup> Public support for the death penalty is, and has been for decades, strong at 65%.<sup>8</sup>

And, yet, as of this writing, the Supreme Court has signaled a moratorium on all executions<sup>9</sup> while the justices decide the claims of two

5. *Id.* at 2.

6. *State v. Kennedy*, 957 So. 2d 757, 760 (La. 2007), *cert. granted*, 128 S. Ct. 829 (2008); Warren Richey, *Should Child Rapists Face Death Penalty?*, CHRISTIAN SCI. MONITOR, Apr. 16, 2008, at 2, available at 2008 WLNR 7031779; see also Michael Mello, *Executing Rapists: A Reluctant Essay on the Ethics of Legal Scholarship*, 4 WM. & MARY J. WOMEN & L. 129, 130 (1997) (discussing non-homicide death penalty cases); Death Penalty Info. Ctr., *Death Penalty for Offenses Other than Murder*, <http://www.deathpenaltyinfo.org/article.php?&did=2347> (last visited Mar. 31, 2008) (indicating there are two people on death row for non-murder offenses).

Patrick Kennedy's sentence for capital rape was affirmed by the Louisiana Supreme Court on May 22, 2007. *Kennedy*, 957 So. 2d at 793. Kennedy's counsel filed a certiorari petition in the U.S. Supreme Court on September 11, 2007. Petition for a Writ of Certiorari, *Kennedy v. Louisiana*, No. 07-343 (filed Sept. 11, 2007). The government filed its opposition on November 14. Both the Louisiana Supreme Court and the government's opposition to certiorari cited my 1997 article. *Kennedy*, 957 So. 2d at 786; Brief in Opposition to Petition for Certiorari at 17, *Kennedy v. Louisiana*, No. 07-343 (filed Nov. 14, 2007). I hate that.

The Court granted certiorari in January 2008 and heard oral argument on April, 16, 2008. Transcript of Oral Argument, *Kennedy v. Louisiana*, No. 07-343 (U.S. argued Apr. 16, 2008), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/07-343.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-343.pdf).

7. DPIC, FACTS, *supra* note 4, at 1.

8. Stuart Taylor Jr., *The Death Penalty: Slowly Fading?*, NAT'L J., Nov. 17, 2007, at 15, 15 (noting that in spite of such high support, "the number of juries opting for death has plunged, from 317 in 1996 to 128 in 2005").

9. Linda Greenhouse, *Justices Stay Execution, a Signal to Lower Courts*, N.Y. TIMES, Oct. 31, 2007, at A1. Texas got in one last execution before the moratorium took hold. See Ralph Blumenthal & Linda Greenhouse, *Texas Planning New Execution Despite Ruling*, N.Y. TIMES, Sept. 29, 2007, at A1 (describing the September 28, 2007, execution of Michael Richard after his lawyers missed a filing deadline by twenty minutes because their computers had crashed).

Lawyers in the [Michael Richard] case on Tuesday said their appeal had been turned down because of an unusual series of procedural problems.

Professor [David Dow, a chaired professor at the University of Houston Law School and Richard's lead counsel,] said the computers crashed at the Texas Defender Service in Houston while lawyers were rewriting his appeal to take advantage of the high court's unexpected interest in lethal injection.

Because of the resulting delay, the lawyers missed by 20 minutes the 5 p.m. filing deadline at the Texas Court of Criminal Appeals in Austin, where the appeal had to go first before moving to the Supreme Court.

The Texas court refused their pleas to remain open for the extra minutes. Because the lawyers missed that crucial step, Professor Dow said, the Supreme Court had to turn down the appeal, and Mr. Richard was executed.

But on Thursday, with a more carefully crafted appeal for Mr. Turner, and the Texas court's closely split rejection, the Supreme Court called a halt to another lethal injection.

Kentucky death row prisoners and others that the lethal injection method used—and frequently botched—in most states may inflict unnecessary pain upon the person being killed.<sup>10</sup>

Death sentences are down across the nation, including in Texas,<sup>11</sup> the buckle of the death belt.<sup>12</sup> The number of juries willing to impose death as a punishment dropped from 323 in 1996 to 138 in 2005.<sup>13</sup> Likewise, the number of executions plummeted from a modern high of ninety-eight in 1999 to fifty-three in 2006 to forty-two in 2007.<sup>14</sup> In December 2007, the New Jersey Legislature voted to abolish capital punishment in that state, the first legislature to do so in the modern era.<sup>15</sup>

By early 2008, the number of death row exonerations reached 128.<sup>16</sup> The National Coalition to Abolish the Death Penalty recently issued a report raising significant questions about whether four people executed in recent years might have been innocent.<sup>17</sup> The governor of Virginia granted a rare commutation, because of doubts about guilt.

On December 2, 2005, Kenneth Lee Boyd became the 1000th person to be executed in the United States since 1977<sup>18</sup>, when a ten-year moratorium

---

*Id.*; see also *Coleman v. Thompson*, 501 U.S. 722, 726, 757 (1991) (ruling that filing a notice of appeal in state supreme court one day late constituted a sufficient procedural bar precluding federal judicial review of constitutionality of death sentence of condemned inmate Roger Keith Coleman). The opinion began: “This is a case about federalism.” *Id.* at 726. The capital sentence was affirmed. *Id.* at 757. In another death penalty case, Henry Allen filed his state court appeals papers one day late, and the Court ruled that federal review of his death penalty sentence was foreclosed. *Brown v. Allen*, 344 U.S. 443, 486–87 (1953). Roger Keith Coleman was executed in Virginia on May 20, 1992; Henry Allen was executed in New York on March 11, 1954. Death Penalty Info. Ctr., Executions is [sic] the U.S. 1608–2002: The ESPY File: Executions by Name, at 10, 74, <http://www.deathpenaltyinfo.org/ESPYname.pdf> (last visited Mar. 31, 2008).

10. Taylor Jr., *supra* note 8, at 15. On April 16, 2008, the Court upheld lethal injection. *Base v. Reez*, 128 S. Ct. 1520, 1538 (2008). The moratorium on execution is over.

11. Evan Thomas & Martha Brant, *Injection of Reflection*, NEWSWEEK, Nov. 10, 2007, at 40, 40.

12. Texas has carried out 405 executions in the modern era of capital punishment. DPIC, FACTS, *supra* note 4, at 3. Virginia is in a distant second place, with ninety-eight; Oklahoma is third, with eighty-six; Missouri is fourth, with sixty-six; and Florida is fifth, with sixty-four. *Id.*

13. *Id.*

14. *Id.* at 1.

15. Jeremy W. Peters, *New Jersey Moves to End Death Penalty*, N.Y. TIMES, Nov. 19, 2007, at B1.

16. DPIC, FACTS, *supra* note 4, at 2; see also Death Penalty Info. Ctr., Innocence News and Developments: 2007, <http://www.deathpenaltyinfo.org/article.php?&did=2564> (last visited Feb. 14, 2008) (noting that Jonathon Hoffman was the 126th person on death row to be exonerated since 1973). This was just one week after a Tennessee jury acquitted Michael Lee McCormick, “the 125th person exonerated from death row since 1973.” *Id.*

17. NAT’L COAL. TO ABOLISH THE DEATH PENALTY, INNOCENT AND EXECUTED 1–9 (2006), available at <https://secure.democracyinaction.org/dia/organizationsORG/ncadp/images/InnocentAndExecuted.pdf>.

18. Brenda Goodman, *North Carolina Man Is 1,000th Person Executed Since 1976*, N.Y.

on executions ended with the state-assisted suicide of Gary Gilmore.<sup>19</sup> By March 2008, the number had risen to 1099.<sup>20</sup> One thousand ninety-nine may not sound like a large number to you. But were I to read their names out loud, at a rate of one name every two seconds, it would take more than a half hour.

Vermont is one of only thirteen states without presumptively valid capital statutes on the books.<sup>21</sup> Vermont's statutes still authorize death for the crime of treason,<sup>22</sup> but that law is almost certainly unconstitutional. The lack of a death penalty statute in Vermont does not mean that the issue does not matter here. It does.

In 2007 the mayor of Barre called for the Vermont Legislature to consider imposing the death penalty on convicted crack and heroin dealers.<sup>23</sup> In 2006, Vermont State Representative Duncan Kilmartin introduced a bill to reinstate capital punishment in Vermont state law.<sup>24</sup> The bill would have permitted a jury to impose the death penalty for murder committed under certain circumstances.<sup>25</sup> Such bills are frequently introduced in the Vermont Legislature, but they have never gone anywhere. What had changed in 2006 was the death verdict the previous summer in

TIMES, Dec. 3, 2005, at A17.

19. Gary Gilmore was executed by firing squad on January 17, 1977. *1977: Gilmore Executed by Firing Squad*, BBCNEWS, [http://news.bbc.co.uk/onthisday/hi/dates/stories/january/17/newsid\\_2530000/2530413.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/january/17/newsid_2530000/2530413.stm) (last visited Mar. 13, 2008).

20. DPIC, FACTS, *supra* note 4, at 1.

21. It is not entirely clear that Vermont has abolished capital punishment. See 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, 205 & n.160 (2002) (noting that from 1965 to the present, Vermont has "no death penalty (with exceptions)"). In 2002, Professor Denno wrote, "Currently, there is still a partial death penalty statute in Vermont. However, the statute applies only to the crime of treason, or, relatedly, crimes committed by three or more people, acting in concert, in a time of war or of threatened war." *Id.* at 205 n.160 (citations omitted).

Notwithstanding these statutes, I still put Vermont in the abolition column. These statutes are holdovers from the pre-*Furman* era. The Supreme Court invalidated all extant capital statutes in *Furman v. Georgia*, 408 U.S. 238 (1971), and Vermont has never enacted, post-*Furman*, a set of procedures for imposing and carrying out capital punishment. Any present-day capital prosecution in Vermont would be unconstitutional, because the Vermont Legislature has never enacted, since the decision in *Furman*, a set of procedures to impose capital punishment.

22. Denno, *supra* note 21, at 205 n.160; see also Adam Silverman, *Vermont Death Penalty?*, BURLINGTON FREE PRESS, Sept. 23, 2006, at 1A (reporting that although Vermont citizens and politicians take pride in the 1987 legislative act abolishing the state death penalty, this statute only prohibited capital punishment for first- and second-degree murder, while overlooking the 1787 version of title 13, section 3401 of the Vermont Statutes, a 219-year-old statute punishing treason with death).

23. Sue Allen, *Mayor Wants Death Penalty for Drug Dealers*, RUTLAND HERALD (Vt.), Feb. 25, 2007, § News, at 4.

24. H.R. 830, 2006 Leg., Reg. Sess. (Vt. 2006), available at <http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2006/bills/intro/h-830.htm>.

25. *Id.* § 2313(g).

the Donald Fell trial.<sup>26</sup> The quality and seriousness of the 2006 bill were also different from previous restoration bills. Previous bills had been shoddy affairs. The 2006 bill, drafted by a superb legislative drafter named Eric Fitzpatrick, was a thoughtfully crafted piece of work. Previous bills had been promoted by unimpressive legislators. Representative Duncan Kilmartin is impressive in every way, beginning with his formidable intelligence and skill as a lawyer. He's also a friend of mine and a guest lecturer at my classes at Vermont Law School.

In this Essay I will use the 2006 bill as a vehicle to explore the larger question of whether the Vermont Legislature should reinstate the death penalty. My primary audience is the legislators, present and future. At the moment, there is no real threat that the Vermont Legislature will restore capital punishment. That could change at any time. No abolitionist state is ever further than one vicious murder away from reinstating the death penalty.

## I. THE CONTEXT AND METHODOLOGY FOR THIS LOVE LETTER

### A. *I Would Oppose Any Bill Reinstating Capital Punishment*

I'm a lawyer by training and a law professor by trade, but I'll try not to sound like one in this Essay. Any idiot with a law degree can make the law seem inaccessible and mysterious; it's much harder to distill complex legal principles and policies into plain English without over-simplifying or hiding behind legalese. I'm allergic to legalese.

I respectfully opposed Representative Kilmartin's bill. In candor, I would oppose *any* capital punishment restoration bill. My objections to the death penalty—the inevitability of mistake and caprice, the warping effects of race and class,<sup>27</sup> the fiscal and other costs, and the corruption of the

---

26. Donald Fell faced *federal* capital murder charges in Vermont for the kidnapping and carjacking murder of Rutland resident Teresca King. Damian Pagano, *Accused Killer Fell Facing Death Penalty*, RUTLAND HERALD (Vt.), Jan. 31, 2002, at A1. The federal crimes of kidnapping with death resulting and carjacking with death resulting carry the death penalty. See 18 U.S.C. § 3591(a)(2)(D) (2000) (making a defendant eligible for the death penalty if found guilty of "intentionally and specifically engag[ing] in an act of violence, knowing that the act created a grave risk of death to a person, . . . such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act"). On September 24, 2002, Judge William Sessions, in the *Fell* case, held the federal death penalty statute unconstitutional. See *United States v. Fell*, 217 F. Supp. 2d 469, 489 (D. Vt. 2002), *vacated*, 360 F.3d 135 (2d Cir. 2004). The Second Circuit reversed. *Fell*, 360 F.3d at 146. In July 2005, a Vermont jury sentenced Fell to death. *United States v. Fell*, No. 2:01-CR-12-01, 2005 WL 4021147 (D. Vt. July 14, 2005).

27. Michael Mello, *Ivon Stanley and James Adams' America: Vectors of Racism in Capital*

medical<sup>28</sup> and legal professions—simply cannot be cured by tinkering with the legal machinery of death. These flaws are endemic to capital punishment as a legal system.

Having said that, I also believe that capital punishment schemes are not all created equal. Some systems are more likely to send innocents to death row and the execution chamber. The present bill is one of those. While miscarriages of justice cannot be eliminated by procedural safeguards, they can be reduced. But the present bill contains no such special safeguards.<sup>29</sup>

Reasonable minds can support capital punishment,<sup>30</sup> in my opinion. At the risk of sounding patronizing or condescending, I want to acknowledge that thoughtful, decent, moral, enlightened, intelligent people can, and do, believe that in our war against crime, the death penalty is a legitimate weapon in that arsenal. Some very smart people—Jeff Jacoby,<sup>31</sup> David Gelernter,<sup>32</sup> Walter Berns,<sup>33</sup> and Ernest van den Haag,<sup>34</sup> to name four—support capital punishment.

### B. Judge Vance's Assassination

Opponents of capital punishment, like me, must honestly acknowledge

*Punishment*, 43 CRIM. L. BULL. 636, 639 (2007).

28. See, e.g., Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 80–84 (2007) (reporting that despite the American Medical Association's opposition to physician participation in executions, "a number of states conceded a certain level of physician participation" and that medical associations were generally apathetic about such involvement).

29. Vt. H.R. 830.

30. See, e.g., WALTER BERNS, FOR CAPITAL PUNISHMENT 76 (1979) ("If we are of the opinion that the United States may rightly ask of its citizens this awful sacrifice [conscription to the military], then we are also of the opinion that it may rightly impose the most awful penalty; if it may rightly honor its heroes, it may rightly execute the worst of its criminals."); Ernest van den Haag, *The Death Penalty Once More*, in THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 445, 445 (Hugo Adam Bedau ed., 1997) [hereinafter van den Haag, *The Penalty Once More*] (stating that the "Constitution . . . authorizes the death penalty"); Ernest van den Haag, *Death but Not Torture*, in ERNEST VAN DEN HAAG & JOHN CONRAD, THE DEATH PENALTY: A DEBATE 13, 13–16 (1983) (arguing that capital punishment is not cruel and unusual punishment); Joshua Marquis, *Vast Majority on Death Row Belong There*, VALLEY NEWS (White River Junction, Vt.), Mar. 2, 2002, at A12 ("We have far more to fear from guilty people wrongly freed by the courts than from that tiny number wrongfully imprisoned and the even smaller number of them who are actually innocent."); Cathy Young, *New Look at Execution, Mental Illness*, BOSTON GLOBE, Mar. 4, 2002, at A15 ("Supporters of capital punishment see it as retribution, not revenge . . .").

31. Jeff Jacoby, *Misplaced Sympathy for Killers*, BOSTON GLOBE, Dec. 7, 2005, at A21.

32. See, e.g., DAVID GELERNTER, DRAWING LIFE: SURVIVING THE UNABOMBER 122–23 (1997) (relating his recovery after being severely injured by a mail bomb sent by Ted Kaczynski, the "Unabomber," and his belief in the death penalty for murderers as a means of justice).

33. E.g., BERNS, *supra* note 30, at 153.

34. E.g., van den Haag, *The Penalty Once More*, *supra* note 30, at 445.

that people are capable of ghastly crimes.<sup>35</sup> Sometimes those crimes hit close to home.

I don't know how many of you have lost a loved one to murder. I have. Eighteen winters ago, a man I loved like a father was murdered by a terrorist.<sup>36</sup> A few days before Christmas 1989, a racist coward with a grudge against the federal judiciary mailed a shoebox-sized bomb to federal appellate Judge Robert S. Vance.<sup>37</sup> The bomb, which detonated in the kitchen of Judge Vance's home on the outskirts of Birmingham, Alabama, literally tore him in two. The blast killed him instantly and almost killed his wife, Helen.

When I graduated from law school in 1982, my first job was as Judge Vance's law clerk.<sup>38</sup> Judge Vance, a genuine hero of the civil rights wars of 1960s Alabama, became much more than a boss to me. He was mentor, confidante, personal and professional role model—my hero, actually. Few people are lucky enough to actually meet—much less to work for—their personal heroes. I was blessed in that regard. He was my father in the law. He taught me, by his own example, that the law could be an honorable battleground in which to fight for racial justice, equality, and human rights. Mostly, Judge Vance was my friend. I miss him every day. I pray for him every night. So I think I understand the very human impulse to demand, in some heinous cases, the maximum punishment allowed under our Constitution. I know what it feels like to have someone you love taken away by a murderer.

---

35. Until recently, I would have used the word “evil” here. I count myself among those who believe that evil exists in our world. MELLO, *DEAD WRONG*, *supra* note 2, at 263. *See generally* ANDREW DELBANCO, *THE DEATH OF SATAN: HOW AMERICANS HAVE LOST THE SENSE OF EVIL* (1995) (describing how the United States has developed an “incompetence before evil”). My own belief that evil exists comes from my lifelong study of the Holocaust. *See generally* ALEKSANDER LASIK ET AL., *AUSCHWITZ 1940-1945* (Waclaw Dlugoborski & Franciszek Piper eds., William Brand trans., 2000) (chronicling central issues in the history of the camp in a five-volume monograph). My belief in Israel's right to exist is also grounded in the history of the Holocaust.

As a capital defense lawyer, I have looked into the eyes of evil. Sometimes the eyes looking back belonged to my condemned clients. Sometimes they belonged to technicians in the machinery of death who were only doing their jobs. Sometimes they were my own eyes staring back at me in a mirror.

I also think that “evil” is a word that ought not be devalued by overuse. I wish President George W. Bush would use the word less frequently, and I wish he would not use phrases like “the evil one” or “evildoers”; such comic-book phrases diminish the label “evil.”

36. *See generally* Mello, *supra* note 27, at 654–56 (describing Judge Vance, his work, and the author's relationship with him).

37. *See generally* RAY JENKINS, *BLIND VENGEANCE: THE ROY MOODY MAIL BOMB MURDERS* (1997) (recounting the assassination of Judge Vance and exploring the life and mind of his killer).

38. MELLO, *DEATHWORK*, *supra* note 2, at 38; Michael Mello, “*In the Years When Murder Wore the Mask of Law*”: *Diary of a Capital Appeals Lawyer (1983-1986)*, 24 VT. L. REV. 583, 595 (2000) [hereinafter, Mello, *Diary*].

I also want to acknowledge that mine is a minority position. Thirty-six states, the federal government, the President, Congress, and the majority of the American people support capital punishment. Maybe all of them are wrong and I'm right; maybe their support for capital punishment is based on ignorance about how it works.<sup>39</sup> Maybe. But abolitionists like me must pause before concluding that we are clearly right and most everyone else is clearly wrong. Some opponents of the death penalty tend toward the sanctimonious, so clear are they in the moral superiority of their position and so certain are they that those who disagree must be fools or knaves. This sort of moral arrogance—hubris, really—is, I believe, a grave error. Humility is far more appropriate. We abolitionists do not have a franchise on morality.

Capital punishment is not an easy issue with easy answers. It isn't easy morally, and it isn't easy legally. Anyone who tells you it *is* easy doesn't know what he's talking about.

Capital punishment appears attractive as a response to horrible crimes. The September 11 atrocities, the Oklahoma City bombing, the Unabomber, the videotaped murder and beheading of *Wall Street Journal* reporter Daniel Pearl, the D.C.-area sniper, and the murder of Rutland's Teresca King are the kinds of crimes that cry out for swift and severe punishment. This is as it should be: Especially heinous crimes deserve an especially severe response by the criminal law. Reasonable minds and good hearts can conclude that capital punishment should exist as an option.

### C. Roadmap

My discussion will proceed in several stages. In the remainder of this Part, I will address the “gateway issue” of financial cost. In the next Part, I will discuss the 2006 Kilmartin bill.<sup>40</sup> Then, I will outline capital punishment as a

---

39. This view has come to be called the “Marshall Hypothesis.” Justice Thurgood Marshall made this argument in *Furman v. Georgia*, 408 U.S. 238, 360–69 (1972). See *Gregg v. Georgia*, 428 U.S. 153, 232 (1976) (Marshall, J., dissenting) (citing his own concurring opinion in *Furman* and noting that his “hypothesis” inspired a study revealing that the “opinions of an informed public would differ significantly from those of a public unaware of the consequences and effects of the death penalty”).

I have never felt comfortable arguing the Marshall Hypothesis. It strikes me as arrogant to contend that those who disagree with me must be ignorant and that if they only knew the true facts, they would agree with me. Capital punishment is a much harder issue than that, it seems to me.

40. Vermont's experience with the *Fell* case illustrates this history. See *supra* note 26 (discussing *United States v. Fell*, 217 F. Supp. 2d 469 (D. Vt. 2002), *vacated*, 360 F.3d 135 (2d Cir. 2004)). See generally Alan J. Keays, *Fell Trial Delayed by Judge*, RUTLAND HERALD (Vt.), June 12, 2002; Editorial, *Life and Death*, RUTLAND HERALD (Vt.), Feb. 1, 2002, at A8 (discussing *Fell*); Pagano, *supra* note 26 (discussing *Fell*).

A few years ago, another Vermont federal capital prosecution resulted in a guilty plea.

legal system and its justifications: deterrence and retribution. I will also sketch out what I mean by the *real* capital punishment. Next, I will explore the intimate relationship between the financial costs of the death penalty and the likelihood of executing innocents. Finally, I will suggest that the very real costs of the death penalty do not outweigh the ephemeral benefits.

#### D. Cost as a “Gateway Issue”

Before launching into my analysis, however, I want to suggest an analytical sequence for the Vermont Legislature to follow in analyzing any reinstatement bill. As I will discuss in detail below, capital punishment raises complicated moral, legal, and constitutional issues. One crucial issue—financial cost—sometimes gets short shrift.

I believe cost should be the *first* issue the legislators consider. I think of cost as a gateway issue. If the Legislature concludes that capital punishment costs too much, then they need not reach the genuinely difficult issues raised by Vermont’s getting into the killing business.

Regardless of whether the Legislature chooses to consider cost before, after, or during its exploration of the traditional capital punishment questions raised by this bill, the Legislature must consider cost. It is indispensable to know how much this bill will cost Vermont taxpayers. The best way for the Legislature to learn this information is to commission an objective fiscal analysis. Such a fiscal analysis should study how much the Donald Fell prosecution cost the federal taxpayers.

In neighboring New Hampshire, the Granite State has an unprecedented two capital prosecutions underway.<sup>41</sup> On October 16, 2006, Manchester Police Officer Michael Briggs was shot in the head while serving in the line of duty. Officer Briggs died from his injuries. Within days, the Attorney General of New Hampshire announced she would seek the death penalty against Briggs’s killer. Michael “Stix” Addison was

---

That defendant, Chris Dean, had sent a fatal bomb to a person in Vermont. See Nancy Armour, AP, *Bombing Suspect Will Be Sent to Vermont*, RUTLAND HERALD (Vt.), Mar. 26, 1988, at A1 (stating that police believed they had probable cause to try Chris William Dean for the murder of Christopher Marquis based on his proximity to the post office where the package was mailed and the existence of bomb-making parts at his house); Christine Cupaiuolo, *Teen Killed by Package Bomb*, RUTLAND HERALD (Vt.), Mar. 20, 1998, at A1 (describing the explosion that killed Christopher Marquis and injured his mother from a package bomb delivered by the U.S. Postal Service to their Fair Haven home); Christine Cupaiuolo, *Bombing Suspect Arrested*, RUTLAND HERALD (Vt.), Mar. 21, 1998, at A1 (describing Dean’s arrest); Diane Derby, *Tetzlaff Would Support Penalty*, RUTLAND HERALD (Vt.), Mar. 27, 1998, at A1 (discussing the U.S. Attorney’s comments that he would seek the death penalty for Chris Dean if his case satisfied the conditions under U.S. Justice Department guidelines).

41. Kathryn Marchock, *Simultaneous Capital Murder Cases ‘Extraordinary’ in NH*, N.H. UNION LEADER, May 4, 2007, at A11.

arrested and charged with capital murder for shooting Officer Briggs. While trial had been scheduled for September 2008, that date will almost certainly be delayed.

The capital prosecution of Addison is costing New Hampshire taxpayers a significant amount of money. In October 2006, the New Hampshire Legislature appropriated \$420,000 for prosecutors to pursue the Addison case.<sup>42</sup> In March 2007 the Legislature appropriated \$134,000 for Addison's defense.<sup>43</sup> The amount was for the year 2007 only.<sup>44</sup> An editor at the *Concord Monitor* asserted that the \$420,000 was just a "rough opening estimate" and that in fact the prosecutors had been offered "a blank check."<sup>45</sup> The Associated Press noted that "the cost could well rise above \$1 million."<sup>46</sup> Christopher Keating, Executive Director of the New Hampshire Public Defender program, "estimated it will cost the program about \$400,000 for every year the case goes on."<sup>47</sup> The case has already accumulated a massive amount of pre-trial motions.<sup>48</sup>

---

42. AP, *AG to Add Staffers for Death Penalty Case*, N.H. UNION LEADER, Oct. 18, 2006; Daniel Barrick, *\$420,000 Set for Murder Prosecution*, CONCORD MONITOR, Oct. 19, 2006, at A1; Kathryn Marchocki, *Pursuing Death Penalty Case Takes Lots of Time and Money*, N.H. UNION LEADER, Oct. 19, 2006, at A15.

43. Paula Tracy, *Accused Cop Killer Voted \$134k*, N.H. UNION LEADER, Mar. 9, 2007, at B5.

44. Kathryn Marchocki, *Addison May Contest Death Penalty Law*, N.H. UNION LEADER, Mar. 24, 2007, at A1.

45. Mike Pride, *Viewpoints: Unseemly Enthusiasm*, CONCORD MONITOR, Oct. 22, 2006, at D1.

46. Norma Love, AP, *Death Penalty Untested; State Has No Execution Chamber, Procedures*, CONCORD MONITOR, Oct. 22, 2006, at B1.

47. Marchocki, *supra* note 44. As of February 5, 2008, \$978,000 had been allocated for the Addison case. Kathryn Marchocki, *\$978,000 Allocated in Death Penalty Case*, N.H. UNION LEADER, Feb. 5, 2008, at B2.

48. As of November 2007, these are just some of the motions filed by the parties in *State v. Addison*, No. 07-S-0254 (N. H. Sup. Ct. filed Feb. 20, 2007): Order on Defendant's Motion to Strike No. 6 (Oct. 12, 2007); Order on Death Penalty Challenge No. 15 (Oct. 10, 2007); Defendant's Response to State's Motion to Deny Fair Cross Section Challenge (Oct. 9, 2007); State's Motion to Deny Fair Cross Section Challenge (Oct. 3, 2007); Order on Death Penalty Challenge No. 2 (Oct. 1, 2007); Order on Death Penalty Challenge No. 5 (Oct. 1, 2007); Order on Death Penalty Challenge No. 9 (Oct. 1, 2007); Order on Death Penalty Challenge No. 10 (Oct. 1, 2007); Order on Death Penalty Challenge No. 12 (Oct. 12, 2007); Supplemental Petition for Writ of Mandamus (Sept. 28, 2007); State's Objection to Defendant's Motion in Limine to Exclude Evidence of Other Alleged Crimes or Wrongs (Sept. 28, 2007); State's Objection to Defendant's Motion for Special Verdict (Sept. 28, 2007); State's Partial Objection to Defendant's Motion for Jury Venire Questionnaire and Limited Individual Sequestered Voir Dire (Sept. 28, 2007); State's Objection to Defendant's Motion for Bill of Particulars, Felon in Possession (Sept. 28, 2007); State's Objection to Defendant's Motion for Special Verdict (Sept. 28, 2007); State's Objection to Defendant's Motion to Strike (No. 8): Future Dangerousness (Sept. 28, 2007); State's Objection to Defendant's Motion to Strike (No. 10): All Challenges Under Federal Constitution (Sept. 28, 2007); State's Letter to the Clerk (Sept. 24, 2007); State's Objection to Defendant's Motion to Strike (No. 1): aggravating factors/separation of powers (Sept. 24, 2007); State's Objection to Defendant's Motion to Strike (No. 4): factor involving serious bodily injury (Sept. 24, 2007); State's Objection to Defendant's Motion to Strike (No. 5): overlap between indictment and

---

aggravating factor (Sept. 24, 2007); State's Objection to Defendant's Motion to Strike (No. 6): unadjudicated offenses (Sept. 24, 2007); State's Objection to Defendant's Motion to Strike (No. 7): adjudicated offenses (Sept. 24, 2007); Order on Defense Motion to Bar the Death Penalty No. 6 (Sept.24, 2007);Order on Defense Motion to Bar the Death Penalty No. 8 ( Sept.24, 2007); Order on Defense Motion to Bar the Death Penalty No. 14 (Sept. 24, 2007); Order on Defense Motion to Bar the Death Penalty No. 1 (Sept. 18, 2007); Defense Motion for Special Verdict (Sept. 14, 2007); Affidavit in Support of Jury Expert (Sept. 6, 2007); Motion for Authorization of Fee for Jury Expert (Aug. 30, 2007); Defense Motion on Jury Expert (Aug. 30, 2007); Defense: Deadline for Notice of Defenses (August 30, 2007); Defense Motion to Strike (Nos. 8-10) (Aug. 30, 2007); Defense cover letter on reference materials (Aug. 30, 2007); Defendant's Motion to Strike; aggravating factors/separation of powers (No. 1) (Aug. 28, 2007); Defendant's Motion to Strike; non-statutory aggravating factors (No.2) (Aug. 28, 2007); Defendant's Motion to Strike; statutory aggravating factors (No.3) (Aug. 28, 2007); Defendant's Motion to Strike; factor involving serious bodily injury (No.4) (Aug. 28, 2007); Defendant's Motion to Strike; overlap between indictment and aggravating factor (No. 5) (Aug. 28, 2007); Defendant's Motion to Strike Unadjudicated Offenses (No. 6) (Aug. 28, 2007); Defendant's Motion to Strike Adjudicated Offenses (No. 7) (Aug. 28, 2007); State's Motion to File Corrected Pleading (Aug. 21, 2007); State's Corrected Motion (Aug. 21, 2007); Supreme Court: Petitioner's Reply to Order (Aug. 20, 2007); Supreme Court: State's Memo on Proposed Rules (Aug. 20, 2007); Supreme Court: State's Memo: Appendix A (Aug. 20, 2007); Supreme Court: State's Memo: Appendix B (Aug. 20, 2007); Jury Venire Challenge: State's Objection to Motion to Stay (Aug. 20, 2007); Jury Venire Challenge: State's Objection to Motion to Dismiss (Aug. 20, 2007); Jury Venire Challenge: State's Objection to Motion for Discovery (Aug. 20, 2007); Transcription Order (Aug. 16, 2007); State's Objection to Motion to Bar the Death Penalty (No. 10) (Aug. 9, 2007); Order on Request for Extension of Time (Aug. 9, 2007); State's Motion for a One-Day Extension to Respond to Defense Motion to Bar Death Penalty (No.10) (Aug. 8, 2007); State's Objection to Defendant's Motion to Bar Death Penalty (No. 11) RISK (Aug. 8, 2007); State's Objection to Defendant's Motion to Bar Death Penalty (No. 12) Unconstitutional (Aug. 8, 2007); State's Objection to Defendant's Motion to Bar Death Penalty (No. 13) Unusual (Aug. 8, 2007); State's Objection to Defendant's Motion to Bar Death Penalty (No. 14); State's Objection to Defendant's Motion to Bar Death Penalty (No. 15) Cumulatively State (Aug. 8, 2007); State's Objection to Motion to Bar the Death Penalty (No. 7) (Aug. 6, 2007); State's Objection to Motion to Bar the Death Penalty (No. 8) (Aug. 6, 2007); State's Objection to Motion to Bar the Death Penalty (No. 9) (Aug. 6, 2007); State's Objection to Motion to Bar the Death Penalty (No.3) (July 23, 2007); State's Objection to Motion to Bar the Death Penalty (No.4) (July 23, 2007); State's Objection to Motion to Bar the Death Penalty (No. 6) (July 23, 2007); Motion for Discovery and Motion to Stay; filed with amended docket number (July 20, 2007); Letter on reference materials (July 20, 2007); Jury Venire Challenge: Motion to Dismiss; Motion for Discovery; Motion to Stay (July 19, 2007); Supreme Court Order on Writ of Mandamus (July 17, 2007); State's Objection to Motion to Bar the Death Penalty (No. 1) Notice of Appendix filed (July 16, 2007); Letter Certifying Qualified Defense Counsel (July 16, 2007); Defense Letter to Clerk on Photocopies of Reference Materials (July 13, 2007); Motion to Bar the Death Penalty (No. 10) (July 9, 2007); Motion to Bar the Death Penalty (No. 11) (July 9, 2007); Motion to Bar the Death Penalty (No. 12-15) (July 9, 2007); Motion to Bar the Death Penalty (No. 7) (July 5, 2007); Motion to Bar the Death Penalty (No. 8) (July 5, 2007); Motion to Bar the Death Penalty (No. 9) (July 5, 2007); Reply to State's Objection (July 2, 2007); State's Objection to Petition for Writ of Mandamus (June 28, 2007); Motion to Bar the Death Penalty (No. 3) (June 22, 2007); Motion to Bar the Death Penalty (No. 4) (June 22, 2007); Motion to Bar the Death Penalty (No. 5) (June 22, 2007); Motion to Bar the Death Penalty (No. 6) (June 22, 2007); Clerks response to Petition (June 18, 2007); Motion to Bar the Death penalty (No. 2) (June 15, 2007); Motion to Bar the Death Penalty (No. 1) (June 14, 2007); Supreme Court Order to Respond (June 5, 2007); Notice of Decision on Motion for Services (June 4, 2007); Assented to Motion for Services (May 31, 2007); Defense Petition for Writ of Mandamus (May 30, 2007); Appendix to Petition (May 30, 2007); Order on Application to Disclose (May 9, 2007); State's Notice of Intent to Seek Death Penalty (May 7, 2007); Notice of Hearing, Docket No. 07-S-0813; 0814 (May 3, 2007); Application to Disclose (May 2, 2007); Revised

Six months after Addison was indicted for capital murder, New Hampshire prosecutors announced that they would charge multimillionaire Jay Brooks with hiring men to kill a business associate.<sup>49</sup> Brooks is as different from Addison as one could imagine. Brooks is white and rich; Addison is black and poor. Ironically, Addison might well have the better legal team. He is represented by the superb office of the Public Defender of New Hampshire, while Brooks is represented by private, retained counsel.

New Hampshire is learning in *Addison* what states more experienced with the costs of capital punishment have known for years. Death is expensive. A November 2007 *New York Times* article described the “thankless nature” of a heretofore revered judge who volunteered for a capital murder trial.<sup>50</sup> Judge Hilton Fuller, Jr. was pilloried over his decision to delay the trial until the Georgia Public Defender is paid \$1.2 million in accrued fees.<sup>51</sup> In the case over which Judge Fuller presides, the Georgia Public Defender Standards Council has reviewed and approved the defense budget but “simply . . . cannot pay.”<sup>52</sup>

Those conducting a fiscal analysis should also study New York’s recent experience with capital punishment. In 1995, following a long political battle, the New York Legislature reinstated capital punishment.<sup>53</sup> Over the next nine years, New York spent \$170 million on the death

---

Scheduling Order (Apr. 13, 2007); Agreement on Motion to Protect (Apr. 13, 2007); Order on Defense Motion for Change of Venue (Apr. 13, 2007); Order on WMUR Motion to Amend (Apr. 13, 2007); Order on Status Conferences and Hearings (Apr. 9, 2007); Order on Defense Motion to Protect Interests of Accused (Apr. 9, 2007); Order on State’s Motion to Disclose Transcripts (Apr. 9, 2007); Order on Motion to Amend Deadlines (Apr. 9, 2007); Order on State’s Motion on Scheduling Non-capital Trials (Apr. 9, 2007); Ex parte Motions Filed by Defendant (Under seal) (April 5, 2007); State’s Objection re: status conferences and hearings (Apr. 2, 2007); State’s Response to Defense Objection on Deadlines for Motions (Apr. 2, 2007); State’s Objection to Change Location of Pre-trials (Apr. 2, 2007); Defense Objection to State’s Motion on Scheduling (Mar. 28, 2007); State’s Motion on Scheduling (Mar. 20, 2007); Indictment: Docket No. 07-S-0254 (Feb. 20, 2007); State’s Notice: Motion to Amend Media Order (Feb. 13, 2007); Defense Motion to Protect Interest of the Accused in Privileged or Confidential Records (Feb. 7, 2007); Motion by WMUR-TV Channel 9 to Amend Media Order (Feb. 7, 2007); Media Order (Dec. 27, 2006).

49. In April 2007, New Hampshire prosecutors announced they would charge “multimillionaire John ‘Jay’ Brooks with hiring men to kidnap and kill a Derry man in 2005.” Annmarie Timmins, *Millionaire Faces Death Penalty*, CONCORD MONITOR, Apr. 28, 2007, at A1.

50. Shaila Dewan & Brenda Goodman, *Capital Cases Stalling as Costs Grow Daunting*, N.Y. TIMES, Nov. 4, 2007, at A1.

51. *Id.*

52. *Id.* This article also notes similar dilemmas in New Mexico, California, Arizona, Louisiana, and Texas where low fees for public defense attorneys have resulted in inadequate capital defense resources to proceed with trials. *Id.* The American Bar Association guidelines recommend that capital defendants have at least two lawyers. *Id.* The authors also note that exoneration work, retrials, and re-sentencing often highlight inadequate defense as the cause. *Id.*

53. DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2005: YEAR END REPORT 2 (2005), available at <http://www.deathpenaltyinfo.org/YearEnd05.pdf>.

penalty.<sup>54</sup> That \$170 million yielded seven death sentences and no executions.<sup>55</sup>

The price tag comes to \$23 million per death sentence. Any execution would have been at least ten years off had the court not struck down the capital statute. In 2004 the New York state courts invalidated the statute and cleared death row.<sup>56</sup> In 2005 the New York Legislature rejected a bill to fix the statute and reinstate capital punishment.<sup>57</sup>

New York's cost of \$23 million per death sentence is more than Vermont spent to fund the Departments of State's Attorneys and Office of the Defender General for the *entire fiscal year* of 2004. The Vermont Department of State's Attorneys is responsible for public safety and "the fair and effective prosecution of crime in Vermont."<sup>58</sup> The Department's estimated expenditure in 2004 was \$8,600,527, exceeding the appropriated budget by \$326,402.<sup>59</sup> In 2005, the Department of State's Attorneys requested \$8,529,177.<sup>60</sup> Vermont's Office of the Defender General has the "over-arching duty" of assuring "that persons entitled to appointed counsel receive effective legal advocacy."<sup>61</sup> Its mission statement further provides that "[t]he provision of representation with reasonable diligence and promptness, and a zealous commitment and dedication to the interests of the client on behalf of those charged with [a] serious crime is a necessary component to the fair administration of the criminal justice system."<sup>62</sup> The Office of the Defender General's estimated expenditure in 2004 was \$8,242,327, exceeding the appropriated budget by \$389,282.<sup>63</sup> In 2005, the Defender General requested \$8,168,639.<sup>64</sup> Vermont's criminal justice budget is very limited, as exemplified by these figures. To add the burden of implementing a capital system would certainly exacerbate the enormous financial strain already felt by the state.

The experiences of New York, New Hampshire, and elsewhere explode one capital punishment myth: that executions cost less than incarceration for life without possibility of parole. The reason: "Lawyers cost more than prison guards."<sup>65</sup>

---

54. *Id.*

55. *Id.* at 2–3.

56. *Id.* at 2.

57. *Id.* at 2–3.

58. STATE OF VT., FISCAL YEAR 2005: BUDGET RECOMMENDATIONS 137 (2005), available at <http://finance.state.vt.us/Fin%20Budget%20Documents/2005%20ebr.pdf>.

59. *Id.* at 138.

60. *Id.*

61. *Id.* at 146.

62. *Id.*

63. *Id.* at 149.

64. *Id.*

65. The quote is Frank Zimring's. David Baldus, *Keynote Address: The Death Penalty*

## II. THE KILMARTIN BILL<sup>66</sup>

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years, I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.

*Justice Harry Blackmun*<sup>67</sup>

### A. Current Law of Murder

In 1987 the Vermont Legislature formally abolished the death penalty and did so by amending title 13, section 2303(a) of the Vermont Statutes.<sup>68</sup> The current language in section 2303(a) establishes that the punishment for first-degree murder shall be imprisonment for life with a minimum of thirty-five years unless there are aggravating or mitigating factors that the court finds.<sup>69</sup> Finding these factors can increase the minimum up to life or, if mitigating factors outweigh aggravating factors, reduce the minimum to not less than fifteen years.<sup>70</sup> The Vermont Supreme Court recently declared the aggravated murder statute unconstitutional.<sup>71</sup>

However, Vermont’s death penalty was effectively rendered invalid by the U.S. Supreme Court in 1972 with its decision in *Furman v. Georgia*.<sup>72</sup> In that decision the Court struck down a death sentence on both Eighth and Fourteenth Amendment grounds.<sup>73</sup> Specifically, the Court noted that it is inherently “unusual” punishment to inflict a death sentence on someone when the sentencing process discriminates against that person by reason of

---

*Dialogue Between Law and Social Science*, 70 IND. L.J. 1033, 1035 (1995).

66. This Part was written by Peter Clark.

67. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) (footnote omitted).

68. Act effective May 16, 1987, 1987 Vt. Acts & Resolves 125–26.

69. VT. STAT. ANN. tit. 13 § 2303(a) (1998 & Supp. 2007), *invalidated* by *State v. Provost*, 179 Vt. 337, 896 A.2d 55 (2005).

70. *Id.* § 2303(b).

71. *Provost*, 179 Vt. at 346–47, 896 A.2d at 64.

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

73. *Id.* at 239–40.

race, social position, etc., or it is imposed under a process that “gives room for the play of such prejudices.”<sup>74</sup> The Court referred specifically to Vermont’s sentencing procedures in this context in *Thompson v. Oklahoma*.<sup>75</sup> There it noted that since title 13, sections 7101 through 7107 of the Vermont Statutes had failed to guide jury discretion adequately (in terms of aggravating and mitigating factors), the statute (like statutes in other states) was unconstitutional, and thus Vermont should be counted as a state without a death penalty.<sup>76</sup>

First-degree murder is currently defined in title 13, section 2301 of the Vermont Statutes and includes: “Murder committed by means of poison, or by lying in wait, or by wilful, deliberate and premeditated killing, or committed in perpetrating or attempting to perpetrate arson, sexual assault, aggravated sexual assault, robbery or burglary . . . .”<sup>77</sup>

Currently the Vermont Statutes include a class of homicide termed “aggravated murder,” which includes both first- and second-degree homicide where one or more of certain aggravating factors are present at the time of the defendant’s actions.<sup>78</sup> These include murder committed when the defendant is in custody for murder or aggravated murder; defendant has previously been convicted of murder in any jurisdiction; defendant committed multiple murders at the same time; during the murder the defendant “created a great risk of death” to other people; the murder was committed to avoid arrest; the murder was committed under contract; the victim was known to be a correctional or law enforcement officer; and the murder was committed in a sexual assault or attempted sexual assault.<sup>79</sup> The burden is on the state to prove beyond a reasonable doubt one or more of the aggravating factors.<sup>80</sup>

Currently the punishment for aggravated murder is life imprisonment with no possibility of parole.<sup>81</sup> The statute specifically states that the “court shall not place on probation or suspend or defer the sentence of any person convicted of aggravated murder.”<sup>82</sup> Additionally, a person sentenced for aggravated murder “shall not be eligible for work-release or noncustodial furlough.”<sup>83</sup>

---

74. *Id.* at 242 (Douglas, J., concurring).

75. *See* *Thompson v. Oklahoma*, 487 U.S. 815, 829 n.29 (1988) (“Vermont is frequently counted as a 15th State without a death penalty, since its capital punishment scheme fails to guide jury discretion, and has not been amended since our decision in *Furman v. Georgia* holding similar statutes unconstitutional.”) (citations omitted).

76. *Id.*

77. VT. STAT. ANN. tit. 13, § 2301 (1998).

78. *Id.* § 2311(a).

79. *Id.*

80. *Id.* § 2311(b).

81. *Id.* § 2311(c).

82. *Id.*

83. *Id.*

*B. The Architecture*

The principal amendment to title 13 (Chapter 53) by the Kilmartin bill would have been the substitution of “Capital Murder” for the current “Aggravated Murder.”<sup>84</sup> The Kilmartin bill maintained the same architecture of title 13 in that it maintained the same distinction between first- and second-degree murder, but instead of overlaying the aggravating factor to both classes of homicides, it reclassified aggravated murder as “Capital Murder.”<sup>85</sup> Most importantly, it added a new subsection (a) to section 2303, which stated the punishment for capital murder would be death.<sup>86</sup>

The bill defined capital murder in precisely the same terms as aggravated murder was currently defined,<sup>87</sup> but added two new circumstances that bumped up first- or second-degree murder to capital murder: where the “murder was committed in perpetrating or attempting to perpetrate [a] kidnapping”; and where the “victim of the murder was a law enforcement officer who was at the time of the killing engaged in his or her official duties, and the defendant knew or reasonably should have known that the intended victim was a law enforcement officer.”<sup>88</sup>

The bill also maintained the old architecture of title 13 by keeping the existing aggravating and mitigating factors available for consideration in sentencing for first- and second-degree murder that was not capital murder.<sup>89</sup> These aggravating and mitigating factors would still be available to be presented at the sentencing hearing.<sup>90</sup>

The bill also would have repealed sections 7101 to 7137, which deal with the process of carrying out the death sentence, e.g., pardons, reprieves, and place of confinement.<sup>91</sup> These sections would have been replaced by the new section 2315 (Procedure To Carry Out The Sentence After Review).<sup>92</sup> This was entirely new language and in short stated that a death sentence shall be carried out not “less than one year from the day sentence is passed”; execution would be by lethal injection; and it would be carried out by a licensed physician or nurse “*according to accepted standards of medical practice.*”<sup>93</sup>

---

84. H.R. 830, 2006 Leg., Reg. Sess. § 2311 (Vt. 2006), available at <http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2006/bills/intro/H-830.htm>.

85. *Id.* §§ 2301–2303.

86. *Id.* § 2303(a).

87. *Id.* § 2311(a)(1)–(8).

88. *Id.* § 2322(a)(9)–(10).

89. *Id.* § 2303(d).

90. *Id.* § 2313(d).

91. VT. STAT. ANN. tit. 13, §§ 7101–7137 (1998).

92. Vt. H.R. 830, § 2315.

93. *Id.* § 2315(a) (emphasis added).

### C. Sentencing

Perhaps the most important part of Representative Kilmartin's bill was the section dealing with sentencing. The key provisions were sections 2312, 2313, and 2314. Section 2312 provided new language, which required the state to announce before trial or acceptance by the court of a plea of guilty that it intended to seek the death penalty.<sup>94</sup> Such an "all cards on the table" approach would not only give the defendant notice of the penalty sought, but also would disclose the statutory basis for the penalty. Under the same section, the state could withdraw the notice of intent, though withdrawal would foreclose the state's re-filing the notice at a later date.<sup>95</sup> The provision would seem to defuse criticism that capital murder defendants could be disadvantaged in pretrial preparation by not knowing precisely the penalty sought by the state or the basis for the penalty.

Section 2313 provided entirely new language requiring the same judge presiding at trial (if possible) to conduct a sentencing hearing to determine punishment.<sup>96</sup> Such hearing would be conducted in front of the same jury that heard the case (if possible) and would have at least twelve members unless otherwise agreed by the parties.<sup>97</sup> At the hearing, "information may be presented as to matters relating to the aggravating factors" normally applied to first- and second-degree murder (such as the victim was weak, the crime was particularly brutal or arbitrary, previous violent felony conviction, etc.), which would be based on evidence taken at trial and at the sentencing hearing or from the presentence investigation report.<sup>98</sup> Mitigating factors would likewise be drawn from section 2303 and would include lack of criminal history, mental or physical disability that reduced culpability, lack of judgment due to old age or youth, and any other factor that the defendant can offer.<sup>99</sup> Information presented at the sentencing hearing could also include the trial transcript, exhibits, and, "*regardless of its admissibility under the rules of evidence,*" any other relevant information, "except that [it] may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."<sup>100</sup>

The state and the defendant would be "permitted to rebut any

---

94. *Id.* § 2312(a).

95. *Id.* § 2312(b).

96. *Id.* § 2313(a).

97. *Id.* § 2313(a)(1), (b).

98. *Id.* § 2313(d).

99. *Id.* § 2303(f).

100. *Id.* § 2313(d) (emphasis added).

information received at the hearing.”<sup>101</sup> The burden of proof would be on the state to establish aggravating factors, and the standard would be beyond a reasonable doubt.<sup>102</sup> The burden would be on the defendant to establish mitigating factors, but the defendant would only be held to a preponderance of the evidence standard.<sup>103</sup>

If an aggravating factor was not found to exist, the defendant would be sentenced to “life imprisonment without the possibility of parole.”<sup>104</sup> If an aggravating factor was found to exist, the jury would be then bound to consider if the aggravating factor outweighed all mitigating factors or, if there are no mitigating factors, whether the aggravating factor was sufficient by itself to justify the death sentence.<sup>105</sup> If the jury found either of these, then, “by unanimous vote only, [it] may recommend . . . a sentence of death.”<sup>106</sup> Regardless of the above analysis, the jury would never be bound to impose the death penalty and would be so instructed.<sup>107</sup>

Section 2313(g) of the bill stated that with a jury recommendation of death, “the court shall sentence the defendant to death.”<sup>108</sup> Otherwise the court would sentence the defendant to “life imprisonment without the possibility of parole.”<sup>109</sup> Should the jury not deliver a decision “within a reasonable time,” then “the judge shall impose the sentence of life imprisonment without the possibility of parole.”<sup>110</sup> Also, in the event of reversal based on the sentence hearing, any new trial would only pertain to the issue of punishment.<sup>111</sup>

Section 2314 called for an automatic review by the Vermont Supreme Court “within 60 days after certification [of the record] by the sentencing court.”<sup>112</sup> The court would be required to determine if “the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.”<sup>113</sup> It would also be tasked with weighing the evidence of whether the aggravating factor(s) in fact exist.<sup>114</sup> Also, the court would consider whether the sentence was “disproportionate to the penalty imposed in

---

101. *Id.* § 2313(e).

102. *Id.*

103. *Id.*

104. *Id.* § 2313(f).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* § 2313(g).

109. *Id.*

110. *Id.* § 2313(i).

111. *Id.*

112. *Id.* § 2314(a).

113. *Id.* § 2314(b)(1).

114. *Id.* § 2314(b)(2).

similar cases.”<sup>115</sup> Based on the above, in addition to the court’s authority regarding correction of error, it was authorized to either affirm the sentence or remand for new sentencing.<sup>116</sup>

### III. SEEING “THE SKULL BENEATH THE SKIN”<sup>117</sup>: THE REAL DEATH PENALTY AND THE HARD MORAL, LEGAL, AND ETHICAL ISSUES NOT ADDRESSED IN THE KILMARTIN BILL

#### A. *Capital Punishment as a Legal System*

I have studied capital punishment as a legal system for more than twenty years. I’ve published five books<sup>118</sup> and a couple of dozen scholarly articles on the subject. But that’s not what I want to talk with you about here.

For four years in the early and mid-1980s, I worked full time as a capital public defender in Florida.<sup>119</sup> After that time, I represented death row prisoners and national organizations in the Florida Supreme Court, the federal courts of appeals, and the U.S. Supreme Court. I have represented condemned prisoners in Texas, Georgia, Illinois, and Florida. In all, I have been closely involved—as counsel or its functional equivalent—in approximately 110 capital cases, including some high-profile ones: Ted Bundy,<sup>120</sup> Paul Hill, and “Crazy Joe” Spaziano<sup>121</sup> in Florida; Theodore Kaczynski<sup>122</sup> (the Unabomber) in California; and Rolando Cruz in Illinois.

These *experiences* with capital punishment as a legal system, rather than my books and scholarly articles, form the basis of my remarks here. I won’t be talking about capital punishment as an abstract issue either of ethics (ethics as a branch of moral philosophy), morality, public policy, or constitutional law. As to the latter, capital punishment is constitutional; Justice Jackson once said, “We are not final because we are infallible, but

115. *Id.* § 2314(b)(3).

116. *Id.* § 2314(c).

117. T.S. ELIOT, *Whispers of Immortality*, in COLLECTED POEMS 1909–1962, at 45 (Harcourt Brace & Co. 1991) (1963).

118. MELLO, *DEATHWORK*, *supra* note 2; MELLO, *THE WRONG MAN*, *supra* note 2; MICHAEL MELLO, *THE UNITED STATES OF AMERICA VERSUS THEODORE JOHN KACZYNSKI* (1999) [hereinafter MELLO, KACZYNSKI]; MELLO, *DEAD WRONG*, *supra* note 2; MICHAEL MELLO, *AGAINST THE DEATH PENALTY* (1996).

119. The best book about Florida’s modern experience with capital punishment is DAVID VON DREHLE, *AMONG THE LOWEST OF THE DEAD* (1995).

120. MELLO, *DEATHWORK*, *supra* note 2, at xxii.

121. MELLO, *THE WRONG MAN*, *supra* note 2, at xx.

122. MELLO, KACZYNSKI, *supra* note 118, at 10–11.

we are infallible only because we are final.”<sup>123</sup>

What I want to talk to you “about is capital punishment *as a legal system*. That’s how I’ve experienced it: up close and personal.”<sup>124</sup> What I’ve lived with for over twenty-five years as a lawyer for people on death row is the *real* death penalty in America. “I ended up doing deathwork by accident, if you believe in accidents. Deathwork surely wasn’t the destiny I had in mind when I graduated law school in 1982. But it is my *experience* with capital punishment, on the ground, that qualifies me” to be talking with you here (if, indeed, *anything* so qualifies me).<sup>125</sup>

Scholars and academics have identified and analyzed capital punishment’s costs. Philosophers and theologians have debated the morality of death as a penalty. Criminologists have studied every aspect of the matter amenable to empirical research. Legal scholars have placed our capital punishment jurisprudence under an exacting microscope. Wardens and prisoners have written memoirs. There have, however, been few views from the inside. By the dumb luck of timing and history, I happened to be on the inside during the formative years of capital punishment as it presently exists in the United States.

In her classic diary of the Civil War, the incomparable Mary Chesnut wrote that she had, by chance or design, been present during what she called the “real show.”<sup>126</sup> By that she meant the events that, in historical hindsight, were ones crucial to meaningful understanding and appreciation of the historical moment covered by her diary.

By similar fortuities, I happened to be present during what (looking back on it now with more than a decade of hindsight) was a critical—I would argue the most critical—period of America’s modern experience with capital punishment as a legal system. I was there for capital punishment’s ‘real show.’ From summer 1982 to summer 1983, when I was “death clerk” to Eleventh Circuit Judge Robert Vance, that appellate court (composed of three active capital punishment states: Florida, Alabama and Georgia) was receiving its first wave of federal habeas appeals from prisoners condemned in state court. Because the cases and the constitutional issues they raised were matters of first impression in the Eleventh Circuit (in all federal courts, in fact), those judges took death cases deadly seriously.

---

123. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

124. MELLO, *DEATHWORK*, *supra* note 2, at xxii (emphasis added).

125. *Id.* (emphasis added).

126. C. Vann Woodward, *Diary in Fact—Diary in Form: Introduction to MARY BOYKIN MILLER CHESNUT, MARY CHESNUT’S CIVIL WAR*, at xx (C. Vann Woodward ed., 1981) (emphasis omitted).

Similarly, when I was a Florida capital appellate public defender (from summer 1983 to early January 1987), the Sunshine State, and the nation as a whole, were, for the first time in my lifetime, being forced to come to terms with the reality of capital punishment as a legal system—and with the realities of executions actually being carried out. During that time, executions went from being major media events to non-events. While Florida led the nation in numbers of people on death row and numbers of executions, it also became the first serious capital punishment state to create a statewide public defender office to represent death row in state post-conviction and federal habeas corpus proceedings. That new office, called the Office of the Capital Collateral Representative (CCR), was created in 1985. I was a charter attorney at CCR when it opened its doors in October 1985.

Part of my unique life as a lawyer has been to get to know, and to care about, people who have committed horrible crimes. I've looked across a small table and into their eyes; I've known their mothers and brothers and children—the invisible victims of capital punishment;<sup>127</sup> I've tried to reconstruct and understand the personal archaeologies of my clients; I've tried to understand the intimate grammar of their lives. That's what death row lawyers *do*.<sup>128</sup>

---

127. *E.g.*, Margaret Vandiver, *The Impact of the Death Penalty on the Families of Homicide Victims and of Condemned Prisoners*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT* 613, 614 (James R. Acker et al. eds., 2d ed. 2003) (pointing out that researchers and politicians have paid little attention to the families of defendants).

128. I have elsewhere tried to describe why I did deathwork, as well as the day-to-day reality of that life. *See* MELLO, *DEAD WRONG*, *supra* note 2, at 3, 126 (explaining the decision to serve “society’s most hated members” and including an entire chapter entitled “Why I Did Deathwork”); MELLO, *THE WRONG MAN*, *supra* note 2, at 2 (describing a professional life devoted to “deathwork”); MELLO, *DEATHWORK*, *supra* note 2, at xiv, xxi (containing quotations from a private diary kept while working as a Florida capital public defender); Mello, *Diary*, *supra* note 38, at 589 (explaining that these diaries discuss “the day-to-day reality of death row representation”).

I heard somewhere about a comment made by a mountain climber after he reached the summit of Everest. The effort nearly killed the climber: his oxygen ran out, the weather was awful, and an observer was amazed that he kept going. The observer asked the climber, “Why did you climb Everest to die?” The climber replied, “I didn’t climb Everest to die. I climbed Everest to live.”

In doing deathwork in Florida, I lived. Except when I’m at the controls of an airplane, I’ve never felt more alive than I did in Florida. In writing about that work and the people who do it, I’ve lived. With my few real friends—all deathworkers in one way or another, whether they know it or not—I’ve lived. With some of these friends I’ve shared holy moments, and the bonds created in those moments are love and friendship, which I now believe are the same thing. These people offer me true company, because they hold dear the things I hold dear. They fight for those things by any means necessary. They understand that some things *are* worth dying for and that death isn’t the worst thing that can happen to a person.

For me, deathwork had about it an alluring magic, darkness, and mystery. This, I think, is why I call what I did “deathwork,” rather than “lifework,” although the latter term might be more accurate, and it certainly would sound more upbeat. Naming it “deathwork” captures the immersion in

I tried hard never to minimize my clients' crimes or to sentimentalize their lives. Still, at the end of the day, I found it easy to fight for my clients' lives, because I had come to *know* them as fully contextualized, three-dimensional human beings. I always grieved when they were executed. It's hard to applaud the killing of someone you *know*. My clients were names in court filings to the judges who decided whether they lived or died. But to me they were *people*.<sup>129</sup> Flawed people, but still people.

Thus, for me, capital punishment isn't a collection of arguments. It's a collection of people. It's a collection of stories.

Part of being a good lawyer, however, is knowing your limitations. I had been scheduled to teach my capital punishment seminar at 3:35 p.m. on September 11, 2001, but the law school closed at noon. When my capital punishment seminar met for the first time after September 11—exactly one week to the day after that deadly Tuesday—we scrapped the planned readings and discussion and spent the full two hours talking about the attacks and the inevitable legal and political consequences that would flow from them. Early in that conversation, a student asked me whether I would defend Osama bin Laden.

I said I would not because I had done my time representing serial killers and terrorists and because my anger over September 11 would interfere with my ethical duties to fight hard for such a client. Still, if a court appointed me as bin Laden's lawyer, I would not refuse, assuming he wanted my help after full disclosure that I'm a Jew, a Zionist, and a supporter of Israel in her righteous war against people like him. I wouldn't like it; I didn't like representing Ted Bundy or working with the Unabomber either. But such internal conflicts (the ethics literature calls it "role morality"<sup>130</sup>) go with the territory when one chooses to practice law as a capital public defender. If you can't fight hard for the constitutional rights of people who have committed horrific crimes—to force the law to keep its promises of due process and fairness even to the worst among us—then capital defense is not your line of work.

It is already clear that capital punishment will play a role in our nation's response to September 11. Zacharias Moussaoui faced capital conspiracy charges for his alleged role as the "20th hijacker," and the military order issued by President Bush authorizing military tribunals

---

that moment of mystery that straddles existence and oblivion.

129. See Michael Mello, *Ed Kennedy's Rainbow, Steve Booker's Poetry, and Dick Jorandby's Soul: Remarks for a Fundraiser for Death Penalty Focus of California*, 26 VT. L. REV. 451, 456 (2002) (describing the author's human connection with one client).

130. See, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* xix–xx (1988) (describing the theory of role morality as applied to lawyers).

provides that such tribunals could impose capital punishment.<sup>131</sup> Hugo Bedau observed in April 2002 that

several states (including three traditional abolition jurisdictions—Iowa, Rhode Island, and Wisconsin) have drafted bills to make terrorism a capital crime. We should not be surprised if many erstwhile opponents of the death penalty now find themselves willing to make exceptions for perpetrators of attacks like those of September 11.<sup>132</sup>

I fear, however, that America's use of capital punishment might compromise the international support and cooperation necessary to wage an effective war on terrorism. France indicated that its cooperation in the Moussaoui case would end when the United States decided to seek Moussaoui's execution.<sup>133</sup> These are not empty threats, because the French have a large file on Moussaoui,<sup>134</sup> a French citizen. There is an intimate relationship between domestic and foreign policy. John F. Kennedy fought for civil rights at home in large part because of its impact on foreign policy: he understood that the fight against international communism was a fight for human rights and that segregation in Alabama undermined the moral quality of our campaign abroad. Like it or not, most of the rest of the world we deem civilized considers capital punishment to be a barbaric throwback to an uncivilized past. Canada, Italy, France, and England have in the past refused extradition to the United States for trial absent a promise not to seek the death penalty,<sup>135</sup> nations have protested the United States' execution of their nationals.

I oppose capital punishment as a legal system. For me, that opposition is based on experience, not politics or ideology, and not morality or ethics or philosophy. Issues of philosophy are way above my pay grade. I am not a pacifist; for instance, I do not believe that the state *never* has the moral right to take human life. I believe that the state *does* have the legitimate

---

131. See generally Seymour M. Hersh, *The 20th Man*, NEW YORKER, Sept. 30, 2002, at 56, 56 (discussing Moussaoui's arrest and the evidence against him).

132. Hugo Adam Bedau, *Recent Books on Capital Punishment*, BOSTON REVIEW, Apr.-May 2002, at 68, 68, available at <http://bostonreview.net/BR27.2/bedau.html>.

133. Philip Shenon & Neil A. Lewis, *France Warns It Opposes Death Penalty in Terror Trial*, N.Y. TIMES, Mar. 28, 2002, at A14; see also Jessica Stern, *Allies Split over Executing Terrorists*, BOSTON GLOBE, May 28, 2002, at A13 (stating that "French authorities have been reluctant to provide information that could be used in a capital case").

134. Shenon & Lewis, *supra* note 133.

135. The Canadian Supreme Court explained in 2001 why extradition of two Canadians to face capital charges in the United States would violate the Canadian Charter of Rights and Freedoms. *United States v. Burns*, [2001] 1 S.C.R. 283 (Can.).

moral right to kill, in some circumstances. One such circumstance is a just war (such as World War II, the North in the Civil War, and, I believe, our current war against al Qaeda and other manifestations of militant Islam)<sup>136</sup> waged in a manner consistent with the law of war.<sup>137</sup>

### B. War and Capital Punishment

I believe that the state has a right to take human life in just war<sup>138</sup>—in self-defense against foreign enemies, including the targeted assassination of enemy command-and-control leadership when those targets are effectively beyond the reach of law.<sup>139</sup> Support for American shooting wars does not

136. I support both the goals and the means being used in the present war against al Qaeda and militant Islam (*militant* Islam, not Islam itself). I see this war as both necessary and just. I would support expanding the war to include other terrorist organizations such as Hamas, Islamic Jihad, and Hezbollah. Prior to September 11, Hezbollah had killed more Americans in terrorist attacks than any other group on the planet: the American Embassy in Beirut (sixty-three killed) in April 1983; the American barracks at the Beirut airport (241 U.S. Marines killed) in October 1983; etc. Norman Podhoretz, *How to Win World War IV*, COMMENT., Feb. 2002, at 19, 20.

In my view the use of military force in response to September 11 is legally justified and morally required. I see the present war on terrorism as a matter of national self-defense. See Michael Mello, *Friendly Fire: Privacy vs. Security After September 11*, 38 CRIM. L. BULL. 367, 390–92 n.53 (2002) (stating that military response to the September 11 attacks is justified and morally required and that the war on terror should extend beyond Afghanistan to other governments who support or sponsor terrorism). There is even historical precedent for such a war: the war against the Barbary Pirates. See Lewis Lord, *Pirates! (War on Terrorism)*, U.S. NEWS & WORLD REP., Feb. 25, 2002, at 48, 48 (comparing an earlier war against Mediterranean piracy to the current war on terror).

Even before the release of the Osama bin Laden home movie, see Elizabeth Bumiller, *A Nation Challenged: The Video; bin Laden, on Tape, Boasts of Trade Center Attacks*, N.Y. TIMES, Dec. 14, 2001, at A1, I was satisfied that he and al Qaeda carried out the September 11 atrocity. Assuming the videotape is authentic and that the translation is accurate—assumptions I am willing to make—the videotape is powerful proof of bin Laden’s guilt. And of his evil.

Watching the home movie of bin Laden and his sycophants gloating over the carnage brought to mind Hannah Arendt’s haunting book *Eichmann in Jerusalem*, in which she coined the phrase “banality of evil.” HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1963). Arendt was remarking on the ordinariness of Adolph Eichmann, the bureaucrat who managed Hitler’s death camps. Like bin Laden in the videotape, Eichmann was horrifyingly normal.

I think Arendt got it somewhat backwards. Eichmann and bin Laden illustrate the evil of banality, not the banality of evil. Evil is never banal. But banality can be evil.

137. I do not pretend to be an expert in national security law.

138. To be “just,” a war must be just both in its objectives and the manner in which it is waged. E.g., JEAN BETHKE ELSHTAIN, *JUST WAR AGAINST TERROR* 57–58 (2003) (stressing that in order to be “just,” a war (1) “must be openly declared or . . . authorized by a legitimate authority”; (2) “must be a response to a specific instance of unjust aggression . . . against one’s own people or an innocent third party, or fought for a just cause”; (3) “must begin with the right intentions”; and (4) “must be a last resort after other possibilities for redress and defense of the values at stake have been explored”).

139. For example, I believe Israel was justified in hunting down and killing the Palestinian terrorists responsible for the massacre at the 1972 Munich Olympics. See SIMON REEVE, *ONE DAY IN SEPTEMBER* 160–95 (2000) (describing Israel’s secret Operation Wrath of God and Operation Spring of Youth in which assassins targeted junior and senior Palestinian leaders following the terrorist attack

come easily to me.<sup>140</sup> I never before supported such war in my lifetime. But I do now. I support both of the principal battles in the war on Islamic terrorists: the invasions of Afghanistan and Iraq.<sup>141</sup> I support the war against al Qaeda,<sup>142</sup> and I believe that the war on terror will have to deal with, sooner or later, state sponsors of terror such as Iran and Syria, although there are hopeful signs in both of these places.<sup>143</sup> Some things are worth dying for and killing for. The United States is one. Israel is another.<sup>144</sup> Thus, I am not a pacifist; I do believe the state has the legitimate

---

against Israeli athletes at the 1972 Olympics); David B. Tinnin, *The Wrath of God*, PLAYBOY, Aug. 1976, at 72, 72 (cataloguing the events that occurred after nine Israelis were shot by Palestinian terrorists at the Munich Olympics).

140. For war to be justified, in my view, it must be necessary, for self-defense, or to prevent genocide. I saw the Vietnam War as pointless slaughter, “[c]ertain blood for uncertain reasons,” as Tim O’Brien put it. O’Brien, *supra* note 1, at 164. Grenada was a joke, and Panama was useless. The first Gulf War was for cheap oil. Bosnia was arguably justified to stop genocide, although I’m not sure war by the United States was necessary. I would have supported war in Rwanda to stop genocide. I demonstrated against the Vietnam War, and I still have the black armbands and protest buttons to prove it. I have been tear gassed. I helped take over and occupy a campus building when I was a student. Had I been drafted, I probably would have gone to prison or into exile in Canada. Supporting a war does not come easily to me. War means fighting; fighting means killing; killing means dying.

Supporting a war—especially by someone like me who is now too old to be drafted and who has never served in the military—carries with it a duty to *understand*, at the most basic level, how horrible war is. For me, that understanding comes from memories of long conversations with my Uncle Pashe, a combat veteran of WWII, and one of the most passionate anti-warriors I have ever known. My understanding also comes from reading and re-reading books by veterans, from the searing poetry of Wilfred Owen and Siegfried Sassoon to the haunting prose of Tim O’Brien and Phillip Caputo and Michael Herr. I also re-read books about what war can make good people do (the My Lai massacre, the *Winter Soldier Investigation*) and good nations become (the Pentagon Papers, books on COINTELPRO). I own a bookshelf full of works about the Vietnam War, and another bookshelf of works on the resistance struggle against that war.

My law students also provide me with vivid reminders of the human costs of war. Most of my students are of draft age. The thought of them being placed in harm’s way has brought me to tears. I am constantly aware that war means that my students—many of whom are also my friends—could die for my freedoms. They are the future of American law, and I *hate* the thought that any part of that future could be destroyed on the field of battle. So, when I say that I support this war, I know that my support could mean the killing of people I love.

Only a fool is pro-war. War means sending the sons and daughters of American moms and dads to kill the sons and daughters of other nations’ moms and dads. But sometimes war is necessary to national self-defense. This is one of those times. The attacks of September 11 were not simply crimes. They were acts of war by an enemy determined to annihilate us. We don’t like having to be at war, but we are now a nation at war.

141. Michael Mello, Address at Chase Center, Vermont Law School (Oct. 2004) (“All we are saying . . . is give war a chance: If the Iraq War is illegal, then the law is an ass.”).

142. *Id.*

143. *Id.*

144. Much of the rabid criticism of Israel is, in my opinion, nothing other than disguised anti-Semitism. See generally Michel Gurfinkiel, *France’s Jewish Problem*, COMMENT., July-Aug. 2002, at 38, 39–40 (examining the prevalence of anti-Semitism in France); Hillel Halkin, *The Return of Anti-Semitism*, COMMENT., Feb. 2002, at 30, 30–31 (documenting a rise in anti-Semitism around the world); Gabriel Schoenfeld, *Israel and The Anti-Semites*, COMMENT., June 2002, at 13, 13, 16 (identifying

right to take human life in a just war. From this it seems to follow logically that capital punishment cannot be immoral simply because it involves state-sanctioned homicide.

In fact, I know of no persuasive argument, from theoretical morality or philosophy, that capital punishment is wrong (I also know of no such argument against torture as an instrument of social policy).<sup>145</sup> Of course, my practical arguments against capital punishment are, on some level, moral arguments as well: I believe capital punishment is racist, class based (my experience has shown me that virtually all death row prisoners are poor), and guaranteed to result in execution of the innocent. These are, in a way, moral claims as well. The structural flaws in America's system of legal homicide constitute a moral as well as a practical indictment of the system. Still, I have heard no definitive *theoretical* moral argument against capital punishment. My concern is with practical realities, not abstract moral or ethical claims.

---

instances that evidence Europe's hostility toward Israel); Ruth R. Wisse, *On Ignoring Anti-Semitism*, COMMENT., Oct. 2002, at 26, 32 ("In American universities, the belief that Israel is to blame for the manifold failures of Arab society is by now such a corrupting feature of Middle East studies departments that it has assumed the status of a natural condition . . .").

For instance, Israel is routinely compared to South African apartheid (complete with strident calls for divestment and boycotting of Israeli scholars). But to equate Israel—a democracy at war with enemies bent on genocide, enemies that celebrate the murder of Jewish civilians with a fervor unmatched even by the Nazis—with South Africa is to betray a breathtaking ignorance either of Israel or apartheid or both. Making excuses for the murder of Jews comes naturally to Europe, the UN, and the Arab world (It's no accident that Arab leaders sided with Hitler in WWII, and it is no accident that the most vile libels against Jews are treated as revealed truth in the Arab world). The hatred of the Jewish state by U.S. academics—mostly but not entirely left-leaning U.S. academics, I'm sorry to say—is a bit more surprising and a lot more depressing to me. See Michael Mello, *What If Dartmouth Hall Were in Tel Aviv?*, DARTMOUTH, May 22, 2002 (arguing that Christopher Hedges, a journalist lecturing at Dartmouth College, was anti-Semitic in his reserving his sympathies "exclusively for the Palestinian 'martyrs' . . . who are," in Hedges' view, "driven by despair to kill Jewish civilians" because of Israel's brutal policies, thus suggesting that "*none* of Israel's policies have *anything* to do with self-defense against terror") (emphasis added).

145. Before September 11, this was purely a rhetorical point. No longer. See, e.g., ALAN M. DERSHOWITZ, *SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE* 476–77 (2002) (examining Israel's approach to torture and concluding that individual interrogators are not equipped to decide whether torture is necessary and that the judiciary or legislature should make that determination); ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 162–63 (2002) (arguing that America should utilize the democratic process to establish clearly defined rules governing the use of torture instead of allowing individual government agents to make such decisions); Jonathan Alter, *Time to Think About Torture*, NEWSWEEK, Nov. 5, 2001, at 45, 45 (examining the benefits and limitations of using state-sanctioned torture to fight terrorism after September 11); Philip B. Heymann, *Torture Should Not Be Authorized*, BOSTON GLOBE, Feb. 16, 2002, at A15 (pointing out the flaws of the "ticking time bomb" argument in favor of torture and rejecting the idea that courts should be able to authorize torture); William F. Schulz, *The Torturer's Apprentice: Civil Liberties in a Turbulent Age*, NATION, May 13, 2002, available at <http://www.thenation.com/doc/20020513/schulz> (reviewing Dershowitz's book).

If I may borrow some nomenclature from the antebellum debates over slavery, capital punishment may be justified if it is either a positive good or if it is a necessary evil. I have never heard an argument that government-imposed executions are a positive good. With the exception of those sad souls who have tailgate parties outside the walls of prisons when executions are carried out, I think it's safe to presume that the death penalty is not a happy business or a positive good.

Rather, capital punishment is, at best, a necessary evil. This raises the twin questions: Is it necessary? And which side bears the burden of persuasion that it is or is not necessary?

### *C. Whose Burden of Proof?*

It seems to me that the burden of persuasion rests with those who believe the government should be in the business of deciding that some of its people deserve to die. Capital punishment supporters have the burden of proving that some important state interest is furthered by—and only by—giving the government the power of capital punishment. Opponents ought not need to prove why capital punishment is *unnecessary*. Supporters ought to be required to show why capital punishment is *necessary*.

Anthony Amsterdam made this point well:

I would like to set forth certain basic factual realities about capital punishment, like the fact that capital punishment is a fancy phrase for legally killing people. Please forgive me for beginning with such obvious and ugly facts. Much of our political and philosophical debate about the death penalty is carried on in language calculated to conceal these realities and their implications. The implications, I will suggest, are that capital punishment is a great evil—surely the greatest evil except for war that our society can intentionally choose to commit.

This does not mean that we should do away with capital punishment. Some evils, like war, are occasionally necessary, and perhaps capital punishment is one of them. But the fact that it is a great evil means that we should not choose to do it without some very good and solid reason of which we are satisfactorily convinced upon sufficient evidence. The conclusion of my first point simply is that the burden of proof upon the question of capital punishment rightly rests on those who are asking us to use our laws to kill people with, and that this is a very heavy burden.

....

. . . I submit that the deliberate judicial extinction of human life is intrinsically so final and so terrible an act as to cast the burden of proof for its justification upon those who want us to do it. But certainly when the act is executed through a fallible system which assures that we kill some people wrongly, others because they are black or poor or personally unattractive or socially unacceptable, and all of them quite freakishly in the sense that whether a man lives or dies for any particular crime is a matter of luck and happenstance, *then*, at the least, the burden of justifying capital punishment lies fully and heavily on its proponents.<sup>146</sup>

One could argue that the popularity of the death penalty places the burden of proof on the abolitionists. True, public support for executions is high; 73% as of June 2000.<sup>147</sup> However, that number is actually down slightly from five years previously.<sup>148</sup> And at least one poll suggests that the decline continues.<sup>149</sup>

More importantly, public support for the death penalty is actually a mile wide but only an inch deep. When given an alternative to execution (life imprisonment without possibility of parole), the polling numbers fall to “only about one-half.”<sup>150</sup> “When given the option between the death penalty and life imprisonment with absolutely no possibility of parole *and* the payment of restitution by the offender (who would work in prison industry) . . . only 19 to 43 percent of the public (depending on the sample) prefers the death penalty over the alternative.”<sup>151</sup> In fact, the United States seems to be in the process of rethinking capital punishment.<sup>152</sup>

So, I come back to the burden of proof resting with the proponents of executions. Capital punishment supporters cannot meet their burden of proof, in my opinion.

146. Anthony G. Amsterdam, *Capital Punishment*, in *THE DEATH PENALTY IN AMERICA* 346, 352 (Hugo Adam Bedau ed., 3d ed. 1982).

147. Jonathan Alter, *The Death Penalty on Trial*, *NEWSWEEK*, June 12, 2000, at 24, 25.

148. *Id.*

149. See Richard Morin & Claudia Deane, *Support for Death Penalty Eases; McVeigh's Execution Approved, While Principle Splits Public*, *WASH. POST*, May 3, 2001, at A9 (“[T]he proportion of Americans who favor replacing the death penalty with life in prison has increased in recent years, according to a Washington Post-ABC News poll.”).

150. Robert M. Bohm, *American Death Penalty Opinion: Past, Present, and Future*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT*, *supra* note 127, at 25, 42.

151. *Id.* (citation omitted).

152. See *id.* (explaining the increased support for “harsh and meaningful alternative[s]” to the death penalty based on moral development theories).

*D. Rehabilitation*

An unstated assumption of capital punishment is that condemned killers cannot be rehabilitated. In my experience, that assumption is accurate in some cases, but not all.

An anecdotal study by Joan Cheever suggests my experience might not be atypical. In 1994, shortly after witnessing the execution of her client, Cheever began traveling around the nation to find out what had happened to the 611 people saved by the 1972 decision in *Furman v. Georgia*.<sup>153</sup> After *Furman*, all 611 people on America's death rows were resentenced to life imprisonment that, "in some states, really meant between 10 and 30 years."<sup>154</sup> "Eventually, 310—more than half of those who were on death row in 1972—completed their sentences or were paroled."<sup>155</sup> Cheever wrote in 2002 that "[t]he inmates freed after the *Furman* decision represent one of the largest social experiments in criminal justice history."<sup>156</sup>

So how did those 310 people do after their release from prison? Three killed again.<sup>157</sup> "But those [were] the exceptions."<sup>158</sup> Cheever

followed the incarceration and parole history of all 310 from 1972 to 2002 and interviewed more than 125 of the 200 who [were] still living. Most have been law-abiding, working members of the community. About 90 parolees returned to prison briefly for "technical violations," but most were paroled again. Only 4 percent were convicted of aggravated felonies. Six were found to be innocent of the crimes for which they had been sentenced to death.<sup>159</sup>

"The reasons for their success," Cheever wrote, were "as varied as the men. Only a few said being so close to the electric chair had made them 'scared straight.' Many instead attributed their success to 'a higher power,' an established religious faith or a personal spiritual commitment that they developed while on death row."<sup>160</sup> Many of the 310 "credited strong ties with relatives, fellow inmates, or corrections officials who had served as mentors and, in some cases, father figures. Almost all praised the prison

---

153. Joan M. Cheever, *A Chance Reprieve, and Another Chance at Life*, N.Y. TIMES, June 29, 2002, at A15.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

education programs in which they learned valuable skills or trades that helped them land jobs once paroled.”<sup>161</sup>

One could argue that the success of the *Furman* survivors proves nothing more than that the capital statutes struck down in *Furman* were in fact flawed, and that the modern laws do a better job of distinguishing who should live from who should die. However, the reality that 128 totally innocent people have been sentenced to death<sup>162</sup> under these statutes ought to give one pause. Further, my experience has left me convinced that capital punishment is as much a lottery today—a lottery skewed by class and race—as it was in the bad old days before *Furman*. Today, as then, the worst of the worst are not necessarily the ones selected for execution. Today, as then, the people with the worst *lawyers* are the ones selected for execution.

We don't hear much these days about rehabilitation as a goal of our criminal justice system. The success of the *Furman* freed suggests this is a pity. Perhaps even those souls condemned to death can be saved. But today, we don't even pretend to try.

#### E. Deterrence: Do Executions Save Lives?

One asserted justification for capital punishment is general deterrence:<sup>163</sup> we punish (or execute) A to keep B, C, D, etc., from committing crime. Capital punishment does indeed deter crime, but so does life imprisonment. The issue is not whether capital punishment deters crime—it does—but rather whether it deters crime *any more significantly than does life imprisonment*. Fifty years of social science research had shown that capital punishment had virtually no *more* deterrent value than life imprisonment.<sup>164</sup> Most criminals don't engage in the risk-benefit

---

161. *Id.*; cf. James W. Marquart & Jonathon R. Sorensen, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 LOY. L.A. L. REV. 5, 26 (1989) (noting that 98% of the commuted inmates did not kill again either in prison or in free society); Jonathan R. Sorensen & Rocky L. Pilgrim, *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. CRIM. L. & CRIMINOLOGY 1251, 1256 (2000) (noting that studies find an average repeat murder rate of 0.002% among murderers whose death sentences were commuted). *But see* *Roberts v. Louisiana*, 428 U.S. 325, 354 (1976) (White, J., dissenting) (“It also seems clear enough that death finally forecloses the possibility that a prisoner will commit further crimes, whereas life imprisonment does not.”).

162. DPIC, FACTS, *supra* note 4, at 2.

163. *See generally* Ruth D. Peterson & William C. Bailey, *Is Capital Punishment an Effective Deterrent to Murder?*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT* *supra* note 127, at 157–74 (discussing deterrence).

164. *See id.* (summarizing research on the relationship between capital punishment and deterrence and stating that “most criminologists seem convinced that capital punishment is not a more effective deterrent for murder than imprisonment”); Michael L. Radelet & Ronald L. Akers, *Deterrence*

calculation presupposed by deterrence theory; they don't think they'll be caught, and they sure don't think about the sentence they might receive if they are caught.<sup>165</sup> General deterrence cannot carry the burden of proof that supporters of death as a punishment must shoulder.

However, recent studies suggest that executions do save lives. A November 2007 *New York Times* article summarized the new studies and their critics.<sup>166</sup> According to the data, compiled by economists, “[f]or each inmate put to death . . . 3 to 18 murders are prevented.”<sup>167</sup> Legal scholars criticized the economic theories used to formulate the studies’ methodology, arguing that “the theories of economists do not apply to the violent world of crime and punishment” because it is doubtful that “potential murderers know enough or can think clearly enough to make rational calculations.”<sup>168</sup>

At best, the evidence on deterrence is inconclusive. In fact, I think that capital punishment can have and has had an *anti*-deterrent effect. Far from decreasing the incentives to commit capital murder, and far from sending a message that murder is wrong because, if you commit it, the government will kill you back, the death penalty actually can *encourage* murder.

This can happen in two ways. First, for some criminals, the possibility of execution is a reason *to* commit murder. Ted Bundy was one of these. After escaping from jail in Colorado in 1978,<sup>169</sup> Bundy headed for Michigan, a state that does not have capital punishment.<sup>170</sup> But he didn't kill anyone there. Rather, he headed for Florida—the state most in the news at the time as the capital of capital punishment.<sup>171</sup> It was in Florida where

---

*and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOLOGY. 1, 8 (1996) (noting that approximately 80% of criminologists believe existing research fails to support deterrence justification); Jon Sorensen et al., *Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas*, 45 CRIME & DELINQ. 481, 489–90 (1999) (finding no evidence of a deterrent effect); Raymond Bonner & Ford Fessenden, *Absence of Executions: A Special Report; States with No Death Penalty Share Lower Homicide Rates*, N.Y. TIMES, Sept. 22, 2000, at A1 (finding that homicide rates in death penalty states have been 48% to 101% higher than in non-death-penalty states during the last twenty years). *But see* William Tucker, *Yes, The Death Penalty Deters*, WALL ST. J., June 21, 2002, at A8 (arguing that the death penalty deters because it draws a bright line between a felony and felony murder).

165. *See, e.g.*, Adam Liptak, *Does Death Penalty Save Lives? A New Debate*, N.Y. TIMES, Nov. 18, 2007, § 1, at 1 (summarizing the arguments of those who question whether potential murderers make “rational calculations” when deciding whether to kill).

166. *Id.*

167. *Id.*

168. *Id.*

169. MELLO, *DEAD WRONG*, *supra* note 2, at 98.

170. DPIC, *FACTS*, *supra* note 4, at 1.

171. *See* MELLO, *DEAD WRONG*, *supra* note 2, at 30 (“When it comes to capital punishment, Florida is a bellwether state.”).

Bundy next committed his murders—a bloody rampage through the Chi Omega sorority house in Tallahassee that left two young women dead and several others badly beaten.<sup>172</sup> Perhaps it was coincidence that Bundy—with literally the whole country to choose from—chose the capital of capital punishment as the scene of his next killings. But I think he went there because he had a death wish. If caught, he wanted the celebrity of a high-profile trial and execution. And Florida gave Bundy his wish.<sup>173</sup>

Or consider the serial snipers who terrorized the D.C. area in October 2002.<sup>174</sup> The two snipers first struck in Maryland, which, although it has capital punishment on its books, almost never actually executes anyone (Maryland had at that time executed only three people since executions resumed in 1977) and which, at the time of the sniper attacks, was under a statewide moratorium on executions.<sup>175</sup> Then the snipers hit in D.C., which does not have capital punishment.<sup>176</sup> Then a string of sniper attacks occurred in Virginia, a jurisdiction which imposes and carries out (with gusto) the death penalty.<sup>177</sup>

These sniper attacks were methodically planned and carried out. These killers were extremely premeditated, deliberate, and methodical—paying painstaking attention to details like fields of fire and escape routes, and going so far as modifying a Chevy Caprice so that a shooter could sight and fire while concealed in the car's *trunk*<sup>178</sup>—the quintessentially deterrable killer, according to deterrence theory.<sup>179</sup> However, the presence or absence of capital punishment in the three jurisdictions involved did not seem to matter to this most-deliberate murderer. I don't want to make too much of this point; this was only one series of crimes by a single pair of ratbags. But it does provide an interesting case study in the deterrent effect of capital punishment.

---

172. *Id.* at 97.

173. *See id.* at 110 (describing the “tailgate party atmosphere” and media attention outside the prison following Bundy’s execution).

174. *See generally* Suzanne Smalley et al., “Dear Policeman, I am God,” *NEWSWEEK*, Oct. 21, 2002, at 24, 24 (discussing the ten-day killing spree by an unknown sniper who killed eight people and wounded two more).

175. Adam Liptak, *Retracing a Trail: The Legal Cases; 2 Men Could Face Trials in State and U.S. Courts*, *N.Y. TIMES*, Oct. 26, 2002, at A12.

176. Adam Liptak, *The Hunt for a Sniper: The Prosecution; Jurisdictions Will Weigh Options, Including Death*, *N.Y. TIMES*, Oct. 25, 2002, at A31.

177. *See id.* (“Virginia trails only Texas in the number of people it has executed in recent years.”).

178. *See* Christina Blatchford, *Malvo Sniper Case Ends with Mercy*, *GLOBE & MAIL (Can.)*, Dec. 24, 2003, at A16 (noting that their Chevy Caprice was fitted with a mobile gunport); Smalley et al., *supra* note 174 (“[M]ost of the shootings took place during the day, in busy places where there were plenty of witnesses around.”).

179. *See* Peterson & Bailey, *supra* note 163, at 158 (noting that deterrence requires a killer to think rationally rather than emotionally).

There is a class of people in the D.C. area who might have been deterred by the threat of capital punishment: citizens who suspected that a close family member might be the sniper, or who remembered the prosecutors' betrayal of David Kaczynski. David Kaczynski had begun to suspect that his brother Ted might be the Unabomber. In the end, David turned his brother in—but only after securing what he thought was a promise that the government would not seek to execute Ted. The government then did seek to execute Ted Kaczynski. This was my fear in the sniper case: that one of the four-million people in the D.C. area might have thought their brother or father or son was the sniper, but that that person was afraid to take that information to police because their relative could end up being executed. There is a world of difference between sending a brother to prison and to the lethal injection gurney. Just ask David Kaczynski.

The second way in which capital punishment might encourage murders is what Boston criminologist William Bowers calls the "brutalization effect."<sup>180</sup> Simply put, Bowers found that, for some prospective criminals, the government's willingness to kill for its own ends is persuasive that killing is a legitimate way to solve problems.<sup>181</sup> Some criminals follow the government's example. For some would-be killers, the government cannot itself kill while at the same time claiming credibly that killing is wrong. In other words, hypocrisy matters.

Then there is incapacitation: the idea that we execute A to ensure that A does not commit further crimes. Capital punishment certainly has an incapacitation effect of 100%: dead men don't commit crimes. However, life imprisonment achieves the same goal—separating the criminal from the rest of us, incapacitating him from criminality—without putting the state in the expensive business of deciding who deserves to die. Maximum-security prisons are as incapacitating as executions, even though there is a small risk of escape or murder in prison. Few people who commit murder in prison are in prison *for* murder. Murderers are, as a group, the least likely group of prisoners to be recidivists.

#### *F. Retribution*

Finally, there is retribution: the expression of society's (and the victim's) outrage and anger at heinous misconduct, and the related idea that some people simply deserve to die. As I've said, some crimes and some

---

180. WILLIAM J. BOWERS, *LEGAL HOMICIDE* 273 (1984).

181. *See id.* at 274 ("Executions demonstrate that it is correct and appropriate to kill those who have gravely offended us.").

criminals simply cry out for capital punishment; that's what they *deserve*.<sup>182</sup> As we say down South, "Some folks just need killin'." Think September 11.

Retribution is a credible argument—and, I believe, the only credible argument—in favor of capital punishment. If the supporters of capital punishment are to carry their burden of proof, they must do so on the basis of retribution.

However, life imprisonment in a maximum-security prison is also strongly retributive. Yet, one could argue, life imprisonment is not retributive enough: only execution is enough. The murder of my judge allows me to understand the retribution claim perhaps better than you may think I do.

Judge Vance is the only person I loved who was murdered. I served as Judge Vance's law clerk for the year following my graduation from law school in 1982. He was far more than a boss, however; in the years following my clerkship I came to rely upon his wisdom and guidance and experience. By the time of his death he had become my friend and my father in the law. I was too distraught by his killing to attend the funeral. I bought the plane tickets, but I couldn't force myself to use them.<sup>183</sup>

Before Judge Vance's murder, I thought I had an understanding of why people might support capital punishment. I was wrong. My intellectual understanding wasn't nearly enough. Since Judge Vance's murder, I have come to believe that there are only two kinds of people in the capital punishment debate: those who have lost a loved one to murder and those who have not. It took Judge Vance's murder for me to appreciate—on the most visceral of levels—why people might well demand death as a punishment.

I now date my life as a death row lawyer based on before and after. There was my life before Judge Vance was assassinated. There is my life after. His assassin, Walter Leroy Moody, now lives on Alabama's death row, and although I have spent a large portion of my life as a lawyer defending death row prisoners, when Judge Vance's killer is executed, part

---

182. See Cathy Young, *Revenge and the Death Penalty*, BOSTON GLOBE, May 23, 2005, at A11 (reporting that many who oppose the death penalty often do so with a muddled understanding of the purpose of the criminal justice system, because they fail to acknowledge the legitimacy of retribution in our society).

183. I have not found "closure" regarding his tragic demise, and I don't want it. "Closure" might lead to forgetting, and forgetting is unacceptable to me. My anger helps me remember. I miss him. I miss his presence, his advice, and his wisdom. I miss his laughter. See Michael Mello & Paul Perkins, *Ted Kaczynski's Diary*, 22 VT. L. REV. 83, 149–53 (1997) (offering a heartfelt memoir of the author's relationship with Judge Robert S. Vance and the events leading up to and following his assassination).

of me will cheer.<sup>184</sup> So I honestly do believe that reasonable people can conclude that that extra measure of retribution, that amount beyond the punishment of life imprisonment, justifies capital punishment.

However, before so concluding, it would be prudent to consider the *costs* of having that extra measure of retribution. Before deciding that the extra retribution is worth the costs, one ought to know exactly what those costs are.

Some of the costs of capital punishment are quantifiable; capital punishment is enormously expensive, far more expensive than a system without the ultimate penalty permissible under our Constitution.<sup>185</sup> That is only the beginning. The inevitability that some innocent people will be, have been, and will always be sentenced to death and executed is a necessary cost of doing the business of government-sponsored executions.

Before that, however, I want to discuss what I mean by “capital punishment.” As I’ve said, my topic today is not “capital punishment” as an abstract issue of public policy or public morality. That capital punishment has no real costs. I mean capital punishment *as a legal system*. That is the *real* capital punishment, and its costs are enormous.

G. “*The Skull Beneath the Skin*”: *The Real Death Penalty*

Webster was much possessed by death  
And saw the skull beneath the skin;  
And breastless creatures under ground  
Leaned backward with a lipless grin.

Daffodil bulbs instead of balls  
Stared from the sockets of the eyes!  
He knew that thought clings round dead limbs  
Tightening its lusts and luxuries.

T.S. Eliot<sup>186</sup>

---

184. Politicians often talk about capital punishment as a means of bringing “closure” to the families of crime victims. I’ve never understood what “closure” means; I think it’s a psychobabble word that gained currency by repetition in the media. I’ve also never understood how the lack of finality of the capital appeals process can offer any sense of closure to the families of murder victims; whenever there is another appeal filed or court decision rendered or execution date set, the media dredges up the case—and the victims feel the pain—again.

The families of murder victims are not monolithic. Some support the execution of the killers of their loved ones. Some do not. The survivors and families of the Oklahoma City bombing were evenly divided on their wish for death for Timothy McVeigh. The ambivalence of these victims reflects the ambivalence of the American public in general on capital punishment.

185. See *infra* Part IV.B (discussing the quantifiable costs of capital punishment).

186. ELIOT, *supra* note 117, at 45.

## 1. Cure to Kill

Claude Maturana is the personification of the real capital punishment. Maturana was sentenced to death for murder.<sup>187</sup> He was then found to be a paranoid schizophrenic and mentally incompetent to be executed.<sup>188</sup> “He was convinced he was an agent of the ‘world police’ and spoke frequently in numbers and initials whose meaning was known only to him. Maturana was under the care of Dr. Jerry Dennis, the Arizona State Hospital’s chief medical officer . . . .”<sup>189</sup>

Dr. Dennis visited Maturana “periodically to monitor his condition and treated him with a regimen of tranquilizers which maintained his equilibrium but did not improve his mental state.”<sup>190</sup> Such an improvement would have rendered the doctor’s patient mentally competent to be executed, and the doctor believed that the Hippocratic Oath precluded him from treating a patient in such a way that would make him eligible for execution. Dr. Dennis “could have treated Maturana more aggressively and restored him to the point where he understood that he was going to be executed for committing a crime, but [Dr.] Dennis refused citing his ethical obligations” to his patient.<sup>191</sup>

The Arizona prosecutors ordered Dr. Dennis to treat his patient until he was competent to be executed.<sup>192</sup> The doctor refused. The prosecutors threatened the doctor with contempt of court. He still refused.<sup>193</sup> Hospital administrators then “attempted to find a replacement for [Dr.] Dennis.”<sup>194</sup> The hospital administrators sent a mailing to all Arizona psychiatrists and nurse practitioners, posted classified ads, “and [made] calls to professionals in other death penalty states.”<sup>195</sup>

Not a single Arizona psychiatrist, psychologist, or nurse practitioner was willing to take on the case, but a psychiatrist in Georgia was.<sup>196</sup> The case is unresolved. *This* is the real death penalty,<sup>197</sup> far more typical than

---

187. NINA RIVKIND & STEVEN F. SHATZ, *CASES AND MATERIALS ON THE DEATH PENALTY* 780 (2d ed. 2006).

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. See Suzi Parker, *Appeal Fights Forced Use of Medication to Allow Execution*, DALLAS MORNING NEWS, Dec. 19, 2000, at 27A (discussing case of Charles Singleton where the prison forced anti-psychotic drugs to keep him competent for his execution).

the execution of Timothy McVeigh, for example.

The Arizona case was especially real for me because a number of years ago, when I was a Florida public defender, I had a profoundly schizophrenic client named Nollie Lee Martin. Lee Martin's mental illness was treatable with drugs; untreated, Martin's daily life was a tortured hell of delusions and panic. I ordered the prison to cease psychiatric treatment of Lee Martin because his (untreated) mental illness was my best chance of a stay of execution. It was one of the most agonizing decisions I ever had to make as a lawyer, and to this day I'm not certain I chose correctly.<sup>198</sup> I got the stay; my client's unmedicated "life" was horrible beyond words; he was electrocuted a few years later anyway.<sup>199</sup> *This* is the real capital punishment.

## 2. Texas: Death by Assembly Line

And then there is the Texas execution assembly line—more of the real death penalty. No discussion of the real capital punishment can ignore Texas. Texas sets the standard, both in terms of numbers of executions and in terms of downright creepiness.<sup>200</sup> As of this writing Texas has carried out more than 400 executions since executions resumed in 1977.<sup>201</sup>

On four consecutive nights in May 1997, Texas executed four men, one per night. This was a modern record. The press reported the executions as if it were reporting the results of a ball game. "At this rate," the *Washington Post* wrote, "Texas will easily shatter its own record of 19 executions set in 1995." Three weeks later it did. "*Texas Puts 2 to Death, Tying Record*," was the June 3, 1997 headline on page A-24(!) of the *New York Times*: Dorsey Johnson-Bey shot a convenience store clerk, named Jack Huddelston, on March 23, 1986. A little more than an hour later, Davis Losada, a gang leader ordered the murder of Olga Perales, a fifteen-year-old girl who had been repeatedly raped and beaten by Losada and his three fellow gang members before they killed her.

The executions of Dorsey Johnson-Bey and Davis Losada were the third and fourth in Texas that week. They marked the first double execution in the state since January 1997, and the third multiple execution

---

198. See MELLO, DEATHWORK, *supra* note 2, at 108–114 (discussing the Martin case).

199. *Id.* at 114.

200. Interestingly, Texas is not a leader in sentencing people to death. "Texas ranks 21 of the 38 capital punishment states . . . in death verdicts per 1,000 homicides from 1973 to 1995." Diane Jennings, *Death Penalty Study Challenges Stereotype*, DALLAS MORNING NEWS, Feb. 11, 2002, at 17A. Further, "[m]ore than half of Texas' 254 counties never sentenced anyone to die during that same 22-year period." *Id.*

201. DPIC, FACTS, *supra* note 4, at 3.

in the nation since executions resumed in 1977. Texas had four more executions scheduled for that week, and at least eleven for that month.

But even by Texas standards, the December 8, 1999, execution of a man requiring oxygen and continuous medical care (following a drug overdose) was notable in its weirdness. Two days prior to his scheduled execution, [and three weeks before Christmas,] forty-six-year-old Martin Long was found unconscious in his cell by death row guards: Long hoarded and then “ingested an overdose of anti-psychotic drugs.” Doctors placed him “in intensive care on a ventilator . . . .”

On the day before his scheduled execution by lethal injection—a state-mandated overdose, in a manner of speaking—Long was taken off the respirator and upgraded from critical to serious condition. Long remained in intensive care, or, actually, he would have remained in intensive care for another two or three days, were it not for his scheduled execution.

Long’s doctor in Galveston was asked by the state “to sign an affidavit stating that Mr. Long could be safely transported to Huntsville [for execution], a request he said he refused.” However, the doctor did sign an affidavit “stating that Long’s health had improved, that he suffered no seizures and was responding to questions—but that transporting him could be risky without appropriate medical care.”

So Long was transported—on oxygen and with continuous medical care—by airplane from Galveston to Houston, a twenty-five minute trip. He was then executed. Long wasn’t even the first person this scenario had happened to recently; something very similar occurred in Oklahoma in 1995. The Long case had no impact on the pace of executions inside or outside Texas. Another Texas execution was scheduled the next night, and two more for the next week. On the night Long was executed in Texas, convicts were also executed in Oklahoma and Indiana. All in all, 1999 was a busy year for the executioner: before the last year in the twentieth century even ended, there had been 92 executions in America that year, the most since 1952.

Twelve days into the twenty-first century, Texas carried out its 200th execution since capital punishment resumed in that state in 1982 (this was the first execution of the new century). And it should surprise no one who keeps track of this algebra of blood that Texas planned to herald in the new millennium with a string of controversial executions. In January 2000, Texas intended to execute two prisoners (Glen McGinnis and Anzel Jones) who were juveniles at the time they committed their crimes. That same month, Johnny Penry, a convicted murderer who is considered mentally retarded, was scheduled for lethal injection. Larry Robison, who had been diagnosed with paranoid schizophrenia, and David Hicks, who claims that

the DNA evidence that sent him to death row was faulty, were also scheduled to be executed by Texas in the first month of the new millennium.

By the end of 2000 Texas had set a national record for executions in a single year.<sup>202</sup> Garry Dean Miller was executed on December 4, 2000, the thirty-eighth person put to death by the Lone Star State that year.<sup>203</sup> The record of thirty-eight eclipsed the record of thirty-seven set by Texas in 1997.<sup>204</sup>

This is the real death penalty, where a tiny percentage of killers are chosen, almost at random, to die. They're not the worst of the worst. They're the unluckiest of the unlucky. They're the people with the worst lawyers.

Justice Potter Stewart famously compared being sentenced to death with being struck by lightning.<sup>205</sup> He meant to capture the random nature of how the legal system decides who deserves to die, but his metaphor isn't quite right. Lightning strikes truly randomly; it does not target poor people or minorities. Capital punishment in the United States does.<sup>206</sup>

It bears repeating: reasonable minds can support capital punishment, in my opinion. Thoughtful, decent, moral, enlightened, intelligent people can, and do, believe that in our war against crime, the death penalty is a legitimate weapon in that arsenal. All nine justices on this nation's highest court are on record as holding that capital punishment passes constitutional muster.<sup>207</sup> Our elected representatives, from the President on down, overwhelmingly believe—or at least act as though they believe—that capital punishment is a wise and necessary public policy.<sup>208</sup>

---

202. Richard Stewart, *38th Inmate Executed, Setting Record for Year*, HOUS. CHRON., Dec. 6, 2000, at A1.

203. *Id.*

204. *Id.*

205. See *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring) (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”).

206. See Stuart Taylor Jr., *Strict Penalties for Criminals: Pendulum of Feeling Swings*, N.Y. TIMES, Dec. 13, 1983, at A1 (discussing “the wide disparity in the punishment of criminals who had committed similar crimes”).

207. In 1976, the Supreme Court held the death penalty was not “cruel and unusual punishment” under the Eighth Amendment of the U.S. Constitution. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). This is still binding precedent, although the current justices differ on under what circumstances and against whom the death penalty may be administered. See, e.g., *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007) (splitting the Court in a five-to-four decision over whether the sufficiency of a schizophrenic defendant’s mental capacity to be executed should be determined by a jury).

208. See Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (2000) (limiting habeas claims in federal courts to grant relief only when the state court’s adjudication of the claim resulted in a decision that was “contrary to, or involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States” or “based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding”);

The devil is in the details, however. Capital punishment newcomers and veterans alike appear dissatisfied with the ultimate penalty as a legal system. Take New York. New York imposed its first death sentence in June 1998, three years after its present capital punishment statute was passed.<sup>209</sup> The new system clanked along until 2004, when New York's high court declared the state's capital punishment statute unconstitutional.<sup>210</sup> Or take California, which has had capital punishment for more than twenty years and now has the largest death row not only in the nation, but in the western hemisphere (more than 600), but has conducted only thirteen executions.<sup>211</sup> In 1986, the California electorate decided that the state supreme court was too soft on capital punishment, and the people tossed three justices out of office<sup>212</sup>—and yet there have been only four California executions in the intervening years. Then there's Texas, where death rides an assembly line.

### 3. Florida: The Doctor in the Purple Moon Suit

Or consider Florida, the state that has, perhaps more than any other, striven (and paid, with millions and millions of tax dollars) to make capital punishment fair as well as swift, and the state where I worked full-time as a capital appellate public defender from 1983 to 1987. Florida has executed more people (sixty-four) than all but four other states.<sup>213</sup> For a year, all executions in Florida were on hold following the fiery botched electrocution of Pedro Medina in March 1997.<sup>214</sup>

Why, you might ask, did Florida not simply replace its three-legged, solid-oak electric chair, built in 1923 by prison inmates, with lethal injection?<sup>215</sup> It's not that simple. Lethal injections can be, and frequently are, botched. This is so because the Hippocratic Oath precludes doctors and other highly trained medical personnel from participating in executions; and *this* means that Florida's medical lobby opposed lethal injection as a method of execution. In fact, no mechanism of execution is close to

---

Mark Olser, *Christ, Christians, and Capital Punishment*, 59 BAYLOR L. REV. 1, 2 (2007) (noting that both President Bill Clinton and President George W. Bush support the death penalty).

209. Fred Kaplan, *N.Y. Jury Revives Death Penalty for Former Guard*, BOSTON GLOBE, June 7, 1998, at A2.

210. *People v. LaValle*, 817 N.E.2d 341, 367 (N.Y. 2004) (striking down New York's capital punishment statute because of its deadlock jury instruction).

211. DPIC, FACTS, *supra* note 4, at 3.

212. Seth Mydans, *Los Angeles Votes on Lenient Verdict*, N.Y. TIMES, June 1, 1992, at A13.

213. DPIC, FACTS, *supra* note 4, at 3.

214. MELLO, DEATHWORK, *supra* note 2, at 121–22.

215. I was closely involved in the early legal challenges to Florida's use of the electric chair. *See id.* at 123.

foolproof because it just isn't easy to devise a way of killing an otherwise healthy human being that is quick, painless, and not horrible for the state-selected witnesses to watch.

In 2000, Florida did change its statute to provide for lethal injections.<sup>216</sup> The Sunshine State's solution to the problem of doctors' participation in executions was unique: a doctor wearing a purple moon suit—similar to those used by hazardous materials workers—monitors the dying inmate's heartbeat and pronounces the inmate dead.<sup>217</sup> Florida's solution reflects a compromise between the “strong passions surrounding the role of physicians in executions, and the conflicting pressures that prison officials around the country are increasingly feeling” to prevent botched executions.<sup>218</sup> Several other states such as Texas, Missouri, Alabama, and Ohio use doctors in varying degrees during executions, and all of these states take similar steps to shield the doctor's identity.<sup>219</sup>

It turns out that Florida had no easy or simple answer to its problem about how to carry out executions. This illustrates an essential fact about capital punishment: *nothing* about it is as easy or simple as it first appears, not even the choice of execution method. And that choice is only the beginning.

#### 4. The Hard Questions Not Addressed in the Kilmartin Bill

If Florida, which has extensive experience with capital punishment,<sup>220</sup> took nearly three decades to figure out what method of execution to use, then what about the *really* hard questions about capital punishment as a legal system? For example:

- Why does it take an average of almost ten years between the time a death sentence is handed down and the execution is carried out,<sup>221</sup> (in California, the wait is even longer)<sup>222</sup>

---

216. *Id.* at 122.

217. Ron Word, *Fla. Protects Doctors' IDs*, ASSOCIATED PRESS, Aug. 28, 2007, available at <http://www.thefreelibrary.com/Fla.+protects+doctors'+IDs-a01610750180>.

218. *Id.*

219. *Id.*

220. Florida has carried out sixty-four executions. DPIC, FACTS, *supra* note 4, at 3. Florida executed four people in an eight-day period in early 1998, *Florida Puts to Death First Woman in 150 Years*, N.Y. TIMES, Mar. 31, 1998, at A16, and has nearly 400 men and women on death row. DPIC, FACTS, *supra* note 4, at 2.

221. See Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255, 266 (1992) (citing failure to raise constitutional objections in previous habeas petitions as cause for delay); *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1131 (1984) (citing “lengthy procedures now required

even though rules to expedite capital cases have been in place for some time?<sup>223</sup> Is it because of a conspiracy of

---

before a death sentence can be carried out” as basis for public uncertainty with death penalty); Evan Caminker & Erwin Chemerinsky, *The Lawless Execution of Robert Alton Harris*, 102 YALE L.J. 225, 226 (1992) (discussing conflict between allowing inmate to raise all meritorious arguments versus interests of finality); James E. Coleman, Jr., *Litigating at the Speed of Light: Postconviction Proceedings Under a Death Warrant*, 16 LITIG. 14, 14–19 (1990) (detailing the complex appeals procedure for the Ted Bundy execution); Arthur J. Goldberg, *The Supreme Court Reaches Out and Touches Someone—Fatally*, 10 HASTINGS CONST. L.Q. 7, 12–13 (1982) (citing cause for delay as Supreme Court’s decade-long moratorium on the death penalty); Steven M. Goldstein, *Expediting the Federal Habeas Corpus Review Process in Capital Cases: An Examination of Recent Proposals*, 19 CAP. U. L. REV. 599, 606–07 (1990) (citing collateral review process and the lack of res judicata in federal habeas proceedings as main reasons for such long period between death sentence and execution); Patrick E. Higginbotham, *Stays of Execution: A Search for Predictability and Rationality*, 20 TEX. TECH. L. REV. vii, ix (1989) (citing lack of res judicata and collateral estoppel in habeas proceedings as cause for delay); Jerome J. Kaharick, Comment, *The Reform of Federal Habeas Corpus in Capital Cases*, 29 DUQ. L. REV. 61, 70, 75 (1990) (discussing problems associated with federal habeas corpus proceedings, including unnecessary delay and repetition); Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513, 554–63 (1988) (measuring time and expense necessary for death penalty appeals in terms of hours that an attorney spends on the process); John T. Noonan, Jr., *Horses of the Night: Harris v. Vasquez*, 45 STAN. L. REV. 1011, 1017 (1993) (detailing the appeal process for Robert Harris’s death sentence appeal and noting that many of the steps were “fruitless”); Stephen Reinhardt, *Supreme Court, the Death Penalty, and the Harris Case*, 102 YALE L.J. 205, 218–20 (1992) (citing a last minute challenge to the gas chamber method of execution as a reason for further delay); Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 158–59 (1990) (citing several sources of delay at the state level); Alvin B. Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 NOTRE DAME LAW. 648, 648–52 (1980) (discussing how the growing size of the federal judiciary staff overworks judges and diminishes the quality of communication between judges, clerks, and staff and the growing complexities of federal litigation); Charles M. Sevilla & Michael D. Laurence, *Thoughts on the Cause of the Present Discontents: The Death Penalty Case of Robert Alton Harris*, 40 UCLA L. REV. 345, 348 (1992) (arguing against hastening the execution process to protect fairness and integrity in the capital punishment system). *But cf.* Gailon W. McGowen, Jr., *An Opportunity to Address the Merits: Barefoot v. Estelle*, 463 U.S. 880 (1983), 17 COLUM. HUM. RTS. L. REV. 83, 100 (1985) (discussing the impact of the use of expedited proceedings in habeas corpus appeals for death penalty sentences); Julia E. Boaz, Note, *Summary Processes and the Rule of Law: Expediting Death Penalty Cases in the Federal Courts*, 95 YALE L.J. 349, 352 (1985) (examining “the debate underlying the Supreme Court’s recent commitment . . . to expediting the normal deliberative processes for capital cases in the federal courts”); Nicole Veilleux, Note, *Staying Death Penalty Executions: An Empirical Analysis of Changing Judicial Attitudes*, 84 GEO. L.J. 2543, 2554 (1996) (reporting a downward trend in the number of execution stays issued by circuit courts in capital habeas appeals).

222. See Henry Weinstein, *Court Urges Amendment to Speed Death Penalty Reviews*, L.A. TIMES, Nov. 20, 2007, at A1 (stating that it takes an average of seventeen years to carry out a death sentence in California—twice the national average).

223. See JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM, PART I: ERROR RATES IN CAPITAL CASES, 1973–1995, at 21–25 (2000), available at <http://www.thejusticeproject.org/press/reports/pdfs/Error-Rates-in-Capital-Cases-1973-1995.pdf> (detailing the capital review process). A capital review process consists of three inspections: (1) state direct appeal; (2) state post-conviction; and (3) federal habeas corpus. *Id.* For condemned prisoners, suicide and death by natural causes often beat the executioner. See Alex Roth, *Many Death-Row Inmates Die Before Execution Date; Suicide, Natural Causes Often Beat State Process*, SAN DIEGO UNION-TRIB., Jan. 28, 2002, at A-1 (stating that the death

defense lawyers?<sup>224</sup>

- Has the Supreme Court really held that executing an innocent person does not in and of itself violate the Constitution? (Yes, sort of.)<sup>225</sup>
- Why are so many (two in three) death sentences thrown out on appeal?<sup>226</sup>
- Why are so many innocent people sentenced to death (128 have been released from prison after proving their innocence,

---

penalty is the third-leading cause of death among California's death row inmates). For a discussion of the steps in the capital appeals process, see MELLO, *DEATHWORK*, *supra* note 2, at 163–65; MELLO, *THE WRONG MAN*, *supra* note 2, at 41–43.

224. See Anthony Amsterdam, *Selling a Quick Fix for Boot Hill: The Myth of Justice Delayed in Death Cases*, in *THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE* 148, 164–65 (Austin Sarat ed., 1999) (describing theory that delay is caused by a conspiracy between defense lawyers).

Texas and Virginia lead the states in executions. DPIC, *FACTS*, *supra* note 4, at 3. This is no accident. Both states have grossly dysfunctional systems for providing defense lawyers at capital trials, and both have state and federal judiciaries that rubber-stamp death sentences. See WELSH S. WHITE, *LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES 4–7* (2006) (“The states with the most executions have done the least to ensure that capital defendants are provided with effective representation at trial.”); Andrew Hammel, *Jousting with the Juggernaut*, in *MACHINERY OF DEATH: THE REALITY OF AMERICA’S DEATH PENALTY REGIME* 107, 107–08 (David R. Row & Mark Dow eds., 2002) (describing the death penalty under the Texas and Virginia systems as “inexorable”).

225. See *Herrera v. Collins*, 506 U.S. 390, 400, 411 (1993) (holding that “[c]laims of actual innocence based on newly discovered evidence” are not “ground[s] for federal habeas relief” if no constitutional violation occurred in the “underlying state criminal proceeding” and that the state’s “refusal to entertain” the new evidence did not violate the procedural due process guarantees of the Fourteenth Amendment); Vivian Berger, *Herrera v. Collins: The Gateway of Innocence for Death-Sentenced Prisoners Leads Nowhere*, 35 WM. & MARY L. REV. 943, 975–90 (1994) (describing courts’ reluctance to grant habeas corpus review in light of new evidence relevant to guilt). *But cf.* Margery Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code’s Exclusion of Death in the Presence of Lingering Doubt*, 21 N. ILL. U. L. REV. 41, 41 (2001) (advocating exclusion of the death penalty as a sentence “when the evidence does not foreclose all doubt respecting the defendant’s guilt”); Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303 *passim* (1993) (discussing Supreme Court decisions that suggest a review of a capital case is warranted when sufficient doubt is cast on the defendant’s guilt); Daniel M. Bradley, Jr., Comment, *Schlup v. Delo: The Burden of Showing Actual Innocence in Habeas Corpus Review and Congress’ Efforts at Reform*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 463, 475–76 (1997) (describing Supreme Court decision allowing “probable or colorable” showing of innocence to overcome procedural bar to habeas corpus review); Tara L. Swafford, Note, *Responding to Herrera v. Collins: Ensuring that Innocents Are Not Executed*, 45 CASE W. RES. L. REV. 603, 604 (1995) (“The nation was stunned that a capital defendant alleging new evidence of innocence could not obtain review from federal courts since a claim of innocence is not a constitutional claim.”).

226. See LIEBMAN, *supra* note 223, at iii (reporting the national average of death penalty reversals at 68%); Marcia Coyle, *Trimming Death Sentence Errors*, NAT’L L.J., Feb. 11, 2002, at A8 (discussing study finding that state and federal appellate courts reversed 68% of more than 5000 of the death sentences studied).

at last count)?<sup>227</sup>

- Do people confess to crimes they didn't commit? (Yes: Coerced or false confessions were involved in one-fifth of the convictions, nationwide, that were later reversed on account of DNA evidence.)<sup>228</sup> Do people plead guilty to crimes they didn't commit? (Again, yes.)<sup>229</sup>
- Why does it cost so much money to operate the legal machinery of capital punishment?<sup>230</sup>
- Is there any rational way for juries to distinguish killers who deserve to die from killers who deserve to live?<sup>231</sup>
- Should jurors who oppose capital punishment be excluded from serving as jurors in capital cases?<sup>232</sup>
- Should procedural technicalities (like filing a brief one day late) preclude judicial review of the legality of a death sentence?<sup>233</sup>
- Should executions be televised, or, if not, should members of the victim's family have a right to witness the execution?<sup>234</sup>

227. DPIC, FACTS, *supra* note 4, at 2.

228. *E.g.*, Jodi Wilgoren, *Confession Had His Signature; DNA Did Not*, N.Y. TIMES, Aug. 26, 2002, at A1, available at 2002 WLNR 4045972 (describing an example of a false confession by Eddie Joe Lloyd to a 1984 murder).

229. *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 *passim* (2004) (analyzing 125 cases of "interrogation-induced" false confessions); Nadia Soree, Comment, *When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony*, 32 AM. J. CRIM. L. 191, 261–63 (2005) (arguing that the Constitution allows defendants to "present the expert testimony necessary to dispel the common misperception that an innocent person would not confess to a crime committed by another").

230. *See infra* Part IV.

231. *See* RIVKIND & SHATZ, *supra* note 187, at 17 (discussing the inherent arbitrariness in imposing criminal punishments).

232. *See, e.g.*, *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (articulating the standard for determining when it is proper to exclude prospective jurors because of their views on capital punishment).

233. *See, e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 726–28, 757 (1991) (affirming the Virginia Supreme Court's decision to dismiss a death row inmate's appeal because it was filed three days late).

234. *See* WENDY LESSER, PICTURES AT AN EXECUTION *passim* (1993) (exploring issues surrounding televised executions); Letter to the Editor, *Let Victims' Kin See Executions?; Don't Let Them View Executions*, HOUS. CHRON., Apr. 1, 1995, at A31 (voicing various opinions on whether victims' families should be permitted to view executions). *See generally* JOHN D. BESSLER, DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA 163–205 (1997) (discussing, among other things,

- Should the sentencing judge and jury be *required* to witness the execution?<sup>235</sup>
- Should we execute juveniles,<sup>236</sup> the mentally retarded,<sup>237</sup> the floridly insane,<sup>238</sup> or the less-than floridly crazy?
- Are lethal injections less cruel (and therefore more constitutional) than old-fashioned electrocutions, hangings,

---

whether the government has the right to censor journalists' access to executions and proposing that televised executions will have educational value). The author concludes that "[t]he public has a right to know when and how the state takes a human life." *Id.* at 210.

235. See Jeremy G. Epstein, *Require Judge and Jury to Witness Executions*, NAT'L L.J., Dec. 11, 1995, at A19 (arguing that the judge and jury should be required to attend executions).

236. See *Roper v. Simmons*, 543 U.S. 551, 574–75 (2005) (reversing *Stanford v. Kentucky*, 492 U.S. 361 (1989) and holding that the death penalty cannot be imposed on juveniles); MELLO, DEATHWORK, *supra* note 2, at 152 (discussing the Paul Magill case). See generally VICTOR L. STREIB, DEATH PENALTY FOR JUVENILES (1987) (arguing that the death penalty for juveniles is not supported by any theory of punishment).

237. See generally EMILY FABRYCKI REED, THE PENRY PENALTY: CAPITAL PUNISHMENT AND OFFENDERS WITH MENTAL RETARDATION (1993) (arguing against the application of the death penalty to the mentally retarded). The U.S. Supreme Court held in 1989 that executing the mentally retarded is constitutional; several such inmates have been executed. *Id.* at 1, 97.

Some death penalty opponents say that as many as thirty-five mentally retarded people have been executed since the death penalty was reinstated in 1976. Gaylord Shaw, *High Court Arguments on Vouchers, Executions*, NEWSDAY (N.Y.), Feb. 21, 2002, at A16. Precise numbers are hard to come by because there is no universal definition of retardation. Mental retardation is often defined as (1) an IQ of less than seventy; (2) that causes significant impairment of their abilities to function normally (school records, work records); and (3) these impairments manifested themselves before age eighteen. U.S. Dep't of State, Capital Punishment in U.S. Hit 30-year Low in 2003, <http://usinfo.state.gov/dhr/Archive/2005.Mar/01-985703.html> (last visited Mar. 6, 2008).

In 2001 the Supreme Court granted review in a North Carolina case to revisit its 1989 ruling. Linda Greenhouse, *Top Court Hears Argument on Execution of Retarded*, N.Y. TIMES, Feb. 21, 2002, at A21 (noting that the question for the court was "whether the balance has now shifted sufficiently so that executing the retarded should be considered 'cruel and unusual punishment' in violation of the Eighth Amendment"). The North Carolina Legislature then banned such executions, mooting the case. *Id.* Consequently, the Supreme Court granted review in a Virginia case of a mentally retarded prisoner. *Id.*

In June 2002 the Supreme Court outlawed execution of the mentally retarded. See *Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002) (noting that mentally retarded defendants may be less able to show mitigation of aggravating factors, assist counsel, provide testimony, or maintain a demeanor that does not give a false impression of a lack of remorse). For a thoughtful argument in favor of executing the mentally retarded, see Barry Latzer, *Misplaced Compassion: The Mentally Retarded and the Death Penalty*, 38 CRIM. L. BULL. 327, 365 (2002).

238. *E.g.*, Panetti v. Quarterman, 127 S. Ct. 2842, 2862 (2007) (holding that a defendant's delusions should have been considered in sentencing); KENT S. MILLER & MICHAEL L. RADELET, EXECUTING THE MENTALLY ILL 1–5 (1993) (discussing arguments against executing the mentally ill); Michael Mello, *Executing the Mentally Ill: When Is Someone Sane Enough to Die?*, 22 CRIM. JUST. 30 *passim* (2007) (discussing specific executions of mentally ill); Michael Mello, *Alvin Ford's Delusions— and Our Own*, 44 CRIM. L. BULL. (forthcoming 2008).

gassings, or firing squads?<sup>239</sup>

- The question I discussed earlier: if it is inhumane (and therefore unconstitutional) to execute the presently insane, then may a condemned prisoner who *is* insane be forcibly medicated in order to render him competent enough to be executed “in his lucid interval”?<sup>240</sup>
- And apart from the legalities, what are the medical ethics of restoring insane prisoners to sanity so that the “patient” becomes sufficiently mentally competent to be put to death?<sup>241</sup>
- Does lethal injection degrade the medical profession in a more intimate way than the use of more traditional methods of state killing?<sup>242</sup> And in any event, what are the professional ethics of participation in lethal injection by doctors, nurses, medical technicians, and members of the healing professions enjoined by the Hippocratic Oath to “give no deadly medicine” and to “abstain from whatever is deleterious and mischievous”? Or, as this injunction is

---

239. The Supreme Court upheld the constitutionality of lethal injections in *Base v. Reez*, 128 S. Ct. 1520, 1538 (2008). *See also, e.g.*, MELLO, DEATHWORK, *supra* note 2, at 115–26 (discussing challenges to Florida’s electric chair); Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 325 (1997) (introducing a “five-factor execution methods test that . . . incorporates the multifaceted legal and factual issues pertinent for accessing any execution method”); Martin R. Gardiner, *Execution and Indignities—An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 OHIO ST. L.J. 96, 128–29 (1978) (considering the constitutionality of lethal injection).

240. “As a Mississippi prosecutor argued, ‘We could put him in [the mental hospital], and if found to be competent, come to this court and execute him in his lucid interval. [The law] does not say this court can vacate his death sentence. It only says we can come back and try again.’” MELLO, DEAD WRONG, *supra* note 2, at 23 (alterations in original).

241. *E.g.*, Charles Ewing, “Above All, Do No Harm”: *The Role of Health and Mental Health Professionals in the Capital Punishment Process*, in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT, *supra* note 127, at 461, 466–72 (discussing the ethical dilemmas mental health professionals face in evaluating and treating persons facing the death penalty); Michael L. Radelet & George W. Barnard, *Treating Those Found Incompetent for Execution: Ethical Chaos with Only One Solution*, 16 BULL. AM. ACAD. PSYCHIATRY & L. 297, 306 (1988) (“We conclude that the ethical dilemma created by the demand to treat prisoners so that they can be executed can only be resolved by commuting the sentence of mentally incompetent death row prisoners to long-term imprisonment.”); Rochelle Graff Salguero, Note, *Medical Ethics and Competency to Be Executed*, 96 YALE L.J. 167, 168 (1986) (discussing the ethical dilemma that physicians face when choosing between providing medical care and allowing an execution to take place).

242. *See* Denno, *supra* note 28, at 80–84 (discussing American Medical Association’s stance on physician participation in executions); Word, *supra* note 217 (describing how states protect the identities of doctors who participate in executions); sources cited *supra* note 241.

commonly understood, “First, do no harm”?<sup>243</sup>

- Is execution necessarily a worse punishment than life imprisonment?<sup>244</sup> If you had to choose between death by lethal injection or life imprisonment in a maximum-security prison, which would you choose?<sup>245</sup>
- What is it like to live, year after year, on death row?<sup>246</sup>
- What impact does administering death row have on prison guards, wardens, and clergy?<sup>247</sup>
- How much judicial time and energy does capital punishment consume that could be devoted to other kinds of criminal and civil cases?<sup>248</sup>
- Should condemned prisoners be permitted to “volunteer” for execution by waiving their appeals, and, if so, should their lawyers fight to enforce their condemned clients’ decisions?<sup>249</sup>

---

243. See sources cited *supra* notes 241–42. “The prison director of Texas’s death row calls it medicine, and a former attorney general observed, ‘It’s not a lot different from putting a dog to sleep.’” MELLO, DEAD WRONG, *supra* note 2, at 23–24.

244. See, e.g., Michael Mello, *Representing Death Row: An Argument for Attorney-Assisted Suicide*, 34 CRIM. L. BULL. 48, 48 (1998) (“Anyone who has been inside the medieval fortress of Florida State Prison can appreciate that a reasonable person could conclude that death is preferable to the uncertainty of death row and even to life in a maximum-security prison.”); Michael Mello, *Raising Holy Hell*, 34 CRIM. L. BULL. 279, 294 (1998) (suggesting that the efforts by Ted Kaczynski’s lawyers to save him from the death penalty by arguing that he was incompetent to stand trial were not in Kaczynski’s best interest).

245. See Hugo A. Bedau, *Imprisonment vs. Death: Does Avoiding Schwarzschild’s Paradox Lead to Sheleff’s Dilemma?*, 54 ALB. L. REV. 481, 482, 495 (1990) (arguing that the death penalty and life in prison without parole are both “morally objectionable” and proposing less “outrageous” alternatives).

246. See, e.g., Willie Jasper Darden, Jr., *An Inhumane Way of Death*, in FACING THE DEATH PENALTY: ESSAYS ON A CRUEL AND UNUSUAL PUNISHMENT 203, 203–04 (Michael L. Radelet ed., 1989) (discussing the injustice of capital punishment from a death row inmate’s perspective); Joseph Giarratano, *The Pains of Life*, in FACING THE DEATH PENALTY: ESSAYS ON A CRUEL AND UNUSUAL PUNISHMENT, *supra*, at 193, 193–97 (describing the emotional struggles death row inmates experience); C. Michael Lambrix, *The Isolation of Death Row*, in FACING THE DEATH PENALTY: ESSAYS ON A CRUEL AND UNUSUAL PUNISHMENT, *supra*, at 198, 198–201 (describing, “in a biographical fashion, the struggles and challenges that life under a sentence of death presents”).

247. See ROBERT JOHNSON, DEATH WORK 115–16, 145–47 (2d ed. 1998) (exploring the relationship between death row inmates and correctional officers).

248. See, e.g., JACK BASS, TAMING THE STORM 453–55 (1993) (documenting the time spent on capital punishment cases by several federal district court judges).

249. See, e.g., G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860, 860–63 (1983)

- Now that more than forty federal offenses are capital,<sup>250</sup> how will the *federal* death penalty be applied in places such as Washington, D.C., Vermont, and Massachusetts that have rejected capital punishment for state crimes?<sup>251</sup>
- How, if at all, ought international law norms and customs limit the domestic scope of capital punishment in the United States?<sup>252</sup> Do the *people* of Europe and Canada—as opposed to their governments—really oppose capital punishment?<sup>253</sup>
- Who should decide who deserves to die: judges, juries, or, as in Florida and three other states, a combination?<sup>254</sup>
- Why should capital punishment be limited to killers? Shouldn't rapists be executed if their crimes are especially brutal?<sup>255</sup> What about conspirators in terrorism?<sup>256</sup>

---

(analyzing the Supreme Court's "next friend" cases); William Glaberson, *From Death Row, an Inmate Battles to Control His Case*, N.Y. TIMES, June 24, 2002, at B1 ("I'd rather be executed than spend my life in a cell."); Ron Word, *Florida Inmate Executed*, RUTLAND DAILY HERALD (Vt.), Oct. 3, 2002, at A3 (stating that a female serial killer, who had been sentenced to death, was "declared mentally competent to abandon her appeals").

At least eighty-nine executions have been of volunteers. Richard Willing, *More Death Row Prisoners Waive Appeals*, USA TODAY, Apr. 24, 2001, at 5A.

250. TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT, 2006—STATISTICAL TABLES 8–9 (2007), available at <http://www.ojp.usdoj.gov/bjs/pub/html/cp/2006/cp06st.pdf>.

251. DPIC, FACTS, *supra* note 4, at 1.

252. See, e.g., Joan F. Hartman, "Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty, 52 U. CIN. L. REV. 655, 699 (1983) (arguing that international law norms should direct the United States' policy toward capital punishment for juveniles).

253. See Joshua Micah Marshall, *Death in Venice*, NEW REPUBLIC, July 31, 2000, at 14, 14–15 (offering a thoughtful argument that the *citizens* of Western Europe and Canada, as opposed to their governments, "crave executions almost as much as their American counterparts do," but simply have less democratic leverage with which to influence their politicians due to constitutions abolishing the death penalty outright or parliamentary governments' immunity to political upstarts).

254. In 2002, the Supreme Court held that juries, not judges, must make the findings of fact necessary to support a death sentence. *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

255. *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (outlawing capital punishment for rape); Mello, *supra* note 6, at 130–31 (discussing laws that impose the death penalty for rape).

Two condemned prisoners in America, Patrick Kennedy and Richard Davis, both in Louisiana, are on death row for the crime of rape of a child. Death Penalty Info. Ctr., *supra* note 6. All other death row prisoners in America are there for homicides. *Id.*

Patrick Kennedy's sentence for capital rape was affirmed by the Louisiana Supreme Court on May 22, 2007. *State v. Kennedy*, 957 So. 2d 757, 793 (La. 2007). Kennedy's counsel filed a certiorari petition in the U.S. Supreme Court on September 11, 2007. See Petition for a Writ of Certiorari, *supra* note 6, at 17–19, 22 (noting that the Utah Supreme Court has held the Eighth Amendment precludes imposing the death penalty for an assault on prison guards because "under *Coker*,

- Have courts really held that it is constitutionally permissible for a defense lawyer to sleep through portions of capital trials? (Yup.)<sup>257</sup>

---

no rape, 'with or without aggravating circumstances,' can constitutionally qualify for the death penalty when death has not resulted" (emphasis omitted) (quoting *State v. Gardner*, 947 P.2d 630, 653 (Utah 1997))). The government filed its opposition on November 14. Brief in Opposition to Petition for Certiorari, *supra* note 6. Both the Louisiana Supreme Court, and the government's brief in opposition to certiorari cited my 1997 article, Mello, *supra* note 6. *Kennedy*, 957 So. 2d at 785–86; Brief in Opposition to Petition for Certiorari, *supra* note 6, at 17.

256. See e.g., Mello, *supra* note 136, at 393–94 n.53 (discussing the merits of sentencing Moussaoui to death for participating in a terrorism conspiracy); Michael Mello, *Taking Conspiracy Too Far*, NAT'L L.J. Jan. 14, 2002, at A20 (discussing reasons not to seek the death penalty for Moussaoui).

257. See generally Matthew J. Fogelman, *Justice Asleep Is Justice Denied: Why Dozing Defense Attorneys Demean the Sixth Amendment and Should Be Deemed Per Se Prejudicial*, 26 J. LEGAL PROF. 67 (2002) (focusing on a highly publicized Calvin Burdine case from Texas and its dozing public defender, Joe Frank Cannon).

Joe Frank Cannon is the most famous "sleeping lawyer" in Texas's capital lore. Cannon slept during the capital trials of George McFarland, Calvin Burdine, and Carl Johnson. See S. CTR. FOR HUMAN RIGHTS, CAPITAL PUNISHMENT ON THE 25TH ANNIVERSARY OF *FURMAN V. GEORGIA* 12 (1997), available at <http://www.schr.org/reports/docs/furman3.pdf>.

Carl Johnson was executed in 1995. *Id.*

Texas has had so many "sleeping lawyer" capital cases that there exists a jurisprudence on the subject. Calvin Burdine was a lucky one. His lawyer slept through significant portions of his capital trial and he came within moments of execution in 1987. E.g., Linda Greenhouse, *Inmate Whose Lawyer Slept Gets New Trial*, N.Y. TIMES, June 4, 2002, at A16; Charles Lane, *Justices Won't Reinstate Conviction in 'Sleeping Lawyer' Case; Ruling on Texas Death Row Inmate Does Not Set Precedent*, WASH. POST, June 4, 2002, at A8; Henry Weinstein, *Supreme Court Allows Retrying Death Row Inmate Whose Lawyer Slept During Trial*, VALLEY NEWS (Vt.), June 4, 2002, at B1. A state trial judge had vacated Burdine's conviction after finding that his lawyer slept through significant parts of the trial. Greenhouse, *supra*. The state appellate court reversed and reinstated his conviction and death sentence *Id.* A federal district judge threw out the conviction, and the state appealed. A three-judge panel of the Fifth Circuit upheld his death sentence. *Id.* The full Fifth Circuit sided with the district judge by a vote of nine to five. *Id.* However, the fact remains that a state appellate court and a three-judge panel of the federal appellate court *did* hold that a lawyer who sleeps through a capital trial does not violate the Constitution.

The state sought review in the U.S. Supreme Court. James Vicini, *Top U.S. Court Sides with Inmate Whose Lawyer Slept*, REUTERS, June 3, 2002. The government argued that the en banc court's decision "illogically segregates attorney sleeping from other . . . impairments that have indistinguishable effects on an attorney's ability to function during trial." *Id.* (alteration in original) (quoting Texas Solicitor General Julie Parsley's statement in the state's appeal to the Supreme Court). Such as, you ask? Well, "Texas argued the performance of a sleeping lawyer should be judged like those of drunk, drugged or mentally ill attorneys." *Id.* The en banc Fifth Circuit "ruled that a sleeping lawyer can exercise no judgment whatsoever, while drunk, drugged or mentally ill lawyers can at least exercise impaired judgment." *Id.* Got it? I am not making this up.

It was not just Burdine and his sleeping lawyer, Joe Frank Cannon. There was also John Benn. The *Houston Chronicle* observed in 1992:

Seated beside his client—a convicted capital murderer—defense attorney John Benn spent much of Thursday afternoon's trial in apparent deep sleep.

His mouth kept falling open and his head lolled back on his shoulders, and then he awakened just long enough to catch himself and sit upright. Then it happened

- Should states provide postconviction lawyers for condemned prisoners beyond the trial and first appeal for the sometimes protracted, and often bitterly controversial, “collateral” postconviction litigation that can last for more than a decade?<sup>258</sup>
- After spending a long time on death row—seventeen years, say—may a condemned prisoner argue that the very delay in his execution was a form of “cruel and unusual punishment?”<sup>259</sup>
- What about the politicization of the judiciary that the death penalty has brought to states like California, Florida, Tennessee, and New York?<sup>260</sup>
- Why is it that virtually no wealthy people are sentenced to death or executed?<sup>261</sup>
- Why is it that, in the South, race seems to play such a big role in deciding who is sentenced to death?<sup>262</sup>

---

again. And again. And again.

Every time he opened his eyes, a different prosecution witness was on the stand describing another aspect of the Nov. 19, 1991, arrest of George McFarland in the robbery-killing of grocer Kenneth Kwan.

When state District Judge Doug Shaver finally called a recess, Benn was asked if he truly had fallen asleep during a capital murder trial.

“It’s boring,” the 72-year-old longtime Houston lawyer explained.

John Makeig, *Asleep on the Job? Slaying Trial Boring, Lawyer Says*, HOUS. CHRON., Aug. 14, 1992, at A35; see also, e.g., Paul Marcotte, *Snoozing, Unprepared Lawyer Cited*, A.B.A. J., Feb. 1991, at 14, 14 (describing representation of African-American capital defendant by eighty-three-year-old former imperial wizard of the Ku Klux Klan); Jeffery Levinson, Note, *Don’t Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 147–48 (2001) (providing other examples of ineffective counsel asleep at trial).

258. Cf. MELLO, DEAD WRONG, *supra* note 2, at 3–4 (describing the author’s decision to “[walk] out on this mess of a legal system”).

259. E.g., David Jackson, *U.S. Supreme Court Rejects Plea on 17-Year Death Row Stay*, DALLAS MORNING NEWS, Mar. 28, 1995, at 15A (noting Supreme Court’s rejection of the argument that a seventeen-year delay constitutes cruel and unusual punishment).

260. See, e.g., Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 772–90 (1995) (describing the political role capital punishment has played in recent elections).

261. See, e.g., RIVKIND & SHATZ, *supra* note 187, at 17 (“[V]irtually all capital case defendants are poor and receive appointed counsel, many of whom are not qualified to try a capital case.”).

262. See, e.g., David C. Baldus & George Woodworth, *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT, *supra* note 127, at 385, 385; Marcia Coyle, *Case Provides a Chilling Peek at Pre-Batson World*, NAT’L L.J., Feb. 11, 2002, at A8 (describing the prevalent use of race-based jury selection prior to *Batson v.*

- Why is it that women are so rarely sentenced to death or executed?<sup>263</sup> Does capital punishment discriminate against men?
- Whatever happened to the once-robust institution of executive clemency?<sup>264</sup>
- If a capital defense lawyer loses her client's case in the courts, ought the lawyer take the case to the media?<sup>265</sup> What if the lawyer believes her client is innocent?<sup>266</sup>
- How can lawyers defend killers they know to be guilty?<sup>267</sup>
- Can (ought) a capital defense lawyer make a conscientious decision refusing to participate in capital punishment as a legal system?<sup>268</sup>

As the footnotes following each of these questions suggest, these questions are neither rhetorical nor hypothetical. These questions, and scores like

*Kentucky*).

263. See Victor Streib, *Executing Women, Children and the Mentally Retarded: Second Class Citizens in Capital Punishment*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT*, *supra* note 127, at 301, 301–05 (arguing that the effective exemption of women from the death penalty seems justified in some ways considering the types of crimes women commit).

264. See generally CATHLEEN BURNETT, *JUSTICE DENIED: CLEMENCY APPEALS IN DEATH PENALTY CASES 180–92* (2002) (describing executives' unwillingness to grant clemency); Daniel T. Kobil, *The Evolving Role of Clemency in Capital Cases*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT*, *supra* note 127, at 531, 535 (noting the decline in clemency to match the reinstatement of the death penalty).

265. See MELLO, *THE WRONG MAN*, *supra* note 2, at xxii (describing author's decision to take the Joe Spaziano case to the *Miami Herald*).

266. *Id.* at xx; Symposium, *Executing the Wrong Person: The Professionals' Ethical Dilemmas*, 29 *LOY. L.A. L. REV.* 1543 (1996).

267. See, e.g., JAMES S. KUNEN, "HOW CAN YOU DEFEND THOSE PEOPLE?" xi (1983) (stating that people accused of crimes are not necessarily guilty and deserve to be defended); Charles P. Curtis, *The Ethics of Advocacy*, 4 *STAN. L. REV.* 3, 13 (1951) (describing attorney's internal process for defending clients who may be guilty); John B. Mitchell, *The Ethics of the Criminal Defense Attorney*, 32 *STAN. L. REV.* 293, 293, 296 (1980) (answering questions about defending a client whom the attorney knows to be guilty); Symposium, *Responsibilities of the Criminal Defense Attorney*, 30 *LOY. L.A. L. REV.* 1 (1996) (providing a number of justifications such as protecting individual liberty, policing the government, testing the reliability and veracity of the government's evidence, and upholding the criminal justice system).

268. I made such a decision several years ago. See MELLO *DEAD WRONG*, *supra* note 2, at 3–4 (recalling the author's decision to "[walk] out on this mess of a legal system"); Michael Mello, *Dead Reckoning: The Duty of Scholarship and the Ethics of Conscientious Abstention from Death Row Representation*, 35 *CRIM. L. BULL.* 478, 478 (1999) (declaring that author is a conscientious objector to the death penalty).

them, are the *real* death penalty. The thirty-seven states with capital punishment know this.

### 5. 2002: The Story of a Year in Death

Consider the year 2002. For reasons of humanity, politics, and taste, states don't schedule executions to occur between Christmas and New Year's Day. The first significant capital punishment news of 2002 was an exoneration, not an execution. The year was only three days old when Juan Melendez became the ninety-ninth death row prisoner to be exonerated in the modern era of capital punishment.<sup>269</sup> On January 4, 2002, Mr. Melendez walked off Florida's death row after serving seventeen years.<sup>270</sup> Prosecutors had chosen not to pursue a new trial after their case had fallen apart.<sup>271</sup> He had been convicted and condemned for a 1983 murder, even though there had been no physical evidence linking him to the crime.<sup>272</sup> Defense counsel had argued that the real killer had confessed to four investigators, but the admissions were held inadmissible because the government had "lost" the transcripts of the confessions.<sup>273</sup> Then, in 1999, the transcripts were found.<sup>274</sup> One of the state's two key witnesses also recanted his testimony.<sup>275</sup> Florida, by the way, has had more innocent people released from death row than any other state.<sup>276</sup>

Within a two-week period in February 2002, the U.S. Supreme Court heard oral arguments on whether the Constitution barred execution of retarded people.<sup>277</sup> Georgia was poised to execute a psychotic man named Alexander Williams at midnight.<sup>278</sup> Williams had been forcibly medicated to render him mentally competent to be executed.<sup>279</sup> However, hours before the execution, the Georgia Parole Board commuted the sentence to life imprisonment.<sup>280</sup> And Missouri was about to execute Joseph Amrine, an

---

269. Press Release, Death Penalty Info. Ctr., 99th Death Row Exoneree to Be Freed in Florida (Jan. 3, 2002), available at <http://www.deathpenaltyinfo.org/article.php?scid=1&did=33>.

270. *Id.*

271. *Id.*

272. *Id.*

273. Vickie Chachere, AP, *Inmate to Be Released After 17 Years on Death Row*, S. FLA. SUN-SENTINEL, Jan. 4, 2002, at 7B, available at 2002 WLNR 12716395.

274. *Id.*

275. *Id.*

276. DPIC, FACTS, *supra* note 4, at 2.

277. Greenhouse, *supra* note 240.

278. Rhonda Cook, *Questions Raised After Inmate Force-Fed Medication*, ATLANTA J. & CONST., Nov. 7, 2000, at 4B.

279. *Id.*

280. David Firestone, *Georgia Will Not Execute Mentally Ill Killer*, N.Y. TIMES, Feb. 26, 2002, at A18, available at 2002 WLNR 4066964 (explaining the Georgia Board of Pardons and Paroles')

African-American man, for murder “even though every prosecution witness and the jury foreman [said] he’s innocent and new witnesses point to another man. Why? A federal law says the evidence came in too late.”<sup>281</sup> In March 2002, the Supreme Court upheld the death sentence of a Virginia man, Walter Mickens, whose trial lawyer had also represented the man Mickens had killed.<sup>282</sup> Got that? Mickens’ court-appointed lawyer had also represented the murder victim.<sup>283</sup> The Supreme Court, in a five-to-four decision, held that the lawyer had a conflict of interest but that it didn’t have an “adverse effect” on the outcome of the case.<sup>284</sup>

In April 2002, Zacharias Moussaoui, the alleged “20th hijacker,” fired his court-appointed defense lawyers in his federal capital prosecution.<sup>285</sup> Also in April, in the midst of the Illinois death penalty moratorium imposed by Governor Ryan in 2000, a commission appointed by the Governor to study the state’s system of capital punishment recommended sweeping changes in the state’s capital punishment system.<sup>286</sup>

April also marked the release from prison of the 100th capitally convicted person to be exonerated since the reinstatement of the death

decision to commute the death sentence of Alexander Williams, a diagnosed schizophrenic who committed a murder at age seventeen, to life in prison following “unprecedented” support for Williams from parties, including the European Union, the American Bar Association, and former first lady Rosalynn Carter, opposed to the execution of the mentally ill and minors).

Oh, and Williams was also African-American. Sara Rimer & Raymond Bonner, *Young and Condemned: A Special Report; Whether to Kill Those Who Killed as Youths*, N.Y. TIMES, Aug. 22, 2000, at A1, available at 2000 WLNR 3196808.

281. Dave Lindorff, *Too Late to Stop the Hangman?*, SALON.COM, Feb. 20, 2002, <http://dir.salon.com/story/news/feature/2002/02/20/amrine/index.html>.

282. Mickens v. Taylor, 535 U.S. 162, 164–65, 176 (2002).

283. *Id.* at 164.

284. *Id.* at 163, 165, 176.

285. John Gibeaut, *Prosecuting Moussaoui*, 88 A.B.A.J., July 2002, at 36, 38; David Johnston & Philip Shenon, *Evidence Against Suspect From 9/11 Is Called Weak*, N.Y. TIMES, July 20, 2002, at A8; Neil Lewis, *Questions of Competence Are Revived*, N.Y. TIMES, July 19, 2002, at A14; Philip Shenon, *Traces of Terror: The Terror Suspect; Terror Suspect Changes Mind on Guilty Plea*, N.Y. TIMES, July 26, 2002, at A1; Philip Shenon, *A Nation Challenged: The Detainees; Terror Suspect Says He Wants U.S. Destroyed*, N.Y. TIMES, Apr. 23, 2002, at A1; Philip Shenon, *Traces of Terror: The Terror Suspect; Judge Lets Man Accused in Sept. 11 Plot Defend Himself*, N.Y. TIMES, June 14, 2002, at A27; Philip Shenon, *Judge, Fearing Potential Aid to Terrorists, Denies Moussaoui Access to Aviation Security Files*, N.Y. TIMES, June 13, 2002, at A33; Philip Shenon, *Terror Suspect Tries to Enter a Guilty Plea; Judge Rejects It*, N.Y. TIMES, July 19, 2002, at A1; Wayne Washington, *Moussaoui Says He Prays for U.S. to Fall, Would Fire Lawyers, Represent Himself*, BOSTON GLOBE, Apr. 23, 2002, at A1; Wayne Washington, *Moussaoui Free to Be Own Attorney*, BOSTON GLOBE, June 14, 2002, at A30; Wayne Washington, *Terror Suspect Admits Guilt*, BOSTON GLOBE, July 19, 2002, at A1; Wayne Washington, *Moussaoui Withdraws Guilty Plea Defendant Cites Death Penalty Risk*, BOSTON GLOBE, July 26, 2002, at A2.

286. GOVERNOR’S COMM’N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR’S COMMISSION ON CAPITAL PUNISHMENT i–iii (2002), available at [http://www.idoc.state.il.us/ccp/ccp/reports/commission\\_report/complete\\_report.pdf](http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/complete_report.pdf).

penalty.<sup>287</sup> Ray Krone, an Arizona inmate, was released from prison after DNA tests excluded him as a participant in the crime for which he was convicted and condemned to die.<sup>288</sup> On May 3, Thomas Kimball, an inmate on Pennsylvania's death row, became number 101.<sup>289</sup> Kimball was acquitted after retrial on charges that he murdered his neighbor, her two daughters, and her niece.<sup>290</sup> At Kimball's first trial, the trial court excluded evidence that would have placed the murdered neighbor's husband at the scene of the murders less than an hour prior to discovery of the bodies.<sup>291</sup>

In early May 2002, the New York Court of Appeals heard its first capital appeal under that state's 1995 death penalty statute.<sup>292</sup> The first person executed in New York might well have been a volunteer.<sup>293</sup> Also, by early May, Texas appeared poised to recapture its title as the buckle of the death belt: the Lone Star State had accounted for ten of the twenty-three executions in 2002, seven more were scheduled for May, and seven more scheduled through July.<sup>294</sup> Meanwhile, the governor of Maryland ordered a moratorium on executions until a study was completed on the racial aspects of capital punishment in Maryland.<sup>295</sup> Later in May, 230 members of the U.S. House of Representatives signed on to a bill providing safeguards against executing the innocent.<sup>296</sup> May 2002 ended with Texas's execution of Napoleon Beazley, rekindling the debate over executing people who were minors at the time they committed their capital crimes.<sup>297</sup> Within a week, in late May and early June, the U.S. Supreme Court declined to

---

287. Death Penalty Info. Ctr., Innocence Cases: 1994–2003, <http://deathpenaltyinfo.org/article.php?did=2340> (last visited Feb. 26, 2008).

288. *Id.*

289. Press Release, Death Penalty Info. Ctr, Pennsylvania Man is 101st Exonerated Death Row Inmate (May 6, 2002), available at <http://www.deathpenaltyinfo.org/article.php?scid=1&did=279>.

290. *Id.*

291. *Id.*

292. William Glaberson, *For Death Penalty, a Day of Reckoning*, N.Y. TIMES, May 5, 2002, § 1, at 41; William Glaberson, *Law Professors Give State Court a Novel Theory on Executions*, N.Y. TIMES, May 6, 2002, at B1.

293. William Glaberson, *From Death Row, an Inmate Battles to Control His Case*, N.Y. TIMES, June 24, 2002, at B1. In 2004 the N.Y. Court of Appeals held the state's capital statute unconstitutional. *People v. LaValle*, 817 N.E.2d 341, 357 (N.Y. 2004).

294. Jim Yardley, *Executions in Texas Up Sharply After Lull*, N.Y. TIMES, May 5, 2002, § 1, at 39.

295. Francis X. Clines, *Death Penalty Is Suspended in Maryland*, N.Y. TIMES, May 10, 2002, at A20.

296. Mike Dornig, *230 in House Back Bill to Reform Death Penalty*, BOSTON GLOBE, May 16, 2002, at A2.

297. Jeff Jacoby, *The Myth of Executing "Children,"* BOSTON GLOBE, June 2, 2002, at E7, available at 2002 WLNR 2623099; Sara Rimer, *In Similar Cases, One Inmate Is Executed, One Wins Stay*, N.Y. TIMES, May 29, 2002, at A14; Sara Rimer, *Man Who Killed at 17 is Scheduled to Die*, N.Y. TIMES, May 27, 2002, at A7.

review a lower court's decision that a Texas death row prisoner, whose lawyer slept through significant portions of the capital trial, had received constitutionally ineffective assistance of counsel.<sup>298</sup> The Court also reversed another court's judgment that a Tennessee prisoner, whose lawyer presented no mitigating evidence and made no closing argument, had received ineffective assistance of counsel.<sup>299</sup>

In early June 2002, Walter Mickens—the Virginia guy whose court-appointed lawyer had also represented the murder victim—was executed by my home state, the Commonwealth of Virginia.<sup>300</sup> On June 20, the Supreme Court, in a six-three decision, outlawed execution of the mentally retarded.<sup>301</sup> This was good news for the death row prisoners with mental retardation who were still alive at the time of the decision. Too late for those already executed. On June 24, five days before the thirtieth anniversary of *Furman v. Georgia*, the Supreme Court held Arizona's capital statute unconstitutional under the Sixth Amendment because it excluded juries from the capital sentencing process.<sup>302</sup> If the Arizona decision invalidated the 168 death sentences in the judge-only states, it could be the biggest case since *Furman* itself. If the Arizona decision extended to include those states with a hybrid system of judge/jury sentencing, then 797 death sentences would go down. If the Arizona decision wasn't retroactive, it would affect only the one Arizona prisoner, or perhaps those prisoners whose convictions had not yet become final. The Arizona decision and the retardation decision may or may not clear significant numbers of people from death row. What the decisions certainly have done is to introduce uncertainty into the law of death, and here uncertainty means delay.<sup>303</sup>

In July, the New York Court of Appeals threw out the first death sentence imposed under that state's modern capital statute.<sup>304</sup> Also in July, a federal district judge in New York City declared, in an eccentric ruling,

---

298. Greenhouse, *supra* note 260.

299. *Bell v. Cone*, 535 U.S. 685, 688, 692, 702 (2002).

300. The Commonwealth of Virginia scheduled Walter Mickens' execution for 9:00 p.m., June 12, 2002. Mickens was killed on schedule.

301. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

302. *Ring v. Arizona*, 536 U.S. 584, 609 (2002); *see also Furman v. Georgia*, 408 U.S. 238, 238 (1972) (showing that *Furman* was decided June 29, 1972).

303. *See, e.g., John Gibeaut, Death Delayed*, A.B.A. J., Nov. 2002, at 36, 37 (reporting that "after 22 years the state of Texas still hasn't been able to kill [John Paul] Penry" who was sentenced to death for the brutal rape and murder of the 22-year-old Pamela Moseley in her home). "Penry, who claims he's mentally retarded, twice has won new sentencing trials from the U.S. Supreme Court." *Id.* at 38.

304. James C. McKinley Jr., *First Death Sentence Imposed Under '95 Law Is Overturned*, N.Y. TIMES, July 10, 2002, at B1.

the federal death penalty unconstitutional.<sup>305</sup> The judge held that the federal death penalty denied the due process rights of innocent capital defendants by depriving them of an opportunity to prove their innocence by scientific techniques or evidence emerging only after they have been executed.<sup>306</sup> In August, a Texas execution of a Mexican national angered the Mexican government and caused the President of Mexico to cancel a scheduled visit to President Bush's Texas ranch.<sup>307</sup> Less than a week later, a judge in a small Ohio town told prosecutors they "could not seek the death penalty in the murder of a college student because the county's shares of the defense costs would be too great."<sup>308</sup> Six days later, the judge changed his mind and ruled that prosecutors could seek death after all.<sup>309</sup> On September 18, Texas executed Ron Shamburger; it was Texas's twenty-sixth execution of the year, the second in twenty-four hours, and the third in nine days.<sup>310</sup> Of the sixty-one convicts who had been or were scheduled for execution in the nation during 2002, thirty-five were from Texas.<sup>311</sup> The *Washington Post* observed that "rarely since the mid-1970s, when the Supreme Court permitted the resumption of executions, has a state conducted so large a share of all executions in the nation."<sup>312</sup> August ended with a rare dissent from denial of stay of execution by three U.S. Supreme Court Justices.<sup>313</sup> The three Justices argued that the time had come to reconsider the legality of executing people who committed murder as minors.<sup>314</sup> The condemned prisoner, who had been a minor at the time of the crime, was put to death on schedule.<sup>315</sup> (In 2005 the Court outlawed execution of minor offenders.)<sup>316</sup>

September 2002 began with Florida Governor Jeb Bush signing two

---

305. Fred Kaplan, *Federal Judge Rules Death Penalty Illegal*, BOSTON GLOBE, July 2, 2002, at A1; Benjamin Weiser, *Manhattan Judge Finds Federal Death Law Unconstitutional*, N.Y. TIMES, July 2, 2002, at B1; Robert F. Worth, *Prosecutors Oppose Judge in Ruling on Death Penalty*, N.Y. TIMES, May 17, 2002, at B3.

306. *United States v. Quinones*, 196 F. Supp. 2d 416, 420 (S.D.N.Y. 2002), *rev'd*, 313 F.3d 49 (2d Cir. 2002).

307. Ginger Thompson, *An Execution in Texas Strains Ties with Mexico and Others*, N.Y. TIMES, Aug. 16, 2002, at A6; Editorial, *Texas Executes a Foreigner*, N.Y. TIMES, Aug. 17, 2002, at A10.

308. Adam Liptak, *Citing Cost, Judge Rejects Death Penalty*, N.Y. TIMES, Aug. 18, 2002, § 1, at 18.

309. *Judge Changes Mind on Murder Case Costs*, N.Y. TIMES, Aug. 25, 2002, at A22.

310. Lee Hockstader, *Texas Shrugs Off Debate on Executions; Death Row Routine Marches on as Other States Weigh Issues of Fairness and Error*, WASH. POST, Sept. 22, 2002, at A3.

311. *Id.*

312. *Id.*

313. *Patterson v. Texas*, 536 U.S. 984, 984 (2002) (Stevens, J., dissenting); Adam Liptak, *3 Justices Call for Reviewing Death Sentences for Juveniles*, N.Y. TIMES, Aug. 30, 2002, at A1.

314. *Patterson*, 536 U.S. at 984.

315. Liptak, *supra* note 313.

316. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

death warrants.<sup>317</sup> A female serial killer, Aileen Wuornos, was scheduled to be killed on October 9, and a man, Rigoberto Velasco, was scheduled to be executed on October 2.<sup>318</sup> Aileen Wuornos had become a bit of a celebrity—female serial killers are rare—because her story had been told in two movies, three books, and an opera.<sup>319</sup> Both Wuornos and Velasco were “volunteers” for execution—they had dropped their appeals.<sup>320</sup> (Three weeks later, Governor Bush briefly stayed the Aileen Wuornos execution, to determine if she was mentally competent to be put to death.)<sup>321</sup>

A single week in mid-September saw a flurry of activity in the world of death. Illinois Governor George Ryan—who had imposed the moratorium on executions in his state in 2000—decided that either all 157 death row prisoners would have their sentences commuted to life imprisonment, or none would.<sup>322</sup> Governor Ryan said, “the flaws in the state’s death penalty system mean he can’t ‘pick and choose’ which inmates should be executed and which should be spared.”<sup>323</sup> Five days later, the Virginia Supreme Court heard oral arguments in the Roger Keith Coleman case.<sup>324</sup> Coleman had been executed in 1992, but he maintained his innocence to the bitter end.<sup>325</sup> DNA testing could settle the innocence issue once and for all, but the Virginia prosecutors refused to permit such testing, and a state trial judge sided with the prosecutors.<sup>326</sup> Advocates trying to clear Coleman’s name appealed to the state supreme court.<sup>327</sup> The next day, the federal court of appeals in California affirmed the death sentence of Stanley Williams, but asked the governor to consider commuting Williams’s death sentence.<sup>328</sup> Meanwhile, Attorney General John Ashcroft was in Europe, trying, without much apparent success, to persuade EU countries to extradite terror suspects and to provide evidence in such cases to the United States, even though those suspects might face execution.<sup>329</sup>

---

317. Jackie Hallifax, *Female Serial Killer to be Executed*, ASSOCIATED PRESS, Sept. 5, 2002.

318. *Id.*

319. *Id.*; Ron Word, *Florida Inmate Executed*, RUTLAND HERALD (Vt.), Oct. 3, 2002, at A3.

320. Hallifax, *supra* note 317.

321. Word, *supra* note 319.

322. Dan Rozek, *Ryan Sees Clemency for All or None: Governor Says He’ll Decide After Review Board’s Hearing*, CHI. SUN-TIMES, Sept. 7, 2002, at 2.

323. *Id.*

324. Wayne Washington, *More DNA Tests Requested in Virginia Death-Row Case*, BOSTON GLOBE, Sept. 12, 2002, at A8.

325. *Id.*

326. *Id.*

327. *Id.*

328. David Kravets, AP, *Court Suggests Davis Halt Execution*, BOSTON GLOBE, Sept. 13, 2002, at A9.

329. Raf Casert, *EU, U.S., Laud Their Cooperation in the Fight Against Terrorism*, AP WORLDSTREAM, Sept. 12, 2002.

Autumn began with a capital punishment thunderbolt from Vermont: Federal District Judge William Sessions held the federal death penalty unconstitutional.<sup>330</sup> October was only a day old when Texas executed its 36th person of the year.<sup>331</sup> Also, on October 2, Florida gave Rigoberto Velasco his wish and executed him, notwithstanding the general moratorium on executions in Florida.<sup>332</sup> The next week, Florida executed female serial killer Aileen Wuornos.<sup>333</sup>

In October 2002, four Supreme Court Justices expressed willingness to revisit the issue of executing people who were juveniles when they committed capital murder.<sup>334</sup> The opinion for the four called the practice of executing juvenile offenders “a relic of the past” that is “inconsistent with evolving standards of decency in a civilized society” and urged the Court to “put an end to this shameful practice.”<sup>335</sup> In another case, one Justice urged the Court to grant review in the case of a Florida death row prisoner, Charles Foster, who argued that his twenty-seven years on death row amounted to cruel and unusual punishment.<sup>336</sup> Also in October, the Supreme Court heard oral arguments in the case of Thomas Miller-El, an African American death row prisoner in Texas who claimed that his prosecutor improperly excluded prospective jurors who were African Americans.<sup>337</sup>

October also provided an unusually public illustration of what might be

330. Pam Belluck, *Second Ruling Against U.S. Death Penalty*, N.Y. TIMES, Sept. 25, 2002, at A15, available at 2002 WLNR 4018958.

331. See Texas Department of Criminal Justice, Executed Offenders, <http://www.tdcj.state.tx.us/stat/executedoffenders.htm> (last visited Mar. 2, 2008) (showing that James Powell was executed on October 1, 2002, and that he was the twenty-ninth person executed that year).

332. Word, *supra* note 319; Chris Summers, *Serial Killer's Execution "Will Win Jeb Votes,"* BBC NEWS ONLINE, Oct. 8, 2002, <http://news.bbc.co.uk/1/low/world/ameridcas/2303847.stm>.

333. *Woman Who Killed 6 Is Executed in Florida*, N.Y. TIMES, Oct. 10, 2002, at A24, available at 2002 WLNR 4437777.

334. *In re Stanford*, 536 U.S. 968, 968, 972 (2002) (Stevens, J., dissenting).

335. *Id.* at 972.

Four votes are enough to grant certiorari review. The case was an original petition, however, which requires five votes. See *Hamilton v. Texas*, 497 U.S. 1016, 1016 (1990) (explaining that a stay of execution cannot be granted without five votes); *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 559, 560–61 (1957) (Harlan, J., concurring in part, dissenting in part) (explaining the “rule of four” justices needed for a grant of certiorari).

Four justices also issued their opinion in Kevin Stanford’s case in 1989. *Stanford v. Kentucky*, 492 U.S. 361, 382 (1989) (Brennan, J., dissenting). The Court used Stanford’s case as the vehicle to uphold the legality of executing juvenile offenders. *Id.* at 380 (majority opinion).

In March 2005 the Court outlawed execution of juvenile offenders. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

336. *Foster v. Florida*, 537 U.S. 990, 991–92 (2002) (Breyer, J., dissenting from denial of certiorari).

337. Linda Greenhouse, *Court Revisits Question of Jury Selection Bias*, N.Y. TIMES, Oct. 17, 2002, at A25, available at 2002 WLNR 4031914.

called a capital punishment “bidding war.”<sup>338</sup> As mentioned above, two snipers, one an adult and one a juvenile, terrorized the D.C. area for three weeks.<sup>339</sup> Before that spree, they had killed ten people and seriously wounded three more, including a thirteen-year-old schoolboy walking into school.<sup>340</sup> The snipers had previously killed a woman in Alabama and perhaps had killed elsewhere as well.<sup>341</sup> Once the snipers, who were dubbed the Beltway Snipers because the first shootings occurred within the D.C. beltway, were caught, capital punishment would be a major issue in deciding which jurisdiction would prosecute the killers.<sup>342</sup> Possible jurisdictions would include Maryland, Virginia, Alabama, D.C., and the federal government.<sup>343</sup> The day after the two were arrested, Alabama prosecutors announced that they would seek death for both suspects.<sup>344</sup> Their case was solid, because Alabama had executed twenty-three people since 1977, and Alabama law allowed for the execution of juvenile offenders.<sup>345</sup> “Not so fast,” Maryland responded: the sniper spree killed

---

338. Editorial, *Competing for the Sniper Trial*, N.Y. TIMES, Oct. 30, 2002, at A26.

339. Francis X. Clines & Christopher Drew, *The Hunt for a Sniper: The Overview: With 2 Held, Police Tie Rifle in Car to Sniper Killings*, N.Y. TIMES, Oct. 25, 2002, at A1.

340. *Id.*

341. *Id.*

The sniper manhunt illustrates the dangers of law enforcements’ self-imposed tunnel vision. Law enforcement had decided that the snipers were probably two white men in a white van. David Johnston & Don Van Natta, Jr., *Retracing a Trail: The Investigation; Miscues in Sniper Pursuit, Then Calls and a Big Break*, N.Y. TIMES, Oct. 25, 2005, at A1. In fact, the snipers were two black men in a dark blue sedan. At the shooting scenes and elsewhere, police focused on white vans—even though eyewitnesses had identified a dark blue sedan as being nearby at least one shooting location. Francis X. Clines & Christopher Drew, *The Hunt for a Sniper: The Overview; Police Name Man Being Sought for Questioning in Sniper Case*, N.Y. TIMES, Oct. 24, 2002, at A1, available at 2002 WLNR 4104998. (A “be on the lookout” had gone out for a dark blue sedan). *Id.* Thus, the snipers were able to slip through police roadblocks and time and time again. Haya El Nasser, *Maze of Roads Cuts Holes in Dragnet*, USA TODAY, Oct. 22, 2002, www.usatoday.com/news/nation/2002-10-22-maze-usat-cover\_x.htm. As discussed below, this sort of police tunnel vision is one reason so many innocent people have been sentenced to die.

342. Bob Herbert, Editorial, *Saturated With Violence*, N.Y. TIMES, Oct. 28, 2002, at A25; Brian Witte, *Death Penalty Seen Key in Sniper Trial*, BOSTON GLOBE, Oct. 28, 2002, at A3.

343. Adam Liptak, *Retracing a Trail: The Legal Cases; 2 Men Could Face Trials in State and U.S. Courts*, N.Y. TIMES, Oct. 26, 2002, at A12.

The chosen jurisdiction would also boost the political prospects of the prosecutor who went to trial first. See Jayson Blair & Eric Lichtblau, *Retracing a Trail: The Overview; Slaying of Woman in Sniper Attacks Laid to Teenager*, N.Y. TIMES, Oct. 28, 2002, at A1 (explaining that the Maryland prosecutor is “considering a run for state attorney general” and has “denied accusations . . . that his decision [to file murder charges against the snipers] was politically motivated”).

344. Robert Schlesinger & Tatsha Robertson, *Prosecutors in Sniper Case Will Call for Death Penalty*, BOSTON GLOBE, Oct. 26, 2002, at A8.

345. *Id.*; Adam Liptak, *The Hunt for a Sniper: The Prosecution; Jurisdictions Will Weigh Options, Including Death*, N.Y. TIMES, Oct. 25, 2002, at A31 [hereinafter Liptak, *Jurisdictions to Weigh Options*]; Liptak, *supra* note 127.

more people in Maryland than anywhere else (six of the ten killings occurred in Maryland) and Maryland law would allow execution of the adult but not the juvenile.<sup>346</sup> (The local Maryland prosecutor who made the announcement was expected to run for political office in the near future.)<sup>347</sup>

Virginia officials said, “Whoa,” and filed capital murder counts against both suspects.<sup>348</sup> Maryland had a moratorium on executions in effect at the time; Maryland courts required a lengthy appellate process; Maryland has had only three executions since 1977; and Maryland law forbade execution of juvenile offenders.<sup>349</sup> Virginia officials were also quick to point out that Virginia law would allow execution of the seventeen-year-old suspect, and that four such men had been put to death in Virginia in the preceding three years.<sup>350</sup> Some evidence suggested that the young sniper had actually pulled the trigger in one fatal Virginia shooting, making for a strong case for executing the younger suspect.<sup>351</sup> Virginia had executed eighty-six people since 1977, second only to Texas and Virginia’s post-September 11 capital terrorism statute could apply to the sniper.<sup>352</sup> The Virginia Attorney General told a television interviewer, “You know, we have the death penalty for both [snipers]. We can try this juvenile as an adult and subject him to the death penalty, and we can move quickly.”<sup>353</sup> Translation: the state and federal courts in Virginia rubber-stamp death sentences, so we could kill both snipers quickly. The Maryland governor responded that his moratorium on executions was temporary and would not preclude seeking death for the adult sniper; and this move was “widely viewed as an effort to insulate Lt. Gov. Kathleen Kennedy Townsend, the Democratic candidate for governor, from criticism.”<sup>354</sup>

---

346. Francis X. Cline & Christopher Drew, *Retracing a Trail: Overview; Maryland County is First to Move on Sniper Charges*, N.Y. TIMES, Oct. 26, 2002, at A1.

347. Blair & Lichtblau, *supra* note 343; Schlesinger & Robertson, *supra* note 344; Liptak, *Jurisdictions to Weigh Options*, *supra* note 345; Liptak, *supra* note 343.

348. E.g., Jeffrey Gettleman, *Retracing a Trial: The Prosecutors; Counties in Virginia File Sniper Charges; U.S. to Act as Well*, N.Y. TIMES, Oct. 29, 2002, at A1; Wayne Washington, *4th Jurisdiction Pursues Sniper Charges Both Suspects Could Face Death Penalty in Virginia’s Courts*, BOSTON GLOBE, Oct. 29, 2002, at A2.

349. Liptak, *supra* note 343.

350. *Id.*

351. Blair & Lichtblau, *supra* note 343.

352. E.g., *id.*; *The Media and the Snipers*, WEEKLY STANDARD, Nov. 4, 2002, at 2. Reportedly, the adult sniper had praised September 11 terrorists and had recently converted to militant Islam. See Special Report, *Descent Into Evil*, NEWSWEEK, Nov. 4, 2002, at 20 (explaining that one of the snipers had told “a buddy who worked out with Muhammad and Malvo at the local YMCA” that 9-11 was good and that he “marveled at the damage a relatively small number of terrorists could do”). For an argument that the snipers were indeed terrorists, see Editorial, *Yes, the Sniper Was a Terrorist*, WEEKLY STANDARD, Nov. 4, 2002.

353. Witte, *supra* note 342 (quoting Virginia Attorney General Jerry Kilgore).

354. Blair & Lichtblau, *supra* note 343.

In the end, the federal Department of Justice would be the body to decide which state could try the suspects first;<sup>355</sup> the accused suspects were in federal custody, and possession is, on occasion, nine-tenths of the law. One anonymous Justice Department official reportedly said that “Maryland ‘comes in dead last’ in terms of the strength of its law on the death penalty.”<sup>356</sup> Attorney General John Ashcroft had previously overruled Maryland federal prosecutors’ recommendations against seeking capital punishment.<sup>357</sup> Local officials blamed the federal prosecutor in Maryland for “hogging the limelight.”<sup>358</sup> Initially, the feds decided to prosecute the adult in federal court; federal law, like Maryland law, precludes capital punishment for juvenile offenders. Federal prosecutors argued that they should prosecute first because only a federal trial could link all of the D.C. area killings together into a single trial.<sup>359</sup> Federal prosecutors charged the adult in a twenty-count complaint; one count, using a firearm during the commission of a federal crime (such as the \$10 million interstate extortion scheme), carries death as a possible punishment.<sup>360</sup> The federal complaint did not name the juvenile, because he was a juvenile.

But a federal capital prosecution would have its own problems. As discussed above, two federal trial judges have declared the federal capital statute unconstitutional; the federal law prohibits the execution of juvenile offenders; the feds have carried out only two executions since 1977; murder cases are usually prosecuted in state court, unless the victims are federal officials or the deaths occurred on federal property; and the extortion hook is thin, because the snipers’ demands for money seemed to have been an afterthought. Attorney General John Ashcroft said he believed the federal charges were proper because, “the ultimate sanction ought to be available here.”<sup>361</sup> In any event, this “capital punishment bidding war, in which the

---

355. See Adam Liptak, *Retracing a Trail: The Legal Thicket; Justice Dept. Has Leverage in Decision on Who Tries Suspects First*, NY TIMES, Oct. 29, 2002, at A29 (stating that the federal government would get to choose which jurisdiction to deliver the snipers for trial first because they were in federal custody).

356. Witte, *supra* note 342.

357. Eric Lichtblau, *Retracing a Trail: The Sniper Case; Seeking Death Penalty, U.S. May Let Virginia Try 2 First*, N.Y. TIMES, Nov. 3, 2002, § 1, at 33.

358. *Descent Into Evil*, *supra* note 352, at 38.

359. Gettleman, *supra* note 348.

360. Wayne Washington, *U.S. Charges Muhammad in Seven Killings*, BOSTON GLOBE, Oct. 30, 2002, at A2; Eric Lichtblau, *Retracing a Trail: The Overview; Tensions Rise over Who Will Prosecute, and How*, N.Y. TIMES, Oct. 29, 2002, at A25.

361. The federal complaint included only the Maryland and D.C. killings; it did not include the Virginia or Alabama murders. *Feds File Charges, Reveal Evidence*, CBS NEWS, Oct. 29, 2002, <http://www.cbsnews.com/stories/2002/10/30/national/main527454.shtml>. Ashcroft also told reporters the federal charges would delay having to turn over the suspects to state authorities. Lichtblau, *supra* note 360. Some questioned “whether the federal charges represented an attempt to take what is sure to

case goes to the jurisdiction deemed most likely to execute the defendants,”<sup>362</sup> as the *New York Times* editorialized, “smack[ed] of Alice in Wonderland justice. ‘Sentence First,’ the Queen declared, ‘verdict afterwards.’”<sup>363</sup>

Meanwhile, Germany’s interior minister was urging the Bush administration not to seek to execute Zacarias Moussaoui, the suspected “20th hijacker.”<sup>364</sup> Germany had some leverage in the matter, because Germany reportedly had evidence linking Moussaoui to the September 11 plot. Germany was refusing to hand over the evidence if the United States government sought capital punishment for Moussaoui.<sup>365</sup>

On October 24, the Florida Supreme Court upheld the constitutionality of that state’s capital statute. The justices ruled that recent U.S. Supreme Court decisions did not definitely invalidate Florida’s statute;<sup>366</sup> the Supreme Court Justices were unanimous that any invalidation of the statute would have to come from the U.S. Supreme Court itself.<sup>367</sup> However, the justices were sharply divided on the impact the recent U.S. Supreme Court ruling would have on Florida’s capital statute;<sup>368</sup> each of the seven justices wrote their own separate concurring opinions.<sup>369</sup> The ruling seemed to clear the way for executions to resume in the Sunshine State. The next day, the Utah Supreme Court granted the wish of Robert Arguelles to be executed by firing squad without the traditional hood over his head.<sup>370</sup> Arguelles’ execution had been delayed after he tried to hang himself with a prison laundry bag.<sup>371</sup>

Then there was Illinois. For nine days in October, the Illinois Pardon

---

be a high-profile, politically popular prosecution out of the hands of local officials, many of whom are Democrats, and place it with the Bush administration’s Justice Department one week before congressional elections.” Washington, *supra* note 360.

362. Editorial, *Competing for the Sniper Trial*, N.Y. TIMES, Oct. 30, 2002, at A26.

363. *Id.* In the end, Virginia state prosecutors tried the cases first. The adult sniper was sentenced to death, the minor to life imprisonment. Tom Jackman, *Malvo Is Spared Death Penalty: Jury Gives Teen Life Sentence for his Role in Sniper Slayings*, WASH. POST, December 24, 2003, at A1; Christine Blatchford, *Malvo Sniper Case Ends with Mercy*, GLOBE AND MAIL, December 24, 2003, at A1.

364. Deborah Charles, *Berlin Seeks Pact to Spare Moussaoui Death Penalty*, BOSTON GLOBE, Oct. 26, 2002, at A2; Philip Shenon, *Germany Urges U.S. to Drop Death Penalty Plan*, N.Y. TIMES, Oct. 26, 2002, at A9.

365. Charles, *supra* note 364; Shenon, *supra* note 364.

366. *Bottoson v. Moore*, 833 So. 2d 693, 695 (Fla. 2002); *King v. Moore*, 831 So. 2d 143, 144 (Fla. 2002).

367. *Florida Court Rejects Death Row Appeal*, N.Y. TIMES, Oct. 25, 2002, at A16.

368. *Bottoson*, 833 So. 2d at 695–96, 699, 703–05, 710–11, 718–19, 731.

369. *Id.*

370. AP, *Killer to Be Executed Without Hood*, N.H. UNION-LEADER, Oct. 26, 2002, at A3.

371. *Id.*

Review Board heard clemency hearings for virtually everyone on Illinois' death row.<sup>372</sup> Governor George Ryan, who would not be bound by the clemency board's recommendations, continued to hint that he was still considering a blanket clemency grant to clear Illinois' death row. Opponents of capital punishment had hoped the hearings would showcase the flaws of Illinois' system of meting out ultimate justice. The strategy backfired, and the hearings instead highlighted the horrific crimes committed by Illinois' death row prisoners.<sup>373</sup> By the end of the hearings, Governor Ryan had backed away from blanket commutation. The governor explained that "I would guess at this point that I have pretty much ruled out blanket commutations based on the hearings and the information that I've gathered . . . . I've pretty much decided that it's not an option that I'm going to exercise."<sup>374</sup>

The last day of October—Halloween—brought word of yet another murder tied to the D.C. area Beltway Snipers. Before their shooting spree in Maryland, Virginia, and D.C., the two snipers allegedly murdered a woman in Baton Rouge, Louisiana.<sup>375</sup> Louisiana had a fully functional system of capital punishment; Louisiana law allowed capital punishment for juvenile killers;<sup>376</sup> Louisiana had executed fewer people than Virginia, but more than Maryland since executions resumed. The Baton Rouge prosecutor said, "Our goal is not to engage in a competition as to who will go first."<sup>377</sup>

In early November 2002, on election day, the voters of Florida endorsed a state constitutional amendment apparently intended to allow the execution of people who were juveniles when they committed murder.<sup>378</sup> Also in November, the Virginia Supreme Court demonstrated why Virginia is the venue-of-choice for capital prosecutors—from the Moussaoui

---

372. Jodi Wilgoren, *Illinois Moves to Center of Death Penalty Debate*, N.Y. TIMES, Oct. 14, 2002, at A12.

373. Don Babwin, AP, *Death Row Hearings Revive Old Anguish*, BOSTON GLOBE, Oct. 24, 2002, at A11.

374. Christi Parsons & Steve Mills, *Ryan Backs Off Blanket Clemency; Governor to Review Cases Separately, Says Hearings Raise Troubling Issues*, CHI. TRIB., Oct. 23, 2002, at N1 (quoting Gov. George Ryan).

In fact, Ryan did ultimately issue a blanket commutation. Jeff Flock, "Blanket Commutation" *Empties Illinois Death Row*, CNN.COM/LAWCENTER, Jan. 13, 2003, <http://www.cnn.com/2003/LAW/01/11/illinois.death.row/>.

375. David M. Halbfinger, *Louisiana Accuses 2 Sniper Suspects in Sept. 23 Killing*, N.Y. TIMES, Nov. 1, 2002, at A1.

376. *Id.*

377. *Id.*

378. See generally Dana Canedy, *Linking Cruel to Unusual with an "And,"* N.Y. TIMES, Oct. 13, 2002; Alicia Caldwell & Anita Kumar, *Smoking Limited, Hog Crates Enlarged*, ST. PETERSBURG TIMES, November 6, 2002, at 1B.

terrorism case to the Beltway Sniper case. The court refused to allow DNA testing in the Roger Keith Coleman case.<sup>379</sup> DNA would prove (or disprove) Coleman's innocence.<sup>380</sup> He had maintained his innocence even as Virginia put him to death in 1992. At the same time, in 2002, Virginia appeared to be the Ashcroft Justice Department's first choice to try the Beltway Snipers for capital murder.<sup>381</sup> On November 7, it was made official: the federal charges against the snipers were dismissed, and the two were handed over to Virginia state prosecutors.<sup>382</sup> Also in November, the U.S. Supreme Court temporarily stayed the Texas execution<sup>383</sup> of a paranoid schizophrenic named James Colburn.<sup>384</sup> Colburn dozed during his own capital murder trial "because he was so heavily medicated with antipsychotic drugs."<sup>385</sup>

In mid-November 2002, capital punishment collided with the war on Islamic terrorists. Virginia executed Mir Kasi, a Pakistani national, for killing two CIA employees at the Agency's headquarters in Langley.<sup>386</sup> The State Department had warned that Kasi's execution might result in retaliatory attacks against Americans in Pakistan; during Kasi's 1997 trial, several Americans were murdered in Pakistan in apparent retaliation.<sup>387</sup> And the Bush administration, apparently finding the Constitution inconvenient, leaked that they were considering transferring the Zacharias Moussaoui case to a military tribunal rather than civilian criminal court in northern Virginia.

On November 19, the federal prosecutor for Massachusetts—a jurisdiction with no state death penalty—announced he would seek capital punishment against Gary Lee Sampson for carjacking and murdering two men.<sup>388</sup> A week later, the media reported that a Texas trial judge had decided to let documentary filmmakers for the show *Frontline* to record

---

379. In January 2006, outgoing Virginia Governor Mark Warner ordered the DNA testing to proceed. *U.S. Governor Orders DNA Guilt Test*, BBC NEWS.COM, Jan. 6, 2006, <http://news.bbc.co.uk/2/hi/americas/4586452.stm>.

380. John Aloysius Farrell, *Court Bars DNA Test in 1981 Killing Bid to Investigate VA Execution Fails*, BOSTON GLOBE, Nov. 2, 2002, at A5; see also Samuel Gross, *Evidence of a Lack of Devotion to Justice*, VALLEY NEWS, Nov. 17, 2002.

381. Lichtblau, *supra* note 357.

382. Eric Lichtblau & Jayson Blair, *Ashcroft Decides Virginia Will Try Sniper Cases First*, N.Y. TIMES, Nov. 8, 2002, at A1.

383. Gina Holland, *Court Mulls Mental Illness Issue*, ASSOCIATED PRESS, Nov. 7, 2002.

384. Jim Yardley, *Amid Doubts About Competency, Mentally Ill Man Faces Execution*, N.Y. TIMES, Nov. 4, 2002, at A3.

385. *Id.*

386. *Virginia Executes Pakistani Who Killed 2 at the C.I.A.*, N.Y. TIMES, Nov. 15, 2002, at A20.

387. *Id.*

388. John Ellement, *US Attorney Will Seek Death for Sampson in Two Killings*, BOSTON GLOBE, Nov. 20, 2002, at B1. A federal jury in Boston eventually sentenced Sampson to death.

jury deliberations in the capital case of Cedric Harrison. Harrison was seventeen-yearsold when he allegedly committed his capital crime.

In December, Florida Governor Jeb Bush stayed the execution of Amos King to allow DNA testing.<sup>389</sup> No one stayed Linroy Bottoson's execution, and Florida put him to death on December 9.<sup>390</sup> The Second Circuit Court of Appeals reversed the Manhattan trial judge's ruling that the risk of executing innocents invalidated the federal death penalty.<sup>391</sup>

By the end of the year 2002, the United States had carried out seventy-one executions.<sup>392</sup> Eighty-six percent of those executions occurred in the south.<sup>393</sup> Texas, with thirty-three executions, led the nation.<sup>394</sup>

The story of the year 2002 illustrates that enacting a capital punishment statute is the easy part. The hard part is making capital punishment—as a legal system—work. That is hard and complicated and frustrating and very expensive.

And it never ends; questions never really get answered definitively; the law never is really settled. Since 1972, Florida has imposed death sentences by a combination of judges and juries. The first U.S. Supreme Court brief I ever wrote (in 1984) argued that the Constitution required that a jury verdict for life imprisonment rather than death must be honored by the sentencing judge. I lost that case in 1984 in the U.S. Supreme Court.

Between 1984 and today, Florida has executed dozens of men and women based on its system of judges and jury sentencing; my old 1984 case had seemed to settle the matter.

But it didn't. In January 2002 the Supreme Court granted review in an Arizona death case to revisit the jury sentencing issue.<sup>395</sup> The Court then stayed two Florida execution warrants pending decision in the Arizona case.<sup>396</sup> Until the Supreme Court decided the Arizona case,<sup>397</sup> there would

---

389. AP, *Gov. Bush Stays Execution to Allow Testing*, N.Y. TIMES, Dec. 3, 2002, at A28.

390. AP, *Florida Executes Inmate for 1979 Slaying*, RUTLAND HERALD (Vt.), Dec. 10, 2002, at A4.

391. Robert F. Worth, *Appeals Court Upholds Federal Law on Executions*, N.Y. TIMES, Dec. 11, 2002, available at <http://query.nytimes.com/gst/fullpage.html?res=9505E6DE143AF932A25751C1A9649C8B63&sec=&spon=>.

392. David G. Savage, *Executions Becoming Province of the South, Report Finds*, L.A. TIMES, Jan. 2, 2003, at 10.

393. *Id.*

394. *Id.*

395. Mary Ellen Klas, *Arizona Case Has Death Sentences in Limbo*, PALM BEACH POST (Fla.), Feb. 7, 2002, at 1A.

396. *Id.*

397. The Arizona case was orally argued on April 22, 2002. See Linda Greenhouse, *Justices Review Judges' Role in Deciding Death Penalty*, N.Y. TIMES, April 23, 2002, at A18.

Timothy S. Ring . . . was convicted in 1994 of the murder of an armored truck driver during a robbery. The jury convicted him of felony murder, and the judge

be no Florida executions.<sup>398</sup> On June 24, 2002, the Court decided the Arizona case and outlawed death sentences imposed without jury participation.<sup>399</sup> The seven to two decision might have cleared the death rows in the five states in which judges alone imposed death sentences (roughly 168 people).<sup>400</sup> Too late for those prisoners already executed in those five states. And it was unclear what impact the Arizona decision might have on the four states—including Florida—which use a hybrid of judge and jury sentencing. The Arizona case would seem to invalidate the death sentences of the nine Florida cases<sup>401</sup> where the juries had returned verdicts of life (too late for the four such people already executed).<sup>402</sup> The early signs were not encouraging. The Supreme Court dissolved stays in two Florida cases (with jury verdicts of death) it had put on hold pending the Arizona decision, and Governor Jeb Bush scheduled execution dates seven days hence.<sup>403</sup> A state trial judge denied a stay.<sup>404</sup> The Florida Supreme Court issued a blanket stay to sort out the applicability of the Arizona case to Florida.<sup>405</sup> The state petitioned the U.S. Supreme Court to

---

then found the existence of an aggravating circumstance, murder for pecuniary gain, and sentenced him to death. The Arizona Supreme Court upheld the sentence.

*Id.*

398. Klas, *supra* note 395.

399. Ring v. Arizona, 536 U.S. 584, 609 (2002).

400. Joel Engelhardt & Larry Lipman, *Capital Sentencing for Juries, Not Judges*, PALM BEACH POST (Fla.), June 25, 2002, at 1A.

401. *Id.*

402. Jessica Sabbath, *Sentencing in Question*, PALM BEACH POST (Fla.), June 25, 2002, at 1A. The possibility that Florida's jury override might be unconstitutional leaves me with mixed emotions. On the one hand, my first U.S. Supreme Court brief—in "Crazy Joe" Spaziano's case in 1984—made exactly that argument. I have written widely—some might say obsessively—on the topic. *E.g.*, Michael Mello, *The Jurisdiction to Do Justice: Florida's Jury Override and the State Constitution*, 18 FLA. ST. U.L. REV. 923, 927 (1991) (characterizing this article as his "second chance to explore the override's validity under the Florida constitution"); Michael Mello, *Taking Caldwell v. Mississippi Seriously: The Unconstitutionality of Capital Statutes That Divide Sentencing Responsibility Between Judges and Jury*, 29 B.C. L. REV. 283, 285 (1989); Michael Mello & Ruthann Robson, *Judge over Jury: Florida's Practice of Imposing Death over Life in Capital Cases*, 13 FLA. ST. U. L. REV. 31, 31 (1985); Michael L. Radelet & Michael Mello, *Death to Life Overrides: Saving the Resources of the Florida Supreme Court*, 20 FLA. ST. U. L. REV. 195, 196 (1992).

On the other hand, there are the four men who have already been executed notwithstanding jury verdicts of life. Their names are Ernest Dobbert (executed in 1984), Buford White (executed in 1987), Bobby Francis (executed in 1991), and Bernard Bollander (executed in 1995). And there is Joe Spaziano himself, who came very near to execution twice in 1995. *See* MELLO, *THE WRONG MAN*, *supra* note 2, at xxii ("At the last minute, Governor Chiles backed down and withdrew the death warrant he had signed three weeks earlier. He would sign a new death warrant weeks later.").

403. Adam Liptak, *A Florida Judge Upholds State Death-Sentence Law*, N.Y. TIMES, July 3, 2002, at A18.

404. *Id.*

405. Jackie Hallifax, *Florida High Court Delays Executions to Consider Supreme Court's June*

dissolve the stay.<sup>406</sup> The Court refused, unanimously,<sup>407</sup> The Florida Supreme Court heard oral argument on August 21.<sup>408</sup> (Two Florida prisoners did have execution dates, but they were “volunteers,” i.e., they *wanted* to be executed, and they dropped their appeals.) On October 24, 2002, the Florida Supreme Court upheld its capital statute and dissolved the blanket stay. The U.S. Supreme Court denied review, and the two men were executed.

In capital punishment, issues are never really settled. Ever.

#### IV. INNOCENCE AND COST: IMAGINE THE IRS WITH THE POWER TO KILL YOU

I would like now to focus on two closely-related aspects of capital punishment as a legal system: financial cost and the possibility of executing the innocent. I say these two aspects are related—intimately related—because when a state tries to do capital punishment on the cheap, the risks of executing the innocent increase. That risk always remains—no matter how careful we are, no matter how much money we spend to try to ensure that innocent people aren’t sentenced to death and executed—but when corners are cut, that risk increases geometrically.

##### A. *Innocence: Capital Punishment as a Government Operation (128 Exonerations from Death Row Since 1973, and Counting)*

Oliver Wendell Holmes famously wrote that “[t]he life of the law has not been logic: it has been experience.”<sup>409</sup> As I’ve mentioned, my opposition to death as a punishment is grounded in my *experience* with the thing. That experience has taught me that many things are wrong with capital punishment as an American legal system: it’s expensive; it’s class-based; it’s random; it deforms our legal institutions and makes killers out of otherwise decent judges and lawyers; it warps the law and it poisons most

---

*Death Penalty Ruling*, ASSOCIATED PRESS, July 8, 2002; see also *Bottoson v. Moore*, 833 So. 2d 693, 695 (Fla. 2002) (terminating the court’s stay of execution and denying habeas relief after finding the Supreme Court decision in *Ring v. Arizona* inapplicable to the Florida death sentence statute); *id.* at 719–34 (Pariente, J., concurring).

406. State’s Emergency Motion to Vacate Stay of Execution, *Moore v. Bottoson*, No. 02A34 (U.S. Sup. Ct.) (filed July 9, 2002).

407. Order [Denying Motion to Dissolve Stay], *Bottoson*, No. 02A34 (U.S. Sup. Ct. July 10, 2002).

408. Mary Klas, *Florida Justices Weigh U.S. Death Penalty Ruling*, PALM BEACH POST (Fla.), Aug. 22, 2002, at 3A.

409. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (43d prtg. 1949). I am grateful to a student in my first-year Criminal Law class for suggesting that Holmes’ quote applied to this statement.

of the people it touches; and it's racist.

But most importantly, for me, is the omnipresent risk—a risk that has been actualized again and again in states with recent experience in the area—that totally innocent people will be, and have been, sentenced to death and executed.<sup>410</sup> The specter of executing the innocent is a brooding omnipresence that hangs over death as a legal punishment.

I want to be clear about what I mean by “innocence.” I mean the person on death row didn't do the crime; I mean innocence the old-fashioned way. I don't mean “innocence” by some legal technicality; I don't mean he did it but he was crazy; I don't mean he was there but didn't pull the trigger. I mean he wasn't there at all. I mean he didn't do it—period. *I mean they got the wrong person.*

Innocent people are sentenced to death and executed in America.<sup>411</sup> It's as inevitable as the law of averages and the fallibility of legal institutions devised and administered by humans.

Innocent people on death row is an issue much in the news these days. As of February 2008, at least 128 condemned prisoners have been exonerated and released since 1973 under current death penalty statutes.<sup>412</sup> During that same time, 1099 people have been executed.<sup>413</sup> Thus, nationally, approximately one innocent person has been released for every eight executed. *One in eight.*

Think about those ratios for a moment: *For every eight executions, one person on death row has been totally cleared after having proven their innocence.* If this were a private automobile company, rather than a government operation, it would likely go bankrupt if, for every eight of its cars manufactured, one car was so hopelessly defective that it couldn't be fixed no matter how great and expensive the effort to do so.

Most people on America's death rows are guilty—factually guilty, legally guilty, and morally guilty. By that I mean they did indeed substantially contribute to the unjustified and unexcused killing of another human being. Capital punishment opponents must acknowledge this simple

410. See generally MICHAEL L. RADELET, ET AL., IN SPITE OF INNOCENCE 272–73 (1992) (stating the authors' belief that nearly two dozen cases exist where an innocent person was executed and that “there are more cases that will probably never be documented in which innocent individuals were executed before they were able to prove their innocence”).

411. See George Will, *Innocent People Are Being Executed*, VALLEY NEWS (Vt.), Apr. 9, 2000, at A8 (explaining that an “inescapable inference . . . is that some of the 620 persons executed [in the twenty-four years since resumption of executions] were innocent”).

412. DPIC, FACTS, *supra* note 4. The 100th person, Ray Krone, was released in April 2002. Henry Weinstein, *Death Penalty Foes Mark a Milestone*, L.A. TIMES, Apr. 10, 2002, at 16, available at 2002 WLNR 12468432; Editorial, *Death Is Different*, N.Y. TIMES, Apr. 10, 2002, at A26, available at 2002 WLNR 4093157.

413. DPIC, FACTS, *supra* note 4.

reality: most people on death row are guilty of murder.

Similarly, supporters of capital punishment must acknowledge that some percentage of the 3350 people on death row in America are totally factually innocent and that some of the 1099 executed were innocent.<sup>414</sup> It simply defies human nature and human experience that our government is perfectly infallible in this particular area of human endeavor.

Capital punishment is a government operation.<sup>415</sup> It's the IRS with the power to kill you.<sup>416</sup>

Like any other governmental process, capital punishment as a legal system is utterly dependent on the human beings who run it. And human beings make mistakes. Because human beings make mistakes, their governments do as well. This is true regardless of whether the government is doing its more prosaic tasks of delivering the mail or calculating the taxes we owe, or whether it is doing its most mortal tasks of deciding whether a particular American has lost his moral entitlement to live.

To recognize that our human government makes mistakes in deciding who dies does not compel the conclusion that capital punishment must be abolished, however. One can argue that the omnipresent risk that innocent people will be sentenced to death and executed is an acceptable price to pay for the other societal benefits gained by having the death penalty. One can reasonably argue that the risks of condemning and executing the innocent are small enough. What one *cannot* reasonably argue, I believe, is that the risk is zero, that there are no innocent people on death row, or that, if innocents are sentenced to death, that none have been or will ever be executed. Executing the innocent is simply inevitable. It has happened. It will continue to happen. Always.

One can quibble about whether or not this or that particular death row prisoner was indeed innocent. But the data really does nothing more than quantify the common sense notion that all people, even our government people, make mistakes.

Sometimes innocence is not proven until after the person has been executed or has died of natural causes.<sup>417</sup> In 1990, the State of Florida

---

414. *Id.*

415. Will, *supra* note 411.

416. Perhaps the INS is a more timely example. Six months to the day after September 11, a Florida flight school received from the INS approvals for visas for two of the September 11 pilots. *Six Months After Sept. 11, Hijackers' Visa Approval Letters Received*, CNN.COM, Mar. 13, 2002, <http://archives.cnn.com/2002/US/03/12/inv.flight.school.visas/>. One such pilot granted INS permission to receive flight training was the most infamous of the terror pilots, Mohamad Atta. *Id.* One might think that *someone* at the INS would have recognized the name that has become synonymous with the September 11 horrors. One would be wrong.

417. *E.g.*, Sydney Freedberg, *DNA Clears Inmate Too Late*, ST. PETERSBURG TIMES, Dec. 15,

executed Jesse Tafero.<sup>418</sup> Tafero, his wife Sonia (Sunny) Jacobs, and a man named Rhodes had been found guilty of killing a policeman at an interstate rest stop in South Florida.<sup>419</sup> Rhodes turned state's evidence and testified against Tafero and Jacobs.<sup>420</sup> Tafero was sentenced to death and executed,<sup>421</sup> and only later did the truth come out.<sup>422</sup> The execution was botched, because Florida's 1923, three-legged execution stool malfunctioned, and Tafero's head burst into flames.<sup>423</sup>

One could argue that the exonerations of so many condemned prisoners suggests the system is working, because the system itself caught its mistakes prior to execution. I think this view reflects a fundamental misunderstanding about capital punishment in the real world.

### 1. The Reasons

In terms of evaluating whether the system of capital punishment is working or not, I wouldn't focus on the reasons these innocent men and women were able to prove their innocence before the state killed them. I wouldn't focus on why they got *off* of death row. I'd focus on *why they were sent to death row in the first place*.

Innocent people are sent to death row because many enthusiastic capital states provide dreadfully incompetent and under-funded counsel to poor people on trial for their lives.<sup>424</sup> Here, as elsewhere in life, you get what you pay for. Innocent people are sentenced to death because of forensic fraud, like "that by the medical examiner who, in one death report, included the weight of the gallbladder and spleen of a man from whom both organs had been surgically removed long ago."<sup>425</sup> Innocent people are sent to death row because police and prosecutors suppress evidence of innocence.<sup>426</sup> Eyewitnesses make mistakes.<sup>427</sup> Innocent people are executed because some state appellate courts—Texas and Virginia, for

---

2000, at A1, available at 2000 WL 8821045 (reporting the FBI cleared a death-row inmate of rape and murder after cancer killed him).

418. Michael L. Radelet et al., *Prisoners Released from Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 T.M. COOLEY L. REV. 907, 941 (1996).

419. *Id.*

420. *Id.*

421. *Id.*

422. *See id.* at 941–42.

423. *Id.* at 941.

424. *Id.*

425. Will, *supra* note 411.

426. *See id.* (stating that a prosecutor suppressed exonerating evidence for six years before a death row inmate was released).

427. *Id.*

instance—rubber-stamp death sentences and apply legal technicalities of procedure with a vengeance, so as to avoid even *considering* newly-discovered evidence of innocence.<sup>428</sup> Innocent people are executed because the U.S. Supreme Court has held that executing the innocent does not violate the Constitution and because the Court and Congress have gutted habeas corpus.<sup>429</sup>

Innocent people don't end up sentenced to death and executed because police and prosecutors wake up in the morning and decide, "Huh, today I think I'll frame an innocent man for capital murder." Judges don't affirm death sentences of people they believe to be innocent. Governors don't sign death warrants on people they know to be innocent.

Rather, it happens because of factors that blind these professionals to facts of innocence that are right in front of them. Part of it is psychological inertia: once the police decide someone is guilty—and often they decide this very early on—they go into building-a-case mode. Evidence inconsistent with this belief in guilt tends to be minimized or disregarded altogether, and evidence that supports the assumption of guilt tends to be magnified. Much of this process is subtle and unconscious: it's how all of us superimpose order and logic upon a chaotic world of indeterminate and often conflicting facts. It's also part of how police—and lawyers who are prosecutors—go about building a case. This process requires these actors to make judgment calls

---

428. See Robert Sherill, *Death Trip: The American Way of Execution*, DEATH PENALTY INFO. CENTER, Jan. 8, 2001, <http://www.deathpenaltyinfo.org/article.php?scid=17&did=452> (explaining that "Virginia's state appellate courts . . . think virtually all capital trials have been fair and error-free and that there's no reason not to speed up the executions" and that the Texas Court of Criminal Appeals has "executed two and a half times more people than even that hard-charging runner-up, Virginia").

429. See *Herrera v. Collins*, 506 U.S. 390, 404 (1993) (stating, "our habeas jurisprudence makes clear that a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits"). Congress constricted habeas in 1996. On the 1996 act generally, see Marshall J. Hartman & Jeannette Nyden, *Habeas Corpus and the New Federalism After the Anti-Terrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337 (1997); Andrea D. Lyon, *New Opportunities for Defense Attorneys: How Record Preservation Requirements After the New Habeas Bill Require Extensive and Exciting Trial Preparation*, 30 J. MARSHALL L. REV. 389 (1997); Michael O'Neill, *On Reforming the Federal Writ of Habeas Corpus*, 26 SETON HALL L. REV. 1493 (1996); Ronald J. Tabak, *Habeas Corpus as a Crucial Protector of Constitutional Rights: A Tribute Which May Also Be a Eulogy*, 26 SETON HALL L. REV. 1477 (1996); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996); Note, *The Avoidance of Constitutional Questions and the Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions*, 111 HARV. L. REV. 1578 (1998); David Blumberg, Note, *Habeas Leaps from the Pan and into the Fire: Jacobs v. Scott and the Antiterrorism and Effective Death Penalty Act of 1996*, 61 ALB. L. REV. 557 (1997); Andrea A. Kochan, Note, *The Antiterrorism and Effective Death Penalty Act of 1996: Habeas Corpus Reform?*, 52 WASH. U. J. URB. & CONTEMP. L. 399 (1997); Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C. § 2254*, 110 HARV. L. REV. 1868 (1997); Kimberly Woolley, Note, *Constitutional Interpretations of the Antiterrorism Act's Habeas Corpus Provisions*, 66 GEO. WASH. L. REV. 414 (1998).

about which witnesses to believe and which facts are important.

By the time a capital case comes to trial, the police and prosecutors *believe* the defendant is guilty. Once the jury finds the defendant guilty, the assumption of guilt becomes etched in granite. From that point on, the cops and prosecutors have a huge stake—professional, emotional and political—in defending that verdict against all assaults by appellate and postconviction defense counsel.

Subsequent reviewing courts also have a stake in refusing to second-guess the jury's finding of guilt. Procedural errors, yes. Legal errors, yes. Constitutional errors, yes. But rarely will appellate courts seriously question a jury's factual determination of guilt.

Capital appellate litigation is something of a game, and we all play our pre-selected roles. Defense counsel argues why the trial was hopelessly tainted by error. Prosecutors argue why the trial was perfectly fair and reliable, or at least was close enough for government work.

Everyone is fighting over the *law*, and often the question of innocence gets lost in the noise and smoke of the legal battle. Innocence becomes just another legalistic argument. In fact, it becomes considerably less than that: the U.S. Supreme Court held in 1993 that innocence is not in and of itself a reason for voiding a death sentence: unless it is tied to a constitutional violation, innocence is constitutionally irrelevant.<sup>430</sup>

Again, the forces at work here are more psychological and emotional—more human—than legalistic. Lawyers—prosecutors, judges and governors—are used to dealing with law, not with messy facts like innocence. Dealing with law is what they're trained to do; it's what they're good at; it's what the U.S. Supreme Court has told them to focus on.

In other words, these actors are thinking like lawyers. More precisely, they're thinking like human beings trained to think like lawyers.

In fact, non-lawyers have shamed the legal system into admitting some of its lethal errors. A group of Northwestern journalism students—*college* students—did the legwork that freed Anthony Porter from death row for crimes he didn't commit.<sup>431</sup> Porter, a mentally retarded African-American man with an IQ of fifty-one, had come within just two days of execution.<sup>432</sup> Reporters at the *Miami Herald* newspaper saved one of my innocent clients, "Crazy Joe" Spaziano, a week before he was to be killed in Florida's electric chair.<sup>433</sup>

---

430. See *Herrera*, 506 U.S. at 400–411 ("Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.").

431. Jonathan Alter, *The Death Penalty on Trial*, NEWSWEEK, June 12, 2000, at 24.

432. *Id.*

433. MELLO, THE WRONG MAN, *supra* note 2, at 210. I discuss the Spaziano case below.

Legal errors in capital cases are not limited to issues of innocence, of course. According to a November 1999 *Chicago Tribune* study of all 285 capital convictions in Illinois since capital punishment was restored there twenty-two years ago, Illinois death penalty cases have been riddled with faulty evidence, incompetent lawyers, and unscrupulous trial tactics.<sup>434</sup>

Of the 285 cases studied by the *Chicago Tribune*, 259 had completed at least one round of appeals.<sup>435</sup> In almost half of those cases—128—new trials or resentencing were ordered: twelve of the defendants were completely exonerated, and seventy-four others received something less than a death sentence.<sup>436</sup> In at least thirty-three cases where a defendant was sentenced to death, he was represented by a lawyer who had been disbarred or suspended.<sup>437</sup> In at least forty-six cases, prosecutors depended on jailhouse informants, an unreliable form of evidence, because they often received reduced sentences in exchange for testifying.<sup>438</sup> In at least thirty-five cases, the person sent to death row was African-American and the jury was all white.<sup>439</sup>

The simple fact that innocents die does not necessarily mean a policy is wrong. Innocent Iraqis die when our bombs go astray; innocent Arabs died when the Israeli Defense Forces cleared out the terror settlement of Jenin.<sup>440</sup> But I would argue, both the American policy in Iraq and the Israeli policy in response to terrorism were morally required, even though innocents died in the process. Innocent casualties are a regrettable yet inevitable part of war. Likewise, one could argue, innocent executions are a regrettable yet inevitable part of capital punishment. We accept these sad facts because war in self-defense and capital punishment are so important.

But here's the difference: innocent deaths require that the policy allowing them be compelling. Fighting terrorism is a matter of national survival for the United States and Israel. National survival is a compelling

---

434. Ken Armstrong & Steve Mills, *Death Row Justice Derailed: Bias, Errors and Incompetence in Capital Cases Have Turned Illinois' Harshes Punishment into It's Least Credible*, CHI. TRIB., Nov. 14, 1999, at C1, available at 1999 WL 2932178. Illinois has since placed a moratorium on capital punishment. Rozek, *supra* note 322.

435. See Ken Armstrong & Christi Parsons, *Half of State's Death-Penalty Cases Reversed, A Variety of Errors Found in 130 Trials*, CHI. TRIB., Jan. 22, 2000, at N1 (stating that the 130th case had been reversed for a new trial or sentencing, which is "exactly half the total of those capital cases that have completed at least one round of appeals," making the previous number of cases having completed at least on round of appeals 259).

436. Armstrong & Mills, *supra* note 434.

437. *Id.*

438. *Id.*

439. *Id.*

440. James Bennet, *Israeli Forces Again Seize Control of Palestinian West Bank City*, N.Y. TIMES, Oct. 26, 2002, at A5.

reason to engage in a governmental policy even though it risks killing civilians. By contrast, as I argued above, capital punishment provides no real benefits that could not also be achieved by life without parole.

Perhaps it is no accident that two of these executions of innocents occurred in Texas—the state that killed Leo Herrera.<sup>441</sup>

## 2. Legal Surrealism: The Law of Innocence

“But wait,” you might be thinking, “we have all those appeals to prevent execution of the innocent.” I suggested above that the appeals and postconviction processes don’t focus on facts like innocence. I want to now to discuss the Supreme Court’s jurisprudence on innocence.

Norman Mailer once remarked that “capital punishment is to the rest of law as surrealism is to realism [in art].”<sup>442</sup> Nowhere is that more true than in the constitutional law of innocence. I have mentioned Leonel Herrera’s case already.

One chapter of the Leonel Herrera story is not widely known, and it is a chapter that occurred in the days and hours leading up to the U.S. Supreme Court Justices’ decision to grant full review to Herrera’s case. Shortly before Herrera was scheduled to be put to death, his attorney, Mark Olive asked the Supreme Court to stay Herrera’s execution and grant plenary review to his innocence claim. Granting certiorari requires the votes of four justices; a stay requires five votes. One might think that a vote for certiorari would imply a stay of execution—otherwise, the prisoner would be killed before the justices would have time to receive briefs and oral argument on the constitutional claims upon which the Court had granted certiorari. If the prisoner is dead, the court won’t decide his constitutional claims. In the Court’s nomenclature, those claims would be “moot.” The claims are moot because the client is moot—execution is the ultimate mootness.

Herrera had four votes for certiorari, but he didn’t have a fifth vote for a stay. In effect, the court was telling Olive: your client’s innovative claim is important enough to warrant our full review. But we’re not going to allow your client to remain alive long enough to give us the time to give him that review. Since your client will be dead by the time we even consider the merits of his innocence claim, your certiorari petition will be dismissed as moot. Olive asked the justices to reconsider. They refused.

By now it was late into the night, and Herrera had a certiorari grant by

---

441. *Herrera v. Collins*, 506 U.S. 390, 393 (1993).

442. Death Penalty Quotes, Writers & Philosophers, <http://freenet-homepage.de/dpinfo/writers.htm> (last visited Mar. 5, 2008).

the Supreme Court (which only requires four votes, recall) but no stay (which requires five votes). So Olive went off in search of a lower court willing to stay Herrera's execution long enough to give the United States Supreme Court time to hear his innocence claim. Close to dawn, Olive found one: a Texas Court of Criminal Appeals judge was willing to grant the stay. Herrera would live long enough for the Supreme Court to receive briefs and hear oral argument in his case—a process that ended up taking several months. In the meantime, Olive recruited “Sandy” D'Alemberte to represent Herrera in the Supreme Court. In the end, of course, Herrera lost five to four, and soon thereafter he was executed.

Susan Bandes, writing in the *Buffalo Law Review*, observed:

In 1960, Charles Black wrote an elegant, witty and powerful response to critics of *Brown v. Board of Education*, particularly addressed to Herbert Wechsler's famous article *Toward Neutral Principles of Constitutional Law*. Wechsler had lamented that although he believed the desegregation decisions would make an enduring contribution to the quality of our society, he had serious doubts whether the decisions rested on neutral legal principles, in the absence of which the decisions could have no legitimacy.

Black responded that indeed these decisions could be justified, through reasoning which might be difficult to accept because it was so unobtrusively, unfashionably simple. The equal protection clause forbids using the laws of the states to significantly disadvantage blacks. Segregation is a massive intentional disadvantaging of blacks by state law. How do we know this? His words bear repeating:

[I]f a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated “equally,” I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter.

Black was describing the situation in which a startlingly obvious principle can't seem to find legal recognition. In Black's words, it is obvious to everyone, including the Justices as individuals, that segregation intentionally fosters inequality for blacks. If there is no ritually sanctioned way in which the Court, as a Court, can learn this, “legal acumen has only one proper

task—that of developing ways to make it permissible for the Court to use what it knows; any other counsel is of despair.”

Upon reading *Herrera v. Collins*, I was struck by the aptness of Black’s response, and by its relevance to the question posed by *Herrera*. Another startlingly obvious principle, which has difficulty finding legal recognition, is that the judicial system should not participate in the execution of innocent people. When a doctrine permits a result so far removed from our collective sense of justice, it is time to re-examine that doctrine.

At this point, of course, numerous complications, limitations and hedges begin to crowd in. Much depends on the way the proposition is phrased, and, however it is phrased, there are those who will take issue with it. But Charles Black slightly overstated his proposition too.

All hedging aside: the question presented in *Herrera* was whether the Eighth and Fourteenth Amendments to the United States Constitution prohibit the execution of a person who is innocent of the crime for which he was convicted. If a negative answer to this question is solemnly propounded, I suggest that laughter is an appropriate response.<sup>443</sup>

During the oral argument in Leonel Herrera’s case, Justice Harry Blackmun presented the lawyer representing the state of Texas with a hypothetical situation. Blackmun asked: What if the new evidence of innocence included an alibi videotape—an alibi videotape proving beyond dispute that the death-sentenced prisoner was somewhere else at the precise moment of the murder? Was the government really arguing that the federal courts could not even consider this piece of evidence that definitively proved the inmate’s innocence, Blackmun wanted to know? The answer the state’s lawyer gave was yes. The federal courts couldn’t intercede. The federal judiciary must rely upon the state executive clemency process to identify and correct death row claims of actual innocence.

Justice Blackmun’s *Herrera* hypothetical materialized in a case that the court decided in 1995. Lloyd Schlup had the piece of evidence that Leonel Herrera lacked: an alibi videotape proving he was somewhere else at the precise moment of the murder. Easy case, one might think; the unanimous justices would at least order a new trial for Mr. Schlup, if not order his

---

443. Susan Bandes, *Simple Murder: A Comment on the Legality of Executing the Innocent*, 44 BUFF. L. REV. 501, 501–02 (1996) (footnotes omitted).

immediate release from death row. One would be wrong.

Like Leonel Herrera before him, Lloyd Schlup wasn't asking for immediate release. He wasn't even really asking for a retrial based on the alibi videotape. All Lloyd Schlup expected was a hearing in federal court. The federal district court and circuit court of appeals refused to give Schlup his hearing, as they were required to do according to the binding precedent of Leonel Herrera's case.

A bare majority of the Supreme Court decided to give Schlup his hearing. The justices split five to four even on this. Justice John Paul Stevens' opinion for the majority spoke of "the paramount importance of avoiding the injustice of executing one who is actually innocent" and explained how:

[T]he individual interest in avoiding injustice is most compelling in the context of actual innocence. The quintessential miscarriage of justice is the execution of a person who is entirely innocent. Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system.<sup>444</sup>

With this Court it's more important to watch what the justices do as well as what they say. What the Court did—by the razor thin margin of five to four—was give Lloyd Schlup his hearing—and he had a videotape. What the Court did was empower the state of Texas to kill Leonel Herrera without a hearing, which the state promptly did.

Ditto in Jesse Jacobs's 1995 case in Texas. As described by Justice Stevens, the prosecutor admittedly made inconsistent arguments at Jacobs's capital trial and at his sister's trial about whether Jacobs or his sister actually committed the capital murder, and "if prosecutors' statements at the [sister's] trial were correct, then Jacobs is innocent of capital murder." Justice Stevens and Justice Ruth Bader Ginsburg thus wrote that Jacobs's case presented a "self-evident" and "deeply troubling" instance of "injustice." Those two justices said they would have stayed Jacobs's execution to consider his claim of innocence. The Court majority was not deeply troubled. No stay. No reason for the federal courts to prevent the state of Texas from mainlining lethal chemicals into Jacobs's veins. Texas obliged, and he was executed on schedule.

The message the Supreme Court sent in Leonel Herrera's case was that the lower federal courts should deny most death row innocence claims without holding a hearing on the newly discovered evidence of innocence.

---

444. Schlup v. Delo, 513 U.S. 298, 324–26 (1995).

The lower federal courts got the message: if the condemned prisoner doesn't have an alibi videotape, then he doesn't get a hearing.

In a case decided in 2006, the Court revisited and reaffirmed *Herrera* in light of DNA's revolutionary impact on claims of death row innocence.<sup>445</sup>

A Tennessee jury convicted Paul Gregory House of raping and murdering a young woman named Carolyn Muncey and sentenced him to death.<sup>446</sup> The state's case at trial included evidence that FBI testing showed semen consistent (or so it seemed) with House's on Mrs. Muncey's clothing and small bloodstains consistent with her blood, but not House's, on House's jeans.<sup>447</sup> The state's theory on motive was that House attempted to rape the victim.<sup>448</sup>

Paul House, a sex offender on parole from Utah, was a newcomer to a rural east Tennessee community when Carolyn Muncey was found murdered near her home in July 1985.<sup>449</sup> The next day, after House was seen walking near where her body was discovered, he became the prime suspect.<sup>450</sup> He lied to police and denied he had left his girlfriend's trailer on foot on the evening of the murder.<sup>451</sup> And he had no convincing explanation for a bruised hand.<sup>452</sup> An FBI special agent told the jury that semen found on Muncey's nightgown was consistent with House's "general type," and a small blood spot on his jeans was consistent with her blood.<sup>453</sup> House was convicted and sentenced to death.<sup>454</sup>

At sentencing, the jury found as an aggravating factor that the murder was committed while House was attempting to commit rape.<sup>455</sup> DNA testing was not available at the time of trial. The technology didn't exist.

In post-conviction proceedings, House used DNA testing to attack both the semen and blood evidence. DNA testing has shown the semen came from Muncey's husband, Hubert, not from House.<sup>456</sup> Blood experts say the spot found on House's jeans came from blood drawn during an autopsy of Muncey.<sup>457</sup> A vial had been mishandled.<sup>458</sup>

---

445. *House v. Bell*, 126 S. Ct. 2064 (2006), was the first innocence case to reach the Supreme Court since the DNA revolution.

446. *Id.* at 2074.

447. *Id.* at 2072.

448. *Id.* at 2074.

449. *Id.* at 2071.

450. *Id.* at 2070–71.

451. *Id.* at 2071.

452. *Id.*

453. *Id.* at 2072–73.

454. *Id.* at 2074–75.

455. *Id.* at 2074.

456. *Id.* at 2078–79.

457. *Id.* at 2079–81.

And defense lawyers have found multiple witnesses in the community who point to Hubert Muncey as the likely killer.<sup>459</sup> One said she saw him arguing with his wife in a parking lot and striking her on the night of the murder.<sup>460</sup> A second said he asked her to lie and tell police that he had stayed at her house on the night of the murder.<sup>461</sup>

Two others said they heard the husband drunkenly confess to the crime shortly before House's trial.<sup>462</sup> According to their account, Mr. Muncey said he had argued with his wife, struck her, and then dumped her body over a hillside near their home.<sup>463</sup> They also said that when they tried to tell the police about the confessions, the officers refused to listen after House was charged with the crime.<sup>464</sup>

The federal district court held an evidentiary hearing, made killer fact findings, and denied the habeas writ.<sup>465</sup> The Sixth Circuit affirmed by a sharply divided en banc court.<sup>466</sup>

Justice Kennedy, writing for a five to three Court, reversed the Sixth Circuit, and allowed a death row prisoner's habeas action to proceed despite his failure to follow the procedural rules in state court, because the petitioner's newly discovered evidence of innocence (including DNA) was strong enough that it was "more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt."<sup>467</sup>

Thus, the Court found House's evidence powerful enough to satisfy the innocence "gateway" around procedural default—and so to allow consideration of the merits of the IAC claim—but not enough to establish a free-standing claim of innocence under *Herrera*—which would have mandated a new trial.

The upshot is *Herrera v. Collins* remains good law. Well, not "good" law—dreadful law, lethal law, but controlling law, and binding precedent.

In spring 2006 a weird little dialogue took place in the Supreme Court.<sup>468</sup> The occasion was a case presenting questions about the Kansas capital statute.

Innocence was not an issue in the Kansas case, but the Justices wrote

---

458. *Id.* at 2081.

459. *Id.* at 2083–85.

460. *Id.* at 2083.

461. *Id.* at 2084.

462. *Id.*

463. *Id.*

464. *Id.*

465. *Id.* at 2075.

466. *Id.* at 2076.

467. *Id.* at 2068, 2086.

468. *Kansas v. Marsh*, 126 S. Ct. 2516 (2006).

about it anyway.<sup>469</sup> A passionate dissent, by Justice Souter for himself and Justices Stevens, Ginsburg, and Breyer, cited evidence of recent exonerations in capital cases.<sup>470</sup> This drew an angry outburst by Justice Scalia. He wrote that there has not been “a single verifiable case” of an innocent person put to death.<sup>471</sup>

Scalia is correct, if by “verifiable” we mean proven beyond any doubt by DNA evidence. However, in the real world, genuine doubts have been raised in several of America’s executed. Sometimes innocence is not proven until after the person has been executed or has died of natural causes.<sup>472</sup>

In 1990, the State of Florida executed Jesse Tafero.<sup>473</sup> Tafero, his wife Sonia (Sunny) Jacobs and a man named Rhodes had been found guilty of killing a policeman at an interstate rest stop in South Florida.<sup>474</sup> Rhodes turned state’s evidence and testified against Tafero and Jacobs.<sup>475</sup> Tafero was sentenced to death and executed.<sup>476</sup> But Jesse Tafero was already dead when the truth came out.<sup>477</sup>

The execution was botched, because Florida’s 1923, three-legged execution stool malfunctioned, and Tafero’s head burst into flames.<sup>478</sup>

In 2004, the *Chicago Tribune* revealed new evidence about the case of Cameron Willingham, who was executed that year in Texas for arson. Fire experts who have re-examined the case believe that the fire was probably accidental.<sup>479</sup>

### 3. The Massachusetts “Gold Standard”<sup>480</sup>

In April 2005, then-Governor Mitt Romney of Massachusetts unveiled his much anticipated “gold standard” for death penalty legislation.<sup>481</sup> House

---

469. *See id.* at 2532–39 (discussing the guilt or innocence of persons sentenced to death after recognizing that guilt and innocence were not at issue).

470. *Id.* at 2544–45 (Souter, J., dissenting).

471. *Id.* at 2539 (Scalia, J., concurring).

472. *E.g.*, Sydney Freedberg, *supra* note 417 (“The FBI clears the death-row inmate of rape and murder 10 ½ months after cancer killed him.”).

473. Radelet et al., *supra* note 418, at 941.

474. *Id.*

475. *Id.*

476. *Id.*

477. *Id.* at 941–42.

478. *Id.* at 941.

479. Steve Mills & Maurice Possley, *Texas Man Executed on Disproved Forensics: Fire That Killed His 3 Children Could Have Been Accidental*, CHI. TRIB., Dec. 9, 2004, at 1.

480. This section was researched and written by John Weir and Erika Wright.

481. Lloyd Fillion, *Governor Romney Introduces “the Gold Standard for the Death Penalty,”* Criminal Justice Policy Coalition, [http://www.cjpc.org/i\\_death\\_penalty.htm](http://www.cjpc.org/i_death_penalty.htm).

Bill 3834 was based on the research and recommendations of a blue-ribbon panel of experts, commissioned by Romney in 2004 to create as close to a “foolproof system” of capital punishment as possible.<sup>482</sup>

Romney’s legislation

relies on many procedures that are standard for capital trials in this country. Trials are bifurcated, with the guilt-innocence decision separate from the sentencing decision. A list of aggravating circumstances is provided; these circumstances are argued within the guilt-innocence phase. Mitigating factors are the only conditions to be argued during the sentencing phase and the defense may present any evidence relevant to mitigation including reliable hearsay evidence. This procedure is unique in that most states include consideration of aggravating and mitigating circumstances within the sentencing portion of the trial. Appellate review is mandatory and cannot be waived. Specifications for qualifying capital case defense counsel are set forth. A second unique factor is that the witness list for the execution does not explicitly give the victim’s family or associates the right to view the execution.<sup>483</sup>

The proposed legislation specifically incorporated ten recommendations of the Governor’s Commission that were intended to make Massachusetts’ death penalty the most effective in the country ensure fair and just administration capital punishment.<sup>484</sup>

1. *A Narrowly Defined List of Death-Eligible Murders:* Capital murders are defined as first degree murders which are acts of political terrorism; are committed to impede a criminal proceeding; involve torture; involve two or more victims; are committed by someone who has already been convicted of first-degree murder.<sup>485</sup>
2. *Appropriate Controls over Prosecutorial Discretion in Potentially Capital Cases:* The bill stipulates that district attorneys will establish a set of protocols governing the

---

482. GOVERNOR’S COUNCIL ON CAPITAL PUNISHMENT, FINAL REPORT AND RECOMMENDATIONS, available at <http://www.lawlib.state.ma.us/docs/5-3-04Governorsreportcapitalpunishment.pdf>.

483. See Fillion, *supra* note 481.

484. See GOVERNOR’S COUNCIL ON CAPITAL PUNISHMENT, FINAL REPORT AND RECOMMENDATIONS, available at <http://www.lawlib.state.ma.us/docs/5-3-04Governorsreportcapitalpunishment.pdf>.

485. *Id.* at 6–7.

exercise of prosecutorial discretion over what substantive factors impact such discretion and what procedures are to be followed. The Attorney General is also directed to develop a protocol to review each exercise of discretion by the county district attorneys. The bill does not address the substance of this issue, but rather leaves the protocols to be developed after the bill becomes law; further, it entrusts their creation to those the protocols are intended to limit.<sup>486</sup>

3. *A System to Ensure High-Quality Defense Representation in Potentially Capital Cases*: The Commonwealth will provide two death penalty certified defense lawyers to all indigent defendants, and one co-counsel to any defendant who can only afford one attorney. There is no provision for funding for properly certified experts to assist the defense, a provision that bills submitted by Romney's predecessors included and that Romney's commission expressly called for.<sup>487</sup>
4. *New Trial Procedures to Avoid the Problems Caused by the Use of the Same Jury for Both Stages of a Bifurcated Capital Trial*: The right to a distinct jury for the sentencing phase is afforded to all defendants who are convicted of death penalty eligible murders. However, if the right is exercised, the defendant waives his right to argue the presence of "residual or lingering doubt about guilt."<sup>488</sup> This is critical for condition #7 below.
5. *Special Jury Instructions Concerning the Use of Human Evidence to Establish the Defendant's Guilt*: The defense may request that either of the juries be given instructions regarding the limitations of eyewitness testimony; cross-racial identification; defendant's statements made while in police custody, particularly in the absence of any video or audio recording of same; testimony from potential co-defendants or informants.<sup>489</sup> While the Commission recommended these instructions be an absolute part of the jury instructions, Romney's bill gives the trial judge the right to decide whether to act upon the request by defense and how to word such instructions.<sup>490</sup>

---

486. *Id.* at 12–13.

487. *Id.* at 13–17.

488. *Id.* at 17–18.

489. *Id.* at 19–20.

490. *See* Reinstating Capital Punishment in the Commonwealth, MASS. GEN. LAWS ch. 279A,

6. *A Requirement of Scientific Evidence to Corroborate the Defendant's Guilt:* The sentencing jury must find the presence of “conclusive scientific evidence reaching a high level of scientific certainty” to impose a sentence of death. The Commission urged that the evidence must “strongly corroborate” the defendant’s guilt;<sup>491</sup> the proposed legislation does not include that as a requirement.<sup>492</sup>
7. *A Heightened Burden of Proof to Enhance the Accuracy of Jury Decision Making:* The sentencing jury may not impose the death penalty unless there is “no doubt” in any one juror’s mind. However, if the defendant requests a new jury impaneled for the sentencing phase, he will have waived his right to raise the issue of lingering doubts, and the decision to request separate juries for the separate parts of the trial must be made before impaneling the first jury. Further, the state has no higher burden of proof to meet within the guilt-innocence portion of the trial.<sup>493</sup>
8. *Independent Scientific Review of the Collection, Analysis, and Presentation of Scientific Evidence:* Under the bill, an independent scientific review advisory committee is established. Their duties include oversight of the state’s forensic laboratories and appointing an independent panel for every death sentence pronounced. The panel will review all evidence to ensure that it is without flaw regarding its integrity, handling, and preservation. Though the bill suggests that the Commonwealth will adhere to the highest and most rigorous standards, it is silent regarding funding for this panel.<sup>494</sup>
9. *Broad Authority for Trial and Appellate Courts to Set Aside Wrongful Death Sentences:* Both trial judges and the Supreme Judicial Court have authority to set aside the death penalty if either believes that the sentence is inappropriate based on law or fact, or if the sentencing jury’s exercise of discretion in its determinations was inappropriate. In addition, the Superior court may dismiss the capital portion

---

§ 8(B) (2005).

491. GOVERNOR’S COUNCIL ON CAPITAL PUNISHMENT, *supra* note 483, at 20–21.

492. MASS. GEN. LAWS ch. 279A, § 10(B) (2005).

493. GOVERNOR’S COUNCIL ON CAPITAL PUNISHMENT, *supra* note 483, at 22–23.

494. *Id.* at 23–24.

of the indictment upon a finding that the Commonwealth's aggravating factors aren't supported by legally sufficient evidence.<sup>495</sup>

10. *The Creation of a Death-Penalty Review Commission to Review Claims of Substantive Error and Study the Causes of Such Error*: A death penalty review commission, comprised of eleven members, is empowered to investigate claims of substantive error by the defendant. Upon a finding of legitimacy in such a claim, the commission will report preliminary findings to the DA and to the defense counsel who may use this finding to petition the court, and its final report will be made public and given to the appropriate superior court.<sup>496</sup>

Advocates and opponents of the death penalty alike speculated that Romney's bill would draw wide support when it reached the house and senate floors for debate this fall, but the legislation had one critical flaw—it failed to address the costs associated with implementation of the “gold standard.”

Immediately after Romney's legislation was unveiled, a coalition of Massachusetts district attorneys criticized the plan, arguing “that the troubled state medical examiner's office and State Police crime laboratory can barely carry out current responsibilities, let alone make sure that innocent people don't end up on death row.”<sup>497</sup> The district attorneys “cited many other concerns, including the high cost of prosecuting death penalty cases, the wisdom of adopting a higher standard of proof . . . and the potential for human error no matter how much scientific evidence is gathered.”<sup>498</sup> Barnstable district attorney Michael O'Keefe, a Republican and proponent of the death penalty, “credited Romney with tying the possible reintroduction of the death penalty to cutting-edge science [b]ut . . . said the governor should instead bring the medical examiner's office and state police lab into the 21st century, before adding responsibilities.”<sup>499</sup> Citing the experience of other states with capital punishment, including Texas and Idaho, Norfolk district attorney William Keating, whose office handles about 19,000 criminal complaints a year, estimated that it would

---

495. *Id.* at 25–26.

496. *Id.* at 28–29.

497. Jonathan Saltzman, *DAs Rap Governor's Death Penalty Plan*, BOSTON GLOBE, May 4, 2004, at A1.

498. *Id.*

499. *Id.*

cost Massachusetts at least \$5 million to prosecute a death penalty case.<sup>500</sup> His office's annual budget is only \$6.8 million.<sup>501</sup> Finally,

Suffolk district attorney Daniel F. Conley, a Democrat, said that the release of four wrongly convicted or indicted inmates since he took the job in 2002 “has simply convinced me that while technology like DNA is critical in determining one’s guilt or innocence, the administration of justice is a human endeavor, and we’re all infallible.”<sup>502</sup>

Executing the innocent, however, is only one cost of capital punishment.

### *B. Cost: Capital Punishment as a Government Operation*

#### 1. You Get What You Pay for: The Intimate Connection Between Cost and Executing the Innocent

The problem of innocence is intimately related to the matter of cost. It is very expensive to run a system of capital punishment that will *accurately* decide who deserves to die.<sup>503</sup> Judge Alex Kozinski and Sean Gallagher wrote:

---

500. *Id.*

501. *Id.*

502. *Id.*

503. According to one January 4, 2000, estimate, it cost Florida “\$24 million per electrocuted murderer.” S.V. Dave, *The High Price of Killing Killers: Death Penalty Prosecutions Cost Taxpayers Millions Annually*, PALM BEACH POST (Fla.), Jan. 4, 2000, at 1A. It would have been cheaper by \$23 million *per executed prisoner* to incarcerate these prisoners for the rest of their lives, “even for an inmate who is imprisoned in his 20s and dies in his 70s.” *Id.* Overall, it costs Florida \$51 million *per year* “to enforce the death penalty—above and beyond what it would cost to punish all first-degree murderers with life in prison without parole.” *Id.* See generally Richard C. Dieter, *Millions Misspent: What Politicians Don’t Say About the High Costs of the Death Penalty*, in THE DEATH PENALTY IN AMERICA 401, 401–410 (Hugo Bedau ed., 4th ed. 1997) (“In Texas, a death penalty case costs taxpayers an average of \$2.3 million, about three times the cost of imprisoning someone in a single cell at the highest security level for 40 years.”); Robert M. Bohm, *The Economic Costs of Capital Punishment: Past, Present, and Future*, in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT *supra* note 127, at 573, 573–92 (“If the ultimate penal sanction is supported because of the belief that it is cheaper than noncapital punishments, this chapter establishes why such a belief is mistaken.”); Barry Nakell, *The Cost of the Death Penalty*, in THE DEATH PENALTY IN AMERICA *supra* note 146, at 241, 241–46 (“Many people mistakenly believe that it is less costly to execute a murderer than to keep him in prison for life.”); Kate Wiltrout, *The High Cost of Killing Killers*, SAVANNAH MORNING NEWS, Jan. 14, 2001, <http://oldsavannahnow.com/stories/011401/LOCdeathmain.shtml> (“Since 1998, the county has spent almost \$700,000 on capital cases, and would have gone broke if not for state and federal aid.”); Burt Hubbard, *Death Penalty Costs on Rise: State Spent \$2.5 million on Cases, Appeals Last Year*, DENVER ROCKY MOUNTAIN NEWS, Dec. 11, 2000, at 5A (“Both prosecutors and defense lawyers said the cases are costly because the stakes are high.”).

California reportedly spends [\$90 million] each year on the death penalty. With 395 death row inmates, that is over \$200,000 per inmate per year. Using that number as a benchmark, that means California has already spent over [\$450 million] on the death penalty this decade. And what can California show for its efforts? It's had all of two executions [as of 1995].<sup>504</sup>

## 2. The Numbers:<sup>505</sup> “Lawyers Cost More than Prison Guards”<sup>506</sup>

While it is difficult to put an exact price tag on the death penalty, major studies all indicate that the death penalty is much more expensive than life in prison without parole.<sup>507</sup> The financial costs of implementing a system of capital punishment are substantial, but the impact is most severe in two respects. First, the fiscal impact on a state and its taxpayers creates an enormous strain on resources. Critics point out that extra money used to fund the death penalty “could be [better] spent on other means of achieving justice and making the community safer: [such as] compensation for victims,” a larger police presence on the streets, and “funds for pursuing cold homicide cases.”<sup>508</sup> Many jurisdictions with the death penalty have been forced to cut back on other “vital services.”<sup>509</sup> In some states, defendants are being released from prison earlier as a cost saving measure to offset the cost of capital punishment.<sup>510</sup> Other states have been forced to close libraries and other vital services.<sup>511</sup>

Second, the gross financial burden of implementing an “effective” system of capital punishment—effective, meaning a system that does not execute the innocent—impacts the state criminal justice system as a whole. Supporters and opponents of the death penalty agree that capital

504. Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 13–14 (1995) (emphasis added) (footnotes omitted). In the years since Judge Kozinski’s article was published, California had eleven additional executions, for a total of thirteen. DPIC, FACTS, *supra* note 4, at 3.

505. This subpart was researched and written by John Weir and Erika Wright.

506. Baldus, *supra* note 65, at 1035 (quoting Frank Zimring).

507. See *infra* notes 519–31 and accompanying text.

508. *Costs of the Death Penalty and Related Issues: Hearing on H.B. 1094 Before the H. Judiciary Comm.*, 2007 Leg., 66th Sess. 3 (Colo. 2007) (testimony of Richard C. Dieter, Executive Director, DPIC), available at <http://www.deathpenaltyinfo.org/COcosttestimony.pdf> [hereinafter *Costs of the Death Penalty 2007*].

509. See, e.g., Fox Butterfield, *As Cities Struggle, Police Get by with Less*, N.Y. TIMES, July 27, 2004, at A10 (describing cutbacks in police forces resulting from straining budgets).

510. *Id.*

511. *Id.*

punishment systems should not take unnecessary risks with innocent lives and should be applied with strict fairness.<sup>512</sup> There is no abstract dollar figure for the cost of the death penalty—it depends on the quality of the system a state demands. And as results in other states have demonstrated, a cheaply implemented death penalty is really no bargain at all. Over two recent decades, the State of Illinois freed more innocent people from death row than it executed.<sup>513</sup> A commission appointed to review the state’s capital punishment system recommended eighty-five changes necessary to make the death penalty more reliable, changes that will cost the state millions of additional dollars to implement.<sup>514</sup>

Research on the financial cost of the death penalty has consistently proven that the pursuit of a capital case costs at least twice as much as convicting and housing that same convicted murderer for life in a high security correctional institution. Cost studies in North Carolina, Kansas, Texas, Kentucky, Nebraska and New York all show varying costs, but similar ratios with regard to the expense of death as a sentencing option. Specifically, the Death Penalty Information Center reported:<sup>515</sup>

- “In New York each death penalty trial costs \$1.4 million compared with \$602,000 for life imprisonment. The cost of imposing the death penalty in New York State has been estimated to be \$3 million for each case.”<sup>516</sup>
- In Florida the cost of each execution was estimated to be \$3.2 million, about six times the amount needed to incarcerate a convicted murderer for life.<sup>517</sup> A more recent

---

512. COMM’N ON CAPITAL PUNISHMENT, STATE OF ILL., REPORT OF THE GOVERNOR’S COMMISSION ON CAPITAL PUNISHMENT i (Apr. 15, 2002), [http://www.idoc.state.il.us/ccp/ccp/reports/commission\\_report/complete\\_report.pdf](http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/complete_report.pdf).

513. See DPIC, *Innocence: List of Those Freed from Death Row*, <http://www.deathpenaltyinfo.org/article.php?did=110> (last visited Mar. 8, 2008) (recording that the State of Illinois acquitted, dismissed charges, or pardoned eighteen inmates); Clark County, Indiana, Prosecuting Attorney Website: U.S. Executions Since 1976, <http://www.clarkprosecutor.org/html/death/usexecute.htm> (last visited Mar. 8, 2008) (reporting twelve executions in Illinois in 1976–2007).

514. COMM’N ON CAPITAL PUNISHMENT, STATE OF ILL., *supra* note 512, at ii (other examples can be found in the *Minority View* sections throughout the report).

515. *Costs of the Death Penalty and Related Issues: Hearing Before the Assemb. Standing Comms. on Codes, Judiciary, and Correction*, Leg., 228th Sess. 6–8 (N.Y. 2005) (testimony of Richard C. Dieter, Executive Director, DPIC), available at <http://www.deathpenaltyinfo.org/NY-RCD-Test.pdf> [hereinafter *Costs of the Death Penalty 2005*]. DPIC, FACTS, *supra* note 4.

516. Gary W. Potter, *Cost Deterrence, Incapacitation, Brutalization and the Death Penalty: The Scientific Evidence*, 22 ADVOCATE, 24, 25 (2000) (citations omitted), available at [http://e-archives.ky.gov/pubs/public\\_adv/jan00/dppotter.html](http://e-archives.ky.gov/pubs/public_adv/jan00/dppotter.html).

517. *Costs of the Death Penalty 2005*, *supra* note 515, at 7 (citing David Von Drehle, *Bottom Line: Life in Prison One-sixth as Expensive*, MIAMI HERALD, July 10, 1998, at 12A).

estimate by the Palm Beach Post found a much higher cost per execution: “Florida spends \$51 million a year above and beyond what it would cost to punish all first-degree murderers with life in prison without parole. Based on the 44 executions Florida had carried out [from 1976 to 2000], that amounts to a cost of \$24 million for each execution.”<sup>518</sup>

- In Kentucky the cost of a capital trial varied between approximately \$2 and \$5 million dollars.<sup>519</sup>
- The most comprehensive study of the costs of the death penalty found that the State of North Carolina spends \$2.16 million more per execution than for a non-capital murder trial resulting in imprisonment for life.<sup>520</sup>
- In California the death penalty adds \$90 million annually to the costs of the criminal justice system; \$78 million of that cost is incurred at the trial level.<sup>521</sup> Since California has averaged much less than one execution annually, the costs are astronomical, approaching \$100 million per execution. “Recently, the governor of California requested an additional \$220 million from the legislature to construct a new death row.”<sup>522</sup>
- “A recent study by Indiana’s Criminal Law Study Commission found that the total costs of the death penalty projected into the future for the state’s current capital cases would be about \$51 million, exceeding the future costs of life without parole sentences by about 38%.”<sup>523</sup>
- In its review of death penalty expenses, the State of Kansas concluded that capital cases are 70% more expensive than comparable non-death penalty cases.<sup>524</sup> “The trial costs for death cases were about 16 times greater than for non-death

---

518. *Id.* at 7.

519. Alan F. Blakely, *The Cost of Killing Criminals*, 18 N. KY. L. REV. 61, 76–79 (1990).

520. DPIC, FACTS, *supra* note 4, at 4; *Costs of the Death Penalty 2005*, *supra* note 515, at 6.

521. *Costs of the Death Penalty 2005*, *supra* note 515, at 7 (citing S. Maganini, *Closing Death Row Would Save State \$90 Million a Year*, SACRAMENTO BEE, Mar. 28, 1988, at 1).

522. *Id.* at 7.

523. *Id.* at 7–8.

524. DPIC, FACTS, *supra* note 4, at 4 (citing LEGISLATIVE DIV. OF POST AUDIT, STATE OF KANSAS, PERFORMANCE AUDIT REPORT, COSTS INCURRED FOR DEATH PENALTY CASES: A K-GOAL AUDIT OF THE DEPARTMENT OF CORRECTIONS 11–12 (2003) [hereinafter KANSAS PERFORMANCE AUDIT REPORT]).

cases (\$508,000 for death case; \$32,000 for non-death case). The appeal costs for death cases were 21 times greater.”<sup>525</sup>

- “The Judiciary Committee of the Nebraska legislature reported that any savings from executions are outweighed by the legal costs of a death penalty case. The report concluded that death penalty does not serve the best interests of Nebraskans.”<sup>526</sup>
- In Texas the cost of capital punishment is estimated to be \$2.3 million per death sentence, three times the cost of imprisoning someone at the highest possible security level, in a single prisoner cell for forty years.<sup>527</sup>

The monetary costs associated with implementing the death penalty as it now exists constitute enormous expenditures for any state. A near foolproof system, such as that proposed by Mitt Romney in Massachusetts, would increase these costs dramatically.<sup>528</sup>

At every stage—from the pretrial investigation and motions practice, to the bifurcated trial, to the first appeal to the state post conviction litigation, to the federal habeas corpus phases—capital cases are infinitely more complex than non-capital cases. Capital cases require a more exhaustively thorough pretrial investigation, which costs more. Namely, specially-trained investigators who prepare for the sentencing stage, DNA and other forensic experts are expensive. The pretrial motions practice is also far more complex and time-consuming, and therefore more expensive. Defense lawyers are required—ethically *required*—to research and raise every possible constitutional issue. If they don’t, that issue is waived forever. A defense lawyer does not want her capital client to be executed on a technicality because the lawyer neglected to raise an issue. Capital trials have two parts: a traditional trial to determine guilt or innocence, and a separate trial to determine the penalty. In the penalty phase of a capital

---

525. *Costs of the Death Penalty 2005*, *supra* note 515, at 8 (citing KANSAS PERFORMANCE AUDIT REPORT, *supra* note 524, at 13 Chart I-1).

526. Potter, *supra* note 516, at 25 (citations omitted).

527. DPIC, FACTS, *supra* note 4, at 4; *Costs of the Death Penalty 2005*, *supra* note 515, at 7.

528. Kate Randall, *US: First New England Execution in 45 Years*, WORLD SOCIALIST WEB SITE, May 14, 2005, [http://www.wsws.org/articles/2005/may2005/exec-m14\\_prn.shtml](http://www.wsws.org/articles/2005/may2005/exec-m14_prn.shtml). “Governor Romney has touted the [April 28, 2005] bill as ‘a model for the nation’ and the ‘golden standard’ for capital punishment legislation. If approved, it would re-impose the death penalty for acts of terrorism resulting in death, killing sprees, killings of police and murders involving torture.” *Id.* The proposed legislation “sets out a series of hurdles for sentencing a defendant to death, in an effort to weed out wrongful convictions” by means of “verifiable scientific evidence, such as DNA testing, before a death sentence can be handed down.” *Id.*

case, the court must establish whether the accused has forfeited his moral entitlement to live. Often the penalty trials last longer than the trial on guilt or innocence, with the meter always running, because the life of an individual is at stake.

i. Gordon Perry in New Hampshire (1997)

The New Hampshire case of Gordon Perry<sup>529</sup> illustrates this point. New Hampshire has not executed anyone since 1939;<sup>530</sup> the State has not sentenced anyone to death since 1959. New Hampshire's capital punishment statute reserves the death penalty for certain narrow categories of crimes involving especially heinous and atrocious murder, including knowingly killing a police officer who is performing his or her duties as a law enforcement official. Gordon Perry's massacre of Epsom, New Hampshire Trooper Jeremy Charron seemed to fit squarely within New Hampshire's existing capital statute.

As I write these words, I can't keep the image of Jeremy Charron in his U.S. Marine uniform out of my mind. At the time he was murdered he was only twenty-four years old—younger than most of my students at Vermont Law School. And, like my best law students, Jeremy Charron was smart, idealistic, and determined to use his God-given gifts in the service of others. More importantly, the gratuitous murder of Trooper Charron justifies a capital prosecution. If a state is to have capital punishment at all, it ought to have it for killings like this one.

The pretrial factual investigation in the *Perry* case was exhaustive and thorough, as it needed to be in a case where the stakes were life itself. Perry's lawyers researched and filed dozens of motions, and the prosecutors filed responses. In the end, Gordon Perry pled guilty and was sentenced to life imprisonment.

Even though the *Perry* case seemed easy, it was enormously expensive and, had the case gone to trial and resulted in a death sentence, the costs would have skyrocketed. New Hampshire has an excellent public defender system, and a significant portion of that system was diverted from its normal duties and into the Perry defense. A first-rate defense team was assembled, including an outside expert on litigating capital cases.

The typical time spent investigating and preparing for a non-capital

---

529. In the interests of full disclosure, I should note that I played an extremely minor, advisory, pro bono role in the *Perry* case.

530. DPIC, *New Hampshire*, <http://www.deathpenaltyinfo.org/article.php?scid=11&did=511> (last visited Mar. 8, 2008); DPIC, *Death Sentences in the United States From 1977 to 2006*, <http://www.deathpenaltyinfo.org/article.php?scid=9&did=847> (last visited Mar. 8, 2008).

murder trial is 200–300 hours.<sup>531</sup> The *Perry* case consumed between 3000 and 4000 hours, over a period of fourteen months.<sup>532</sup> One attorney spent more than half of his billable time for one year on the case.<sup>533</sup>

In all, the *Perry* case cost New Hampshire between \$700,000 and \$1 million dollars in time and expenses.<sup>534</sup> By contrast, it will cost the State approximately \$1 million to incarcerate Perry (who was only twenty-two years old at the time he pled guilty) for the rest of his life.<sup>535</sup> Thus, in a case that did not even go to trial—much less go to the appeals and post-conviction stages of capital litigation—it cost about the same to charge a defendant capitolly as it would cost to imprison him for life.

Capital cases cost more because everything is bigger, longer and more complicated. Also, as discussed above, everything is doubled: capital trials occur in two very different stages (the guilt or innocence phase and the penalty phase), and each stage requires exhaustive investigation and preparation.

Had the *Perry* case gone to trial and penalty phase, the cost would have been tremendous. And that would have been only the beginning of the capital punishment assembly line for Gordon Perry and for the taxpayers of New Hampshire. Following the trial and death sentence, there would have been years of painstaking appellate and post-conviction judicial review by the state courts and then by the federal courts.<sup>536</sup> During all this time, the meter would never stop running: on defense lawyers' time, investigators' time, prosecutors' time, and judges' time.

Capital postconviction litigation is among the most complex<sup>537</sup> and difficult jobs in the law. It is the legal equivalent of rocket science or cutting-edge brain surgery.

Assume hypothetically that Vermont had a death penalty and that the *Perry* case took place here. The procedure for such a case would be as follows. First, there would be the trial on guilt or innocence. Second, there would be the penalty trial. Third, there would be a direct appeal to the Vermont Supreme Court. Fourth, there would be a petition for review in the U.S. Supreme Court. Fifth, there would be state post-conviction

---

531. Telephone Interview with Richard Guerriero, Litigation Dir. of the N.H. Pub. Defender Program (Mar. 2000).

532. *Id.*

533. *Id.*

534. *Id.*

535. *Id.*

536. MELLO, DEATHWORK, *supra* note 2, at 163–65 (tracing steps in capital appeals process); MELLO, THE WRONG MAN, *supra* note 2, at 41–43.

537. See generally RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE (5th ed. 2005) (the indispensable text on federal habeas corpus).

litigation—including evidentiary hearings—back in the state trial court. Sixth, there would be another appeal to the Vermont Supreme Court. Seventh, there would be a petition for review in the U.S. Supreme Court. Eighth, there would be federal habeas corpus litigation in Federal District Court in Vermont. Ninth, there would be an appeal to the Second Circuit Court of Appeals. Tenth, there would be a petition for review in the U.S. Supreme Court. Eleventh, there would be an executive clemency proceeding. Twelfth, an execution date would be set. Then these rounds of state post-conviction and federal habeas corpus litigation would repeat themselves, perhaps several times.

ii. Michael Addison and John Brooks in New Hampshire (2007)

In neighboring New Hampshire, the Granite State has an unprecedented<sup>538</sup> two capital prosecutions underway. One has received relatively little publicity.<sup>539</sup> The other—the capital prosecution of Michael “Stix” Addison for the murder of Manchester police officer Michael Briggs—has received extensive publicity and is costing New Hampshire taxpayers a significant amount of money.<sup>540</sup> In October 2006, the New Hampshire legislature appropriated \$420,000 for prosecutors to pursue the Addison case.<sup>541</sup> In March 2007, the legislature appropriated \$134,000 for Addison’s defense.<sup>542</sup> The amount was for the year 2007 only.<sup>543</sup> Christopher Keating, executive director of the New Hampshire Public Defender program, “estimated it will cost the program about \$400,000 for every year the case goes on.”<sup>544</sup>

iii. Ted Bundy, the Six Million Dollar Man

This complex, multi-level system of judicial review would occur no matter how “easy” the case might appear. Consider the case of the infamous serial killer Ted Bundy. Even today—thirteen years after his

---

538. See Marchocki, *supra* note 41 (“The state’s decision to seek death sentences . . . may be the first time in modern history when two unrelated capital murder cases proceed at once.”).

539. In April 2007, New Hampshire prosecutors announced they would charge multi-millionaire John Brooks with hiring men to kidnap and kill a Derry man in 2005. See generally Annmarie Timmins, *Millionaire Faces Death Penalty*, CONCORD MONITOR, Apr. 28, 2007, at A1.

540. Melanie Asmar, *Charge Upgraded; Autopsy Released*, CONCORD MONITOR, Oct. 19, 2006, at A1.

541. AP, *AG to Add Staffers for Death Penalty Case*, Oct. 18, 2006; Daniel Barrick, *\$420,000 Set for Murder Prosecution*, CONCORD MONITOR, Oct. 19, 2006, at A10; Marchocki, *supra* note 42.

542. Paul Tracy, *Accused Cop Killer Voted \$134k*, N.H. UNION LEADER, Mar. 9, 2007, at B5.

543. See Marchocki, *supra* note 44.

544. *Id.*

execution—Bundy is still cited as the ultimate justification for capital punishment. We need it, so the argument goes, so we can execute the Ted Bundys of the world.

Execute him Florida did, and in a relatively average period of time; it took ten years from sentencing to execution of the death sentence.<sup>545</sup> Still, it cost the State of Florida approximately \$6 million to get Bundy into the electric chair,<sup>546</sup> millions of dollars more than it would have cost to incarcerate him for the remainder of his life. And that was cheap: Bundy was represented on his appeals *pro bono* by Wilmer, Cutler & Pickering, a powerhouse Washington, D.C. law firm. A partner in the firm once told me that the firm spent more than \$1.5 million on the *Bundy* case in out-of-pocket expenses and lost opportunity costs.

Thus, the *Bundy* case cost around \$7.5 million from the time the death sentence was imposed until his execution. And that was in an easy case—it was Ted Bundy, for gosh sake—in a state that already had extensive experience with capital punishment. Add to these costs the additional costs of housing, securing, and executing death row prisoners. Death row is physically separate from the general prison population. The security needs are greater and more specialized. All of this costs money.

#### iv. The Machinery of Death

Plus there is the specialized and complicated matter of carrying out the executions themselves.

Machine failure, human error, tricky new equipment. Sheer nerves, the media. Cramped quarters for the visitors, uncertain or unpracticed staffers. And the hardest part of all, the part only perfectible with constant practice: what to say to a condemned man as potassium chloride solution invades his blood.

It's a strange, taxing craft, performing executions, and Texas, many wardens say, performs it best. Drawn by the state's record pace of executions, wardens from California, Alabama and New Mexico among others are quietly paying visits [to Huntsville, Texas] to watch the experts work.<sup>547</sup>

---

545. See MELLO, *DEAD WRONG*, *supra* note 2, at 97, 107–10 (explaining that Bundy was “convicted and condemned in 1979” and executed on January 24, 1989).

546. Jacob V. Lamar, “*I Deserve Punishment*,” *TIME*, June 4, 2001 (“[Bundy’s] decade of imprisonment and endless appeals eventually cost Florida taxpayers more than \$6 million.”), available at <http://www.time.com/time/magazine/article/0,9171,1101890206-151130,00.html>.

547. Claudia Kolker, *Wardens of Other States Take Lessons from Texas Executions Visiting*

All of this specialized training and expertise costs money—taxpayers' money.

v. Show Me the Money: Vermont's Ongoing Fiscal Crunch

Of course, states can cut the costs by, for example, under-funding the defense team or being stingy in funding the factual investigation.<sup>548</sup> But there is an inverse relationship between the resources devoted to the defense and the risk of sentencing the innocent to death row and executing them. Skimp on the defense, and the risk of miscarriage of justice goes up.

States like Vermont *already* under-fund legal services to poor people on trial for their liberty.<sup>549</sup> Unlike New Hampshire, which has an outstanding and reasonably-resourced statewide public defender system, Vermont has a patchwork of county public defender offices and private firms which contract for indigent defense work. Both the Vermont public defenders and contract attorneys are grossly under-funded and overworked,<sup>550</sup> even though excellent people work at these jobs—a number of them are my former students. Howard Dean's tenure as governor has left public defense in Vermont in shambles. The idea of adding capital punishment to Vermont's already-swamped system of indigent defense<sup>551</sup> seems to me impractical.

The Vermont Department of State's Attorneys is responsible for public safety and "the fair and effective prosecution of crime" in the state.<sup>552</sup> The Department's estimated expenditure in 2004 was \$8,600,527, exceeding the appropriated budget by \$326,402.<sup>553</sup> In 2005, the State's Attorney's

---

*Officials Study the Details, Including How to Survive Psychologically While Taking the Lives of Condemned Prisoners*, CONTRA COASTA TIMES, Apr. 16, 2000, at A19 (detailing the visits of wardens from California, Alabama, and New Mexico—states preparing to implement lethal injection—to the state prison in Huntsville, Texas, to observe executions by lethal injection).

548. Vermont does this today, as I tell my criminal defense-oriented students year after year.

549. Diane Derby, *Public Defenders, Prosecutors at Odds over Budget*, RUTLAND HERALD (Vt.), Aug. 15, 1995, at 1. In 1995 the *Rutland Herald* criticized Governor Howard Dean's proposed budget cuts for Vermont's Defender General's office and argued that the budget cuts would increase public defenders' already heavy case loads, further depriving indigent criminal defendants of adequate representation. *Id.*

550. Robert Appel, the former Vermont Defender General, estimated in 1995 that the average public defender's caseload was 200 clients annually. Robert Appel, *Justice for Rich and Poor*, RUTLAND HERALD (Vt.), Oct. 18, 1995, at 15.

551. Darren Allen, *Douglas Plan to Slash Legal Aid is Plainly Wrong*, RUTLAND HERALD (Vt.), Feb. 6, 2005, at C (attacking Governor Jim Douglas's plan to cut Vermont Legal Aid's budget in half).

552. STATE OF VERMONT, FISCAL YEAR 2005 BUDGET RECOMMENDATIONS 137 (2005), available at <http://finance.state.vt.us/Fin%20Budget%20Documents/2005%20ebr.pdf>.

553. *Id.* at 138.

requested \$8,529,177.<sup>554</sup> Vermont's Office of the Defender General has the overarching duty of assuring that "persons entitled to appointed counsel receive effective legal advocacy."<sup>555</sup> "The provision of representation with reasonable diligence and promptness, and a zealous commitment and dedication to the interests of the client on behalf of those charged with serious crime is a necessary component to the fair administration of the criminal justice system."<sup>556</sup> The Office of the Defender General's estimated expenditure in 2004 was \$8,242,327, exceeding the appropriated budget by \$389,282.<sup>557</sup> In 2005, the Defender General requested \$8,168,639.<sup>558</sup> Vermont's criminal justice budget is very limited, as exemplified by these figures. To add the burden of implementing a capital punishment system would certainly exacerbate the enormous financial strain already felt by the state.

Vermont is a small state with a limited budget. The increased costs associated with implementing a capital punishment system as proposed by Representative Kilmartin, let alone one in which all possible safeguards are in place, would impose an insurmountable burden upon the state and its taxpayers. But the reality of such a situation extends beyond the enormous financial strain on a state with limited funds and resources. This is the cost to the effectiveness of the criminal justice system as a whole.

High costs strain local and state budgets, divert money from other crime control and victim assistance programs, result in tax increases, prolong and extend the anguish of victims families over years of appeals and successive execution dates, reduce other governmental services and often result in deferring salary increases for governmental employees. The death penalty also has a negative impact on the ability of criminal justice agencies to carry out their missions and perform their duties. The immense cost of the death penalty endangers the public in tangible and compelling ways as these examples indicate:

- "In Indiana three capital cases cost taxpayers over \$2 million just for defense costs."<sup>559</sup> Prosecution costs usually exceed those of the defense.<sup>560</sup>

---

554. *Id.*

555. *Id.* at 146.

556. *Id.*

557. *Id.* at 149.

558. *Id.*

559. DPIC, *Costs News and Developments: 2001-1998*, (2008), <http://www.deathpenaltyinfo.org/article.php?did=2061> (citation omitted).

560. *Id.*

- In Washington State, officials were concerned that costs for a single capital case will approach \$1 million.<sup>561</sup> The county in which the trial was held had to let one governmental position go unfilled, postponed employee pay hikes, drained the county's \$300,000 contingency fund and eliminated all capital improvement projects for the fiscal year.<sup>562</sup>
- The State of Ohio spent over \$1.5 million to execute one mentally ill man who was a death penalty volunteer.<sup>563</sup> Some of the costs included \$18,147 in overtime for prison employees and \$2250 in overtime for State Highway Patrol officers to provide support for the execution.<sup>564</sup> In addition, the State had to pay overtime for twenty-five prison public information officers who worked the night of the execution. "The [S]tate [also] spent \$5,320 on a satellite [truck] so the official announcement [of the execution] could be beamed to outside media."<sup>565</sup> Ohio's Attorney General had between five and fifteen prosecutors working on the case, expending ten percent of the state's annual budget for its capital crimes section, over a five year period.<sup>566</sup> Keeping the man who was executed in prison for his entire life would have cost less than half as much.<sup>567</sup>
- Because of death penalty trial costs, Okanogan County, Washington had to delay pay raises for the county's 350 employees; it could not replace two of four public health nurses in the county, and had to stop all non-emergency travel and put a hold on updating county computers and vehicles.<sup>568</sup>
- New Jersey laid off more than 500 police officers in 1991, at a time when it was putting into place a death penalty

---

561. Tom Sowa, *State May Help Pay for Death Penalty Trials; Bill Would Set Aside \$2.5 Million a Year to Help Counties Fund Murder Cases*, SPOKESMAN-REVIEW (Spokane, WA), Jan. 18, 1999, at A9.

562. *Id.*

563. Alan Johnson, *\$88.42 in Drugs End Life of "The Volunteer": Wilford Berry's Case Cost Ohio \$1.5 Million*, COLUMBUS DISPATCH, Feb. 28, 1999, at 1A, available at <http://www.dispatch.com>.

564. *Id.*

565. *Id.*

566. *Id.*

567. *Id.*

568. Washington Coalition to Abolish the Death Penalty, *The Facts: The Cost of the Death Penalty*, [http://www.abolishdeathpenalty.org/PDF/WCADP\\_Cost\\_Fact\\_Sheet.pdf](http://www.abolishdeathpenalty.org/PDF/WCADP_Cost_Fact_Sheet.pdf) (last visited Feb. 14, 2008).

statute that would cost \$16 million a year, more than enough to rehire all 500 officers.<sup>569</sup>

- In Florida, budget cuts resulting in a reduction of \$45 million in funding for the Department of Corrections required the early release of 3,000 inmates<sup>570</sup> while spending an estimated \$57.2 million on executions.
- Ten other states also reported early release of prisoners because of overcrowding and underfunding.<sup>571</sup> In Texas, the early release of prisoners has meant that inmates are serving only 20% of their sentences and re-arrests are common.<sup>572</sup> On the other hand, Texas spent an estimated \$183.2 million in just six years on the death penalty.<sup>573</sup>
- Georgia's Department of Corrections lost over 900 positions<sup>574</sup> in the past year while local counties have had to raise taxes to pay for death penalty trials.

In Vermont, violent crime is relatively low, and the number of cases which might be death-eligible under Kilmartin's proposal is minimal. In 2004, the total number of reported crimes declined by 4.7% from 2003, while the number of homicides declined from fifteen to eleven.<sup>575</sup> However, reported crime did increase, by 5.7% between 2005 and 2006.<sup>576</sup>

#### vi. Back to New Hampshire

Even without providing poorhouse justice, the risk of executing the innocent is always present. Again, the case of the assassination of State Trooper Jeremy Charron is illustrative.

Gordon Perry and his partner, a fellow named Kevin Paul, were sitting

569. AM. BAR ASS'N, *FUNDING THE JUSTICE SYSTEM: A CALL TO ACTION* 16 (1992).

570. *Id.* at 21.

571. *Id.* at ii tbl.

572. *Id.* at 54.

573. Richard C. Dieter, *What Politicians Don't Say About the High Costs of the Death Penalty*, 1 FEMINISM AND NONVIOLENCE STUDIES, WINTER 1995, <http://www.fnsa.org/v1n1/dieter1.html>.

574. AM. BAR ASS'N, *supra* note 569, at 15.

575. Vermont Crime Report 2004, 2004 Vermont Crime Data Released: Total Crime Down by Nearly 5%, [http://www.dps.state.vt.us/cjs/crime\\_04/press.htm](http://www.dps.state.vt.us/cjs/crime_04/press.htm) (last visited Feb. 4, 2008).

576. Div. of Criminal Justice Servs., State of Vt., 2006 Vermont Crime Report Released: Total Crime Up by Nearly 6%, [http://www.dps.state.vt.us/cjs/crime\\_06/press.htm](http://www.dps.state.vt.us/cjs/crime_06/press.htm) (last visited Mar. 1, 2008). "Homicides statewide were up from 8 victims in 2005 to 13 in 2006. Forcible rapes increased by 5.4% from 166 statewide to 175. Robberies increased 56% from 72 in 2005 to 112 in 2006." *Id.*

in a car parked near an Epsom, New Hampshire swimming hole.<sup>577</sup> Trooper Charron tapped on the car's window and asked for identification. Perry handed over his driver's license and vehicle registration. He then shot Trooper Charron several times. Most of the shots were absorbed by Trooper Charron's bullet-proof vest, but one entered his side and ended in his chest. While Trooper Charron bled to death, Perry and Paul sped away. They were later apprehended by police.

The account I just gave you came from Paul, as told to a jailhouse informant. Because, according to Paul's account, Perry was the actual shooter, Perry was arrested for capital murder. Paul was charged with second-degree murder, and he would have testified against Perry at trial—in exchange for favorable treatment.

Here's the problem: Paul said Perry was the shooter, and Perry said Paul was the shooter. The physical evidence was at best inconclusive. The prosecutors had to decide<sup>578</sup> whom of the two occupants of that car they believed, because without “turning” one suspect against the other, they had no case for capital murder against either man. Paul was willing to turn state's evidence and testify against Perry in exchange for favorable treatment, so he got the deal.

Perry and Paul were the only living witnesses of what happened that night in that car—of who *really* assassinated Trooper Charron. Circumstantial evidence suggested that Paul, not Perry, was the shooter. What if the prosecutors chose the wrong man? If Paul, not Perry, was really the shooter, than didn't *he* have the *strongest* incentive to turn state's evidence and testify against Perry?

Thus, it was possible that, in New Hampshire's first capital case in six decades, the man who actually shot the Trooper would have gotten off with a relatively light sentence, while his partner—who was technically guilty of felony murder but who didn't kill anyone—would have been put to death by the State of New Hampshire.

If this scenario sounds far-fetched, consider the case of Jesse Tafero,<sup>579</sup> which I mentioned previously. When I was living in Florida and working as a capital public defender, this hauntingly similar case was playing itself out.

Like the Gordon Perry case in New Hampshire, the Florida case involved the pointless murder of a police officer who had approached a car at a highway rest stop. As in *Perry*, the Florida car contained more than

---

577. AP, *N.H. Man Indicted in Officer's Slaying*, BOSTON GLOBE, Oct. 21, 1997, at B4.

578. See generally John Gibeaut, *Deadly Choices*, 87 A.B.A. J. 38, 38–45 (2001) (illustrating that prosecutors face a gamut of tough decisions when the death penalty is an option).

579. See *supra* notes 418, 473 and accompanying text.

one adult occupant; in fact there were three: Walter Rhodes, Jesse Tafero and Sonia (Sonny) Jacobs (plus Jacobs' young child). Like Perry, in the Florida case, one of the car's occupants (Walter Rhodes) turned state's evidence, and his testimony sent Jesse Tafero and Sonny Jacobs to death row—in exchange for favorable treatment for Rhodes.

Hugo Bedau and Michael Radelet, the two leading scholars on innocence and the death penalty described the Florida case this way:

The victims were a Florida State Trooper and his friend, a visiting constable from Canada. Also convicted and sentenced to death in the case was Jesse Joseph Tafero, Jacobs' common-law husband. A third participant, Walter Rhodes, was convicted of second degree murder and sentenced to life imprisonment in exchange for his testimony against Jacobs and Tafero.

Shortly after the convictions, Jacobs' attorney discovered that Rhodes had undergone a confidential polygraph examination prior to testifying, and that his version of events during this exam differed considerably from what he said at trial. The trial court, however, ruled that there was no need for the prosecutor to reveal this to the defense. In 1981, Jacobs' death sentence was reduced to life imprisonment by the Florida Supreme Court, and for a decade there were no further appeals of her case.

Tafero, convicted on virtually identical evidence, exhausted his appeals and was executed on May 4, 1990. Florida's electric chair malfunctioned, and six-inch flames erupted from his head before his heart stopped beating. This botched execution attracted national attention. Mickie Dickoff, a childhood friend of Jacobs, read about the case, recognized her long-lost friend as the codefendant, reestablished the friendship, and ended up pursuing the investigation and the appeals.

In 1992, Jacobs' conviction was vacated by the Eleventh Circuit Court of Appeals. The Court found that the testimony of a cellmate of Jacobs', saying that Jacobs had confessed to the shootings, had been perjured. Further, they found that "Rhodes' polygraph testimony significantly clashes with his statements at trial . . . ." Since Rhodes' testimony was the "state's only significant evidence" against Jacobs, the court found it "reasonably probable that [the] disclosure of the [polygraph] report would have altered the outcome of [the] trial." Therefore, the court ruled that the prosecution should have turned over the test results to the defense.

Rhodes testified at trial that the officers were shot after Tafero, while leaning on the car and being frisked, struggled with one of the officers and grabbed his service revolver. According to Rhodes, further shots came from Jacobs who was seated in the rear of the car. However, paraffin tests taken after the shootings indicated that only Rhodes had fired a gun. After the trial Rhodes gave a sworn statement admitting that he had lied at trial (he admitted this on several other occasions as well), but by 1992 he was again saying that Jacobs and Tafero were the guilty parties. In 1994 he was released on parole.

Bolstered by the reputation he won in prosecuting the trio . . . the young state attorney who handled the original trials, was elected the Chief State Attorney . . . shortly after the convictions. He remains in that position today. While initially vowing to retry the case, he eventually agreed to a plea bargain when the case against Jacobs collapsed. Jacobs was sentenced to time served and released after she entered a “plea of convenience” to two counts of second-degree murder.<sup>580</sup>

As of this writing, no steps have yet been taken to officially clear Tafero’s name.

One way out of the Perry/Paul paradox—in which each of the only two living witnesses blames the other for the killing<sup>581</sup>—might be called the Louisiana solution. Two Louisiana men, named Glass and Wingo, committed a felony that ended in murder. Both Glass and Wingo were charged with capital murder, even though only one of them could have done the actual killings. At their separate trials, Glass blamed Wingo, and Wingo blamed Glass. Both men were sentenced to death, and they were executed two weeks apart—the idea being that God could sort out which one of them was really the killer.

---

580. Radelet et al., *supra* note 418, at 941–42.

581. The notorious 2001 murder of two popular Dartmouth College professors, Half and Suzanne Zantop, seemed to be shaping up as another illustration of this problem. The Zantops were stabbed to death in their home. Their home is near to my own home, and the crime stunned our community and indeed the nation.

Two highly intelligent and well-liked Vermont teenagers, one sixteen and the other seventeen years old, have been charged with the crime. Physical evidence and DNA linked the suspects to the crime scene, but the police were stumped when it came to motive. So they cut a deal with the sixteen year old. As part of the deal, the sixteen year old agreed to tell the full story about the crime. It could well turn out that the sixteen year old was the more culpable of the two, but we will likely never know for sure. The only living witnesses to the murder are the two suspects.

In the end, both young men pled guilty.

As I've suggested, capital punishment abolitionists need to keep in mind State Trooper Jeremy Charron. But perhaps death penalty supporters ought to keep the Tafero/Jacobs case in mind, as a cautionary tale, if nothing else.

#### vii. Remember New York

Capital punishment newcomers, such as New York, liked to think they would be different from Florida, California, Texas, and the other states that have tried to craft capital punishment systems that are fair and swift: only the guilty will be sentenced to die. But Illinois, Florida, Texas, Pennsylvania, and the others all thought they would be different—at least that's what they thought in the beginning of their state's experiment with legal homicide.

Like New Hampshire, New York had a relatively narrow death penalty statute: in the first seven years under the New York statute, the much larger and more populous New York has sent only seven people to death row.<sup>582</sup> The New York Court of Appeals heard its first oral argument in a death case a full seven years after the capital statute was enacted.<sup>583</sup> Like New Hampshire (and unlike Vermont), New York has a very good public defender system. Like New Hampshire, New York's capital statute is fairly recent, enacted in 1995.<sup>584</sup>

As discussed above, the cost of New York's capital punishment system has been staggering.<sup>585</sup> A 1999 estimate noted that in its first four years, "the total cost to taxpayers for prosecution and defense in death penalty cases has been estimated at \$68 million. And by the time the first lethal injection is administered, which could be more than ten years from now, those costs could soar to more than \$238 million."<sup>586</sup> By 2005 the cost had climbed to \$170 million.<sup>587</sup>

Experience may have taught states otherwise, but once the legal machinery of death is fired up, it takes on an inertia and a momentum all its own. Once a state decides to step into the capital punishment bramble bush,

---

582. DPIC., Death Sentences in the United States from 1977 to 2006, <http://www.deathpenaltyinfo.org/article.php?scid=9&did=847> (last visited Mar. 8, 2008).

583. William Glaberson, *First Arguments in Death Penalty Appeal Focus on Technicalities*, N.Y. TIMES, May 7, 2002, at B6.

584. William Glaberson, *On a Reinvented Death Row, the Prisoners Can Only Wait*, N.Y. TIMES, June 4, 2002, at A1.

585. See *supra* notes 53–57 and accompanying text.

586. David Noonan, *Death Row Cost Is a Killer: Capital Cases Can't Be Handled Fairly and Affordably, Critics Claim*, N.Y. DAILY NEWS, Oct. 17, 1999, at 27.

587. DEATH PENALTY INFO. CTR., *Recent Legislative Activity News and Developments*, available at <http://www.deathpenaltyinfo.org/article.php?did=1729&scid=> (last visited Mar. 8, 2008).

it is all but impossible to extricate itself. The politics of death create a ratchet effect: a narrow death penalty statute will be broadened over time as more and more categories of crimes and classes of criminals become death eligible. Careful (but also costly and cumbersome) procedures will give way to calls for speedier and speedier executions.

More than 3300 people inhabit America's death rows.<sup>588</sup>

Between December 1972 and the end of 1995, over 1500 additional inmates exited death rows after their capital sentences were vacated by appellate courts. In those years, another 313 prisoners were executed and ninety-eight inmates left death row through other causes of death. Six dozen condemned inmates had their death sentences commuted to prison terms by executive clemency.<sup>589</sup>

These figures were compiled by Professors Michael Radelet and Hugo Bedau, the nation's leading experts on releases from death row because of doubts about guilt. In a study published in 1996, Radelet and Bedau identified "68 cases of death row inmates later released because of doubts about their guilt."<sup>590</sup>

Reasonable minds can disagree about whether or not this or that particular death row prisoner was indeed innocent. But the data really do nothing more than quantify the common sense notion that our government (meaning the people who *are* our government) makes mistakes. Anyone who has ever waited for a letter to arrive in U.S. mail—or who has had the sublime pleasure of dealing with the IRS or INS—knows that the government can make mistakes, because people can make mistakes. Even when our government is deciding life or death, it can make mistakes.

*C. Why Supporters of Capital Punishment Ought to Lead the Charge to Spend Whatever It Costs to Ensure Innocent People Are Not Sentenced to Death and Executed*

As I've suggested, doing it right—or anywhere close to right—capital punishment as a legal system is extremely expensive. One way to cut the costs is to limit the appeals and the resources necessary to guarantee (to the extent that humans are capable of guaranteeing) that innocent people are not sentenced to death and executed.

---

588. DPIC, FACTS, *supra* note 4.

589. Radelet et al., *supra* note 418, at 907–08 (footnote omitted).

590. *Id.* at 916.

However, it is those who *favor* death as a punishment who ought to fight the hardest to prevent capital justice from being provided on the cheap. It is *supporters* of capital punishment who ought to be the ones pressing for the most reliable system of deciding who dies, even though such reliability comes with a high financial price tag. It is *supporters* of capital punishment who should be clamoring for the most exacting review of death cases that human minds can conceive and human pocketbooks can fund. I say this because nothing will end capital punishment here sooner—as it ended capital punishment in England in the mid-1900s<sup>591</sup>—than if the American public becomes convinced that there is a genuine likelihood that totally innocent Americans are being sentenced to death and executed.

Executing the wrong person—executing a person for another person’s crimes—comes perilously close to simple murder. The American public will not tolerate murder done in their name by their government. The American public are not murderers.

The conservative columnist (and capital punishment supporter) George Will explored in an April 9, 2000 column why *advocates* of capital punishment have the greatest stake in seeing to it that innocents are not condemned and executed:

“Don’t you worry about it,” said the Oklahoma prosecutor to the defense attorney. “We’re gonna needle your client. You know, lethal injection, the needle. We’re going to needle Robert.”

Oklahoma almost did. Robert Miller spent nine years on death row, during six of which the state had DNA test results proving his sperm was not that of the man who raped and killed the 92-year-old woman. The prosecutor said the tests only proved that another man had been with Miller during the crime. Finally, the weight of scientific evidence wielded by an implacable defense attorney, got Miller released and another man indicted.

You could fill a book with such hair-curling true stories of blighted lives and justice traduced. Three authors have filled one. It should change the argument about capital punishment and other aspects of the criminal justice system. Conservatives, especially, should draw this lesson from the book: Capital punishment, like the rest of the criminal justice system, is a government program, so skepticism is in order.

---

591. Jon Silverman, *England’s Secret Death Penalty*, BBC NEWS, July 28, 2004, available at [http://news.bbc.co.uk/2/hi/uk\\_news/magazine/3932653.stm](http://news.bbc.co.uk/2/hi/uk_news/magazine/3932653.stm).

Horror, too, is a reasonable response to what Barry Scheck, Peter Neufeld and Jim Dwyer demonstrate in *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted*. You will not soon read a more frightening book. It is a catalog of appalling miscarriages of justice, some of them nearly lethal. Their cumulative weight compels the conclusion that many innocent people are in prison, and some innocent people have been executed.

Scheck and Neufeld (both members of O.J. Simpson's "dream team" of defense attorneys) founded the pro bono Innocence Project at the Benjamin N. Cardozo School of Law in New York to aid persons who convincingly claim to have been wrongly convicted. Dwyer, winner of two Pulitzer Prizes, is currently a columnist for the *New York Daily News*. Their book is a heartbreaking and infuriating compendium of stories of lives ruined by:

- Forensic fraud, such as that by the medical examiner who, in one death report, included the weight of the gall-bladder and spleen of a man from whom both organs had been surgically removed long ago.
- Mistaken identifications by eyewitnesses or victims, which contributed to 84 percent of the convictions overturned by the Innocence Project's DNA exonerations.
- Criminal investigations, especially of the most heinous crimes, that become "echo chambers" in which, because of the normal human craving for retribution, the perceptions of prosecutors and jurors are shaped by what they want to be true. (The authors cite evidence that most juries will convict even when admissions have been repudiated by the defendant and contradicted by physical evidence.)
- The sinister culture of jailhouse snitches, who earn reduced sentences by fabricating "admissions" by fellow inmates to unsolved crimes.
- Incompetent defense representation, such as that by the Kentucky attorney in a capital case who gave his business address as Kelley's Keg tavern.

The list of the ways the criminal justice system misfires could be extended, but some numbers tell the most serious story: In the 24 years since the resumption of executions under Supreme Court guidelines, about 620 have occurred, but 87 condemned persons—one for every seven executed—had their convictions vacated by exonerating evidence. In eight of these cases, and in many more exonerations not involving death row inmates, the evidence was from DNA.

One inescapable inference from these numbers is that some of the 620 persons executed were innocent. Which is why, after the exoneration of 13 prisoners on Illinois' death row since 1987, for reasons including exculpatory DNA evidence, Gov. George Ryan, a Republican, has imposed a moratorium on executions.

Scheck, Neufeld and Dwyer note that when a plane crashes there is an intensive investigation to locate the cause and prevent recurrences. Why is there no comparable urgency about demonstrable, multiplying failures in the criminal justice system? They recommend many reforms, especially pertaining to the use of DNA and the prevention of forensic incompetence and fraud. Sen. Patrick Leahy's Innocence Protection Act would enable inmates to get DNA testing pertinent to a conviction or death sentence, and ensure that courts will hear resulting evidence.

....

Two powerful arguments for capital punishment are that it saves lives, if its deterrence effect is not vitiated by sporadic implementation, and it enhances society's valuation of life by expressing proportionate anger at the taking of life. But that valuation is lowered by careless or corrupt administration of capital punishment, which *Actual Innocence* powerfully suggests is intolerably common.<sup>592</sup>

The good news is that science can increasingly serve the defense of innocence. But there is other news.

*D. "Dear Justice Scalia"*

Justice Antonin Scalia saw it differently. In 2006, the Kansas Supreme

---

592. Will, *supra* note 411.

Court struck down its 2004 capital punishment statute—and cleared all eight inmates from death row—because it required jurors to impose death in cases where they found the aggravating and mitigating circumstances were equally balanced.<sup>593</sup> The U.S. Supreme Court reversed, five to four.<sup>594</sup> The case was argued twice, once before and once after Alito joined the Court.<sup>595</sup> So Alito probably made the difference. Justice Thomas wrote for the five to four majority; Souter wrote the dissent, branding the majority’s view “morally absurd.”<sup>596</sup> The tone of Souter’s dissent, which Stevens, Ginsburg, and Breyer joined, was passionate. Souter cited evidence of recent exonerations in capital cases.<sup>597</sup> This drew an angry outburst from Scalia. He said there has not been “a single verifiable case” of an innocent person put to death.<sup>598</sup> Scalia also said the dissenting opinion “will be trumpeted abroad for vindication” of what he called “sanctimonious criticism” of America’s death penalty.<sup>599</sup> Scalia’s dissent, in turn, prompted an open letter from a Texas lawyer:<sup>600</sup>

Dear Justice Scalia:

I think I am sorry that I read your concurring opinion this summer in *Kansas v. Marsh*, in which you label all who are concerned that innocent people have been executed as “sanctimonious” and ignorant, and suggest that everyone with such a concern is merely part of an “abolition lobby.” That’s a pretty breezy generalization, and it is as wrong as your proposition that there has never been “a single case—not one—in which it is clear that a person was executed for a crime he did not commit.” You are either blind, or you aren’t looking very hard.

Texas alone has at least three such cases: Carlos DeLuna, Ruben Cantu and Cameron Willingham. DeLuna and Cantu were both executed on crime-scene identification that the witnesses

---

593. *Kansas v. Marsh*, 126 S. Ct. 2516, 2520 (2006).

594. *Id.* at 2521.

595. *Id.* at 2532.

596. *Id.* at 2544 (Souter, J., dissenting).

597. *Id.* at 2544–45.

598. *Id.* at 2539 (Scalia, J., concurring). This case will probably affect only Kansas. The case is interesting because Roberts, Alito, and Kennedy joined the Thomas opinion for the majority. It’s also interesting because the case sparked heated debate between the Justices on the issue of death row exonerations. I’m puzzled that this case provided the spark, rather than the DNA/factual innocence case, *House v. Bell*, 126 S. Ct. 2064 (2006).

599. *Marsh*, 126 S. Ct. at 2532–33 (Scalia, J., concurring).

600. Keith S. Hampton, *Open Letter to Justice Scalia, Executing the Innocent*, 29 NAT’L L.J. 14 (2006) (citations omitted).

now repudiate. Let me quote your own court: “The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.” When we base death sentences on such evidence, why would you find it so hard to believe that we’ve killed one or two innocent people?

Maybe you think it just happens in misidentification cases. Then take the execution of Willingham for torching his home with his three daughters inside. He was convicted because the fire investigators in his case assumed arson when every bit of evidence was consistent with an accident. Innocent people can be just as easily executed on junk science and incompetent investigators as eyewitness misidentification. So you can see why I also can’t agree with your cheery conclusion that every exoneration “demonstrates not the failure of the system but its success.”

You also claim that it was “the system” that uncovered cases of innocent people, and not some “outside force.” Having been part of the “the system” for many years, I can assure you that prosecutors and police do not investigate whether they “got it right” after they’ve sent someone to prison or to the death chamber. None of these cases would ever have come to light had not newspapers looked into them. Those who are part of “the system” (notably, police and prosecutors) react with denial and hostility when confronted with proof that they got it wrong. When the district attorney in the Cantu case learned that he was innocent, she promptly announced that she would prosecute the surviving victim, Juan Moreno, of “murder by perjury” because he succumbed to police pressure to misidentify Cantu at trial. This is the same guy who was shot nine times and clubbed half to death.

And the police who exploited an opportunity to exact revenge against Cantu? *The Houston Chronicle* and *San Antonio Express News* obtained recorded conversations between the DA investigators and the cops revealing that the cops were cleared well before the DA’s “investigation” ever commenced. No, this really isn’t “the system” self-correcting itself.

An “insignificant minimum”?

But I think you know this because you radically shift positions at the end of your concurrence. Up to the end, you

argue that you've scoured the country looking for proof that a single innocent person has been executed, and, finding none to your satisfaction, deduce "the system" is therefore actually infallible. Then you spring a brand new argument, not quite consistent with the former. Rather than "we've never killed an innocent person," your new argument is "sure we have, but it's a pretty small number." You wrote: "One cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly. That is a truism, not a revelation. But with regard to the punishment of death in the current American system, that possibility has been reduced to an insignificant minimum."

So I take it that if you became convinced an innocent person had been executed, you still wouldn't share the concerns that "the system" is in need of repair. This posture sort of undercuts the sincerity of your search for the white whale of innocence. You use the phrase "insignificant minimum" to describe the number of innocent people you imagine we've executed. How many is that? Ten? Fifty? The system: not infallible, but still the best? I bet you the family and friends of Willingham, Cantu and DeLuna never viewed them as "insignificant."

The casualness with which you sweep people into the oblivion of insignificance must be somehow made easier when the execution involves someone else's child or brother or friend. It is far worse to convict an innocent person than to let a guilty person go free. You've reversed and perverted this long-standing principle and seem to believe it is far better to kill innocent people so long as we also get a greater number of guilty ones. I think we have different sets of values. To sum up: You're dead wrong that only stupid people would oppose executing the innocent, and you're morally wrong not to care. It is wrong for the government to kill innocent people. I can't believe a Supreme Court justice thinks that is debatable.

## CONCLUSION

It is tempting to pretend that [people] on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined. . . . [T]he way in which we choose those who will die reveals the depth of moral commitment among the living.

*William Brennan*<sup>601</sup>

I think capital punishment is something of a cultural Rorschach blot; different people look at the same system and see vastly different things. I look at it and see a legislative Frankenstein with gigantic costs and marginal gains. Others look at that same system and see a finely calibrated machine producing super due process. Perhaps what we see says more about the observer than about the phenomenon being observed.

“Legal interpretation takes place in a field of pain and death,” Robert Cover wrote.<sup>602</sup> Nowhere else in the law is this truth more brutally apparent than with capital punishment—especially after September 11, at the national and state level.

I said at the outset I am not a pacifist; I believe the state has the right to kill in the case of just war. Some things are worth dying for. Some things are worth killing for. The United States is one. Israel is another.<sup>603</sup> But before allowing the government to kill in our name, we must ask what the killing is *for*. For what aim is the killing necessary? In the case of capital punishment, I think we gain little or nothing of value.

On the other side of the ledger, capital punishment has very real costs. Some of these costs are quantifiable, such as the financial burden and the numbers of innocents sent to death row and executed. My experience has convinced me that many of the costs are intangible. These costs include the degradation of our law and our legal institutions by a legal system prone to error and skewed by race and class, and the brutalization caused when our government is in the business of deciding who deserves to die. These costs can’t be measured with precision, but that does not make them any less real.

And what do we gain by this system of legal homicide? The symbolic

---

601. *McCleskey v. Kemp*, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting).

602. Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1601 (1986) (footnote omitted).

603. See generally Michael Mello, Confessions of a 9/12 Liberal: Defending the U.S.A. PATRIOT Act, the Iraq War, and Israel (Sept. 2007) (unpublished manuscript, on file with author).

value of killing Ted Bundy, I suppose? Although, most of the 3700 people on death row are no Bundys. We get nothing that can be measured and nothing of real value.

I'm occasionally asked whether I could imagine a system of capital punishment that works. I can't. Maybe it's a failure of imagination on my part, but I just can't imagine a capital punishment scheme that would work.

We now have nearly three decades of experience with the modern capital punishment statutes. Thirty-seven states (and the federal government) allow death as a punishment. The local varieties of our national experience are impressive. Urban states have capital punishment. So do rural states. Big states and little states. States in the north, south, east, west, and in the middle of the country. None seem to work well. They fail in different ways, but they all fail. They all fail because Godlike decisions cannot be contained within the rule of law.

Public discourse about capital punishment has tended to bifurcate into two constellations of questions. The first focuses on abstract issues of morality and philosophy, while the second centers on describing how capital punishment as a legal institution actually operates. Sister Helen Prejean's book *Dead Man Walking*<sup>604</sup> suggests a unification of these two halves of the discourse: the way the thing actually operates is precisely *why* it is immoral.

We are killing people who are innocent, people who were children when they committed their crimes, people who are crazy, and people who just don't deserve to die. We also killed Ted Bundy, and maybe that makes all the rest of it worthwhile. But not for me, and not in my name.

Over the next few years, capital punishment will continue to clank along. We will execute a few monsters like McVeigh, and a few innocents, but mostly we will execute run-of-the-mill killers.

In the end, I don't think we should abolish capital punishment only because of the people who inhabit our death rows and execution chambers. We ought not abolish it because of what it does to *them*. We ought to abolish it because of what it does to *us*. All of us. We are all downwinders to capital punishment.

Eventually, this pointless killing by our government will end in this country—as it has ended in most of the rest of the civilized world. I have enough faith in the soul of the American people to hope, even now, in the midst of the capital punishment juggernaut, that such a time will come for us. Someday, we will make our national peace with legal homicide. But

---

604. HELEN PREJEAN, *DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES* (1993).

some kinds of peace can only be found on the other side of war.

Capital punishment is more than simply bad public policy.<sup>605</sup> It is wrong. It is evil. It is banal evil in the sense that Hannah Arendt would recognize.<sup>606</sup> Children of a future age will look back at our debate over whether capital punishment is sound social and economic policy with the same bemusement with which we now view the antebellum congressional debates over slavery as a matter of public policy. Slavery and capital punishment both make clear what happens when the lawyers seize control of the conversation. Those same wonderful people trained to “think like lawyers” brought you *Dred Scott*,<sup>607</sup> then *McCleskey v. Kemp*<sup>608</sup> (a little bit of racism in the capital punishment system is okay) and *Herrera v. Collins*<sup>609</sup> (it isn’t unconstitutional to execute a factually innocent person for a crime he did not commit) today.

I oppose capital punishment as it exists—and, as it will continue to exist, for the foreseeable future regardless of what the politicians tell you—as a *legal system* in America today. America’s modern experience with capital punishment has taught that it is a rigged lottery, skewed by matters of politics, class, race, geography, and, most important, the quality of the defense lawyer at trial. The death penalty is not reserved for the worst

---

605. Marla Sandys, *The Death Penalty in America: Current Controversies*, 34 CRIM. L. BULL. 87, 93 (1998) (book review).

606. See ARENDT, *supra* note 136.

607. *Dred Scott v. Sanford*, 19 U.S. (19 How.) 393 (1857).

608. *McCleskey v. Kemp*, 481 U.S. 279 (1987); see also Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 440–47 (1988) (criticizing *McCleskey* for its callousness toward blacks, but explaining why the outcome of *McCleskey* was all but inevitable); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1016 (1988) (characterizing *McCleskey* as “shocking, but not surprising”); Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1388–89 (1988) (documenting briefly criticisms that many commentators have made about *McCleskey* and offering criticism of both “the Court’s ruling and the way it was articulated”); *The Supreme Court 1986 Term—Leading Cases*, 101 HARV. L. REV. 119, 150 (1987) (*McCleskey* evidences the Court’s ignorance of the fact that racism often acts on a “systemic and unconscious level”); Mary Elizabeth Holland, Note, *McCleskey v. Kemp: Racism and the Death Penalty*, 20 CONN. L. REV. 1029 (1989) (noting that Court conceded validity of Baldus data but then ignored story it told); Jennifer Mikel, Note, *McCleskey v. Kemp: Whether Georgia’s Capital Punishment Statute Is a Vehicle for Discrimination*, 1 DET. C.L. REV. 187, 198–99 (1988) (claiming that Supreme Court ignored many of its own past holdings and also history of discrimination in Georgia in order to avoid striking down Georgia capital sentencing procedure); Hugo Adam Bedau, *Someday McCleskey Will Be Death Penalty’s Dred Scott*, L.A. TIMES, May 1, 1987, Metro, at 5 (likening decision to holding in *Dred Scott v. Sanford* and other notoriously unsound and morally reprehensible decisions).

609. See *Herrera v. Collins*, 506 U.S. 390, 400–11 (1993) (stating that “[c]laims of actual innocence based on newly discovered evidence” are not “ground[s] for federal habeas relief” if no constitutional violation occurred in the “underlying state criminal proceeding” and that the state’s “refusal to entertain” the new evidence did not violate the procedural due process guarantees of the Fourteenth Amendment).

murderers; it is reserved for the murderers with the worst lawyers at trial.

But mostly I oppose capital punishment because governments make mistakes. No matter how careful we are; no matter how much money we spend to provide the best defense for people on trial for their lives; no matter what we do, innocent people continue to be sentenced to death and executed. The numbers of such cases are more than just numbers to me: they are *real*, and the people they've destroyed are real to me because I *know* them.

I spoke earlier about the brutalization effect capital punishment can have on potential killers. But there's more to it than that. Capital punishment brutalizes more than the people it kills; it brutalizes all of us. Capital punishment undermines and degrades the ethics and humanity of lawyers, the legal profession, and the law itself; the death penalty turns good people—judges, jurors, prosecutors—into killers. I have tried in my writings to convey some of the interior life, in the hope that people might better understand what the death penalty does to the people it touches. That has always been at the core of my opposition to state killing: what it does to *people*, and not just to the person who is killed. We're *all* part of the collateral damage of capital punishment.

In the end, we shouldn't abolish capital punishment only because of what it does to the people being executed. We should abolish capital punishment because of what it does to *us*. And because the costs of capital punishment *as a legal system* are simply not worth the candle.