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Rethinking the Death Penalty: Can We Define Who Deserves Death – A Symposium Held at the Association of the Bar of the City of New York May 22, 2002

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Recommended Citation

Martin J. Leahy, Norman L. Greene, Robert Blecker, Jeffrey L. Kirchmeier, William M. Erlbaum, David Von Drehle & Jeffrey A. Fagan, *Rethinking the Death Penalty: Can We Define Who Deserves Death – A Symposium Held at the Association of the Bar of the City of New York May 22, 2002*, 24 PACE L. REV. 107 (2003).

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**Rethinking the Death Penalty: Can We
Define Who Deserves Death?***
**A Symposium Held at The Association of
The Bar of the City of New York
May 22, 2002**

The Panelists

Martin J. Leahy**

Robert Blecker†

Hon. William M. Erlbaum†††

Jeffrey Fagan‡‡

Norman L. Greene***

Jeffrey L. Kirchmeier††

David Von Drehle‡

* In light of the defects of the capital punishment system and recent calls for a moratorium on executions, many are calling for serious reform of the system. Even some who would not eliminate the death penalty entirely propose reforms that they contend would result in fewer executions and would limit the death penalty to a category that they call the “worst of the worst.” This program asks the question: Is there a category of defendants who are the “worst of the worst?” Can a crime be so heinous that a defendant can be said to “deserve” to be executed? Would such a limited death penalty be supportable morally, philosophically, and constitutionally?

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*** Norman L. Greene is a practicing attorney in New York, N.Y., a 1974 graduate of the New York University School of Law and a 1970 graduate of Columbia College. He is a member of the law firm of Schoeman, Updike & Kaufman, LLP, New York, N.Y. At the time of the presentation of this program, he was the Chair of the Committee on Capital Punishment at the Association of the Bar of the City of New York. During his term as chair, the Committee published a number of programs, including *Governor Ryan’s Capital Punishment Moratorium and the Executioner’s Confession: Views from the Governor’s Mansion to Death Row*, 75 ST. JOHN’S L. REV. 401 (2001); *Sparing Cain: Executive Clemency in Capital Cases*, 28 CAP. U. L. REV. 513 (2000) (consisting of six articles commencing with Norman Greene’s articles, *The Context of Executive Clemency: Reflections on the Literature of Capital Punishment*, and *Clemency and the Capital Offender: An Introduction to the Power and the Punishment*). Other publications resulting from the Committee’s work include *Capital Punishment in the Age of Terrorism*, 41 CATH. LAW. 187 (2001); Norman L. Greene et al., *The Condemned*,

The Tinkerers and The Machinery of Death, 38 CRIM. L. BULL. 510 (2002); *Dying Twice: Conditions on New York's Death Row*, 22 PACE L. REV. 347 (2002); *Dying Twice: Incarceration on Death Row*, 31 CAP. U. L. REV. 853 (2003); *The Art of Execution*, 15 LAW & LITERATURE 229 (2003).

† Robert Blecker is a Professor of Criminal Law at New York Law School. He received a B.A. from Tufts University, and a J.D. from Harvard Law School. His law school thesis, *To Root in a Flowing Stream* won Harvard's Oberman Award as the best of the class of 1974. After a stint prosecuting corruption in New York City's Criminal Justice System, he returned to Harvard as a Fellow in Law & Humanities. From 1986-99, he spent 2,000 hours inside Lorton Prison, probing the lives of inner city street criminals, from which he has developed his perspective as to who deserves to die and why.

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‡ David Von Drehle is a senior writer on the National Staff of The Washington Post. He is the author of *AMONG THE LOWEST OF THE DEAD: THE CULTURE OF DEATH ROW* (1995), winner of the American Bar Association's distinguished writing award. He is a graduate of the University of Denver (B.A., 1983) and of Oxford University (M.Litt., 1985). His most recent book is *TRIANGLE: THE FIRE THAT CHANGED AMERICA* (2003).

‡‡ Professor Jeffrey Fagan received a B.A. from New York University, 1968, and a Ph.D. from the University of Buffalo in 1975. He taught at the School of Criminal Justice at Rutgers University from 1989-95, was the editor of the *Journal of Research and Crime and Delinquency* from 1990-95, and joined the faculty of Columbia School of Public Health in 1995 as a Professor and Director of The Center for Violence, Research and Prevention. He is a tenured professor at the Columbia Law School, a member of the MacArthur Foundation Research Program on Adolescent Development and Juvenile Justice, and a former member of the National Researchers Committee on the Assessment of Family Violence and Interventions. Professor Fagan serves on the Editorial Boards of *Criminology*, *Journal of Quantitative Criminology*, *Crime and Justice*, and the *Journal of Criminal Law and Criminology*. He is the one of the authors of, *A BROKEN SYSTEM*,

PREFACE

Norman L. Greene

The role of the moderator is to be an advocate for the listener, ensuring that the presentations are proceeding as planned, that the speakers are clear and have a full opportunity to express their points of views, and that the key issues are addressed. In an evening paneled by brilliant thinkers, there was little for me to do as moderator except not get in the way and enjoy the symposium, and that is what I tried to do. The results were extraordinary. However, in order to ease the reader into the symposium, I wish to highlight—although not entirely summarize—the presentations and add some thoughts of my own on capital punishment.

Can we define who deserves to die? How will we know them, and what should we do with them after we identify them? Professor Robert Blecker argues that there are some offenders so much worse than others that not only do they deserve death but also we are obligated to kill them. “[T]he ‘worst of the worst’ are real and can be known and . . . we can, and must, identify and execute them as soon as possible.”¹ He stresses the importance of our own feelings in determining who should die:

Ultimately, the question of the death penalty is a moral question, and every moral question is at its base an emotional question. So, the ‘worst of the worst’ are real; we can know them; we can be certain that they deserve to die. But we can only be certain because we *feel* certain. We can know those who deserve to die only by using a richer language of informed emotion.²

Some are “objectively the worst of the worst. We say he’s worse because he *is* worse. Really, objectively.”³ Professor Blecker finds some common ground with the other speakers, explaining why death row is over-inclusive since it contains many people who should not be death-eligible.⁴ “They are murderers, they

ERROR RATES IN CAPITAL CASES FROM 1973 THROUGH 1995 (2000), and A BROKEN SYSTEM PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES AND WHAT CAN BE DONE ABOUT IT (2002).

1. *Infra* p. 182.

2. *Infra* p. 131.

3. *Infra* p. 127.

4. Professor Blecker would also expand the death penalty, including as follows: “[c]orporate executives who knowingly maintain deadly work places, and

are guilty, they are bad, they have done terrible things, but they are not 'the worst of the worst.'"⁵ "We search for bad character, for evil, for the 'worst of the worst' *criminal* and not merely the 'worst of the worst' crime."⁶

Professor Jeffrey Kirchmeier, deftly playing on superlatives, concludes that the system is set up to seek the "worst of the worst," but it instead gets the "unluckiest of the worst," or maybe the "unluckiest of the unlucky" in the cases where the defendants are innocent, or the "sickest of the sick," since many capital defendants are "brain damaged, victims of childhood sexual and violent abuse . . ."⁷ Rather than exclusively executing the "worst of the worst" (assuming *arguendo* that could be determined), society also seems to execute, among others, the poor, the condemned who lost by narrow votes of clemency boards, defendants whose attorneys file late appeals, or defendants whose mitigating evidence surfaces too late. Executions are also based on incomplete information and vague and complicated aggravating factors, and selecting only the "worst of the worst" is not possible. "And that's the moral question: What does the death penalty say about us when we make decisions to kill a human being based on incomplete information? We know our initial reactions and feelings, but we do not really know the individual."⁸ Furthermore, regardless of his culpability at the time of the crime, the condemned may be a very different person and have even turned his life around by the time of his execution, as in the case of Karla Faye Tucker or Wilbert Evans.⁹ He will then no longer qualify as the "worst of the worst." The execution likewise devastates the "innocent relatives of the condemned . . ."¹⁰

Professor Kirchmeier rejects Professor Blecker's test:

The problem when we talk about moral outrage as being the barometer in deciding who is executed is that it ends up looking a lot

thereby callously kill their own poor employees, or knowingly pollute streams giving people cancer, deserve in my view to die for it because they are acting with heinous, atrocious and depraved indifference to human life." *Infra* p. 177.

5. *Infra* p. 130.

6. *Infra* p. 124.

7. *Infra* p. 139.

8. *Infra* p. 141.

9. *See infra* notes 120-22.

10. *Infra* p. 138.

like the obscenity test: "I know it when I see it." . . . [T]he Constitution will not tolerate arbitrariness in decisions of who lives and who dies where we can just say "well, yeah, that's one that I would kill."¹¹

To the same effect, David Von Drehle points out that "[o]ne judge can think the worst possible case is X and the next judge will say, 'no, that's not the worst, the worst is something else' " and adds "that the long running, now thirty year, attempt to identify and separate" out the worst "has not brought us any closer to the solution."¹² Capital punishment "has proven over many, many years and in every jurisdiction to leave the justice system tied up in knots, contradicting itself and ultimately failing to deliver the punishments it claims to be meting out[.]"¹³

Although not part of the program, philosopher Stephen Nathanson has written that determining who deserves to die is complex if not impossible because "we cannot count on our legal institutions to make judgments of moral desert in a fair, informed, and rational way. . . [and] even if knowledge about what people morally deserve is theoretically possible, we ought not to expect it to be obtained in the legal context."¹⁴ "Under the guise of an attempt to determine the precise degree of a defendant's moral culpability, they will simply be measuring their own degree of distaste for him and his actions."¹⁵ "Judges, prosecutors, jurors, and other officials who act within the legal system are under many practical constraints and are influenced by many factors that have nothing to do with the moral desert of an accused person."¹⁶ Furthermore, Professor Nathanson argues that "even if we can appraise people's level of moral desert, there is no specific punishment or treatment which goes with any level of desert" and "[t]here is no such thing as a uniquely appropriate punishment for any particular crime."¹⁷

11. See *infra* notes 292-93 and accompanying text.

12. *Infra* p. 167.

13. *Infra* p. 170.

14. STEPHEN NATHANSON, AN EYE FOR AN EYE: THE IMMORALITY OF PUNISHING BY DEATH 91 (2d ed. 2001). Judge Erlbaum credits, in his annotations to his remarks, Professor Nathanson, a professor of philosophy, for influencing him in diverse ways throughout this project. *Infra* note 177.

15. NATHANSON, *supra* note 14, at 92.

16. *Id.* at 91.

17. *Id.* at 95.

In a presentation described by David Von Drehle as “the classic, old-fashioned tub-thumping moral case,”¹⁸ Judge William Erlbaum contends that there is no self-defense justification for executions, since the condemned does not pose an imminent threat to the life or safety of the executioner, and an execution corrodes our tradition of not kicking someone when he is down. Execution is also a ritual killing¹⁹ which harms even the executioners²⁰ and kills the mentally impaired; rests on vengeance which is inconsistent with our law;²¹ wastes tax dollars which might be better used on the neglected murder victims’ families; and diverts trial and appellate courts from important work.²² Judge Erlbaum counters Professor Blecker’s position (as he summarizes it) to the effect that “*They* are the ‘worst of the worst.’ They deserve to die. I know that. I feel certain,”²³ by responding with his own statement of feeling which he claims has equal value to and which therefore negates

18. *Infra* p. 166.

19. See, e.g., Roberta M. Harding, *Capital Punishment As Human Sacrifice: A Societal Ritual As Depicted In George Eliot's Adam Bede*, 48 *BUFF. L. REV.* 175 (2000).

20. Executioners as a group have long been stigmatized:

The odious name of hangman . . . a stigma upon the man who bears it, and so it will be as long as it denotes one who publicly strangles another man or breaks him on the wheel. This fact is not now founded on public opinion, but on the overwhelming force of the instinct that abhors every murderer except the man who murders in self-defence; which proves incidentally that the death-penalty is contrary to nature and beyond the jurisdiction of society.

Arthur Isak Applbaum, *Professional Detachment: The Executioner of Paris*, 109 *HARV. L. REV.* 458, 479 (1995) (citation omitted). In the article, the executioner from the French monarchy to the French Revolution’s Reign of Terror, Sanson, is quoted in a fictional dialogue to the effect that the innocence or guilt of his victim is not his concern. While this must be so, one who kills and chooses to kill under these circumstances is a troubling if not perverse character. As Sanson states:

In exercising my professional duties I must set aside personal considerations. I naturally have views, held at varying degrees of certainty, about the guilt or innocence of my victims. I may personally admire or loathe those who come before me. . . . These are the views of Charles-Henri, man and citizen. But the executioner must set aside the reasons of Charles-Henri, for it is not Charles-Henri acting on the scaffold, but the Executioner of Criminal Sentences of Paris.

Id. at 483-84.

21. See LEWIS E. LAWES, *LIFE AND DEATH IN SING SING* 157 (1928) (Capital punishment “is a punishment for revenge, for retaliation, not for protection”).

22. See *infra* notes 183-206 and accompanying text.

23. *Infra* note 180 and accompanying text.

Professor Blecker's statement: "They don't deserve to die. I know that. I feel certain."²⁴ He concludes that "[t]he two testimonials nullify one another, leaving the retributionist at square one."²⁵

Professor Jeffrey Fagan describes his renowned Columbia Law School study of error-prone capital cases, frequently resulting from incompetent defense; judicial bias both in instruction, interpretation and application of the law; and prosecutorial or police misconduct. He suggests that proof be required "beyond any doubt that the defendant committed a capital crime"²⁶ and that the death penalty be barred for "defendants with inherently extenuating conditions—the mentally retarded persons, juveniles, [and] severely mentally ill defendants,"²⁷ but notes that whether errors will still haunt the system after these and other reforms are in place is an "empirical question."²⁸

I will not conclude whether it is possible to determine the "worst of the worst," leaving that analysis to the panelists. However, I would like to raise a question about the death penalty itself and what it means in a sense not raised by each of the participants as they wrestled with who, if anyone, should be the ones selected to die. No death penalty program or preface would be complete without at least a brief inquiry into what we mean when we talk about the death penalty itself. Specifically, my question is whether the death penalty—total corporal punishment—is merely a euphemism masking numerous consequences which are inconsistent with modern moral notions. Is our use of language masking a series of unacceptable tortures with the name of the death penalty?²⁹ Is there anyone who would doubt that any one of the following would be inconsistent with our society's values—blinding someone, depriving him of speech or hearing, rendering him paralyzed, destroying his

24. *Infra* p. 153.

25. *Id.*

26. *Infra* note 162 and accompanying text.

27. *Infra* p. 149 (citation omitted).

28. *Infra* p. 150.

29. For the horrifying consequences of executions themselves, see Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 412 (1997) (describing "botched executions" by electrocution, lethal injection, and lethal gas since the United States Supreme Court's 1976 decision in *Gregg v. Georgia*, 428 U.S. 153 (1976)); *id.* at 419-20 (the botched electrocution of Wilbert Evans who was mentioned in Professor Kirchmeier's presentation).

memory, and leaving him without feeling? Yet if we take all of these tortures and call them death—for surely death has all the effects of these actions and more, the individual consequences seemingly can be ignored.³⁰

Furthermore, should we allow a condemned person to substitute a severe corporal punishment, but one less than death, and if not, why not? Through a few sentences in *The Gulag Archipelago*, author Aleksandr Solzhenitsyn implicitly makes the same inquiry, describing Russian Empress Elizabeth's replacement of execution "with flogging with the knout; tearing out nostrils; branding with the word 'thief;' and eternal exile in Siberia" and wonders whether the prisoner condemned to death today would voluntarily consent to such punishments so long as he could live, but "we, in our humanitarianism, don't offer him that chance."³¹

Finally, Professor Blecker comments that some may accept that there are evil people deserving of death "without embracing a correlative obligation of society to kill them." He notes one rationale for this position—not trusting the State "to do it right"—is a "cynical rejection of government."³² But in response, one might ask who is administering the judicial system; why they might not be trusted; and whether there is good reason for it. This leads, among other things, to an examination of judicial selection reform, and in particular, the dubious effect of judicial elections on our criminal justice system in capital as well as non-capital cases and even civil cases. Commentators have noted that incumbent judges have been attacked and defeated in judicial elections for their decisions in capital cases, and the death penalty overall has played a prominent role in the election, retention and promotion of judges, as well as

30. See Norman L. Greene, *The Context of Executive Clemency: Reflections on the Literature of Capital Punishment*, 28 CAP. U. L. REV. 513, 531, 547-49 (2000) (citing, among other things, Victor Hugo, to the effect that prosecutors use euphemism to describe the "bloody [guillotine] basket" to make it appear "rose-tinted and respectable"). Executions also present particular problems in a secular age such as ours where there is no consensus that an afterlife follows execution and therefore on where, if anywhere, the condemned goes after death. Modern executions have been viewed as the assertion of the right to send the souls of the condemned to places unknown. *Id.* at 549 (citing Victor Hugo).

31. ALEKSANDR I. SOLZHENITSYN, *THE GULAG ARCHIPELAGO 1918-1956: AN EXPERIMENT IN LITERARY INVESTIGATION* 432 (Thomas P. Whitney trans., 1973).

32. *Infra* p. 129.

shaped the campaign debate.³³ As the American Bar Association has found, incumbents risk “losing their tenure when they uphold unpopular laws, invalidate popular laws, or protect the rights of unpopular litigants,” including capital defendants.³⁴ This has led to calls among writers in capital punishment literature for replacement of the elective system with an appointment system for judges with terms of substantial length.³⁵ These calls have been echoed by others focusing on the perni-

33. A.B.A., JUSTICE IN JEOPARDY, REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY, 20 (2003) [hereinafter JUSTICE IN JEOPARDY]. See 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 (1995); see Ronald J. Tabak et al., *Capital Punishment: Is There Any Habeas Left in This Corpus*, 27 LOY. U. CHI. L.J. 423, 529-32, 569-80 (1996); see Richard R. W. Brooks & Steven Raphael, *Life Terms or Death Sentences: The Uneasy Relationship Between Judicial Elections and Capital Punishment*, 92 J. CRIM. L. & CRIMINOLOGY 609, 610, 638 (2002) (authors “observe a strong relationship between election years for judges and the likelihood that a defendant will receive a death sentence,” and “even in a jury trial, judges were still able to influence the juries’ decisions in various ways, particularly through jury instructions”); Bright & Keenan, *supra*, at 812 n.280 (“judge can influence the course of a case by his tone, body language, relations with counsel, and rulings on evidentiary points,” referring to an account of the “Scottsboro Boys” case). An attempt has been made by North Carolina attorney Bruce Cunningham to seek a moratorium on the death penalty pending the establishment of an appointive judicial selection system which has obtained editorial support. See Editorial, *Impose Death Sentence on Judicial Elections*, PILOT, N.C., Oct. 7, 2002, at C1 (“North Carolina can have an independent, impartial judiciary, or it can have an elected judiciary. It can’t have both. That’s especially true with respect to cases involving the death penalty.”). Former North Carolina Chief Justice James Exum described how his election opponents raised the issue of the number of his dissents in death penalty cases, requiring him to demonstrate the amount of times he concurred in cases sustaining the death penalty. Ronald J. Tabak et al., *supra*, at 530.

34. *Id.* at 19; see also Brooks & Raphael, *supra* note 33, at 611 n.8 (“The term ‘political suicide’ is often used to describe the likely consequences when elected officials appear unsupportive of capital punishment.”). See also *Harris v. Alabama*, 513 U.S. 504, 519 (1995) (Stevens, J., dissenting) (“[H]igher authority’ to whom present-day capital judges may be ‘too responsive’ is a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty.”).

35. Bright & Keenan, *supra* note 33, at 818. Such a system for election of judges should be replaced by an appointive selection system in which a “bipartisan judicial qualifications commission” with both lawyers and non-lawyers “nominates a slate of qualified candidates to the executive, who then nominates a judge subject to confirmation by at least one branch of the legislature.” *Id.* Evaluation of the judge would not be by retention election but rather by evaluation by a commission. *Id.*

cious effects of judicial elections on civil justice as well.³⁶ Professor Fagan also confirmed a correlation between a state's rate of serious error in capital cases and its elected judiciary.³⁷

I hope that our readers will study these wonderful presentations, which our speakers have expanded with scholarly footnotes since the night of the symposium, as they refine their positions on capital punishment and participate in the ongoing debate.

Martin J. Leahy

My name is Martin J. Leahy; I am a solo practitioner here in New York and a member of the Committee on Capital Punishment. I would like to thank all those people who are responsible for putting this program together; Norman Greene, who is the Chair of the Capital Punishment Committee, Jeffrey Kirchmeier, and the Honorable William M. Erlbaum. I would also like to thank Kevin Doyle, the Honorable Barbara Jaffe, Russell Neufeld, Carlos Diaz-Cobo, and Maria Pedraza-Perez, who are also members of the Committee.

I was very fortunate when I was in law school to have Robert Blecker as my Criminal Law professor; in fact, I made it a point to take every course I possibly could with him while I was there. While I do not agree with his views on capital punishment, I believe that he has a very important message to present. While Robert Blecker supports the death penalty, he believes that the current statutes are too broad, and that fundamental changes need to be made in the capital punishment system, restricting the death penalty to only those of the most heinous murderers, those he calls the "worst of the worst."

While this program was being formulated a number of important events occurred which makes tonight's program even more relevant. The Illinois Commission set up by Governor George Ryan to study the Illinois capital punishment system came back with a very lengthy list of fundamental changes that had to be made in their state's capital punishment system;³⁸ the

36. See JUSTICE IN JEOPARDY, *supra* note 33.

37. *Infra* pp. 143.

38. See COMM'N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT (2002), available at http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/complete_report.pdf [hereinafter Illinois Report].

Constitution Project also released a report entitled *Mandatory Justice: Eighteen Reforms to the Death Penalty* in which it too proposed fundamental changes be made.³⁹ Columbia University released *Broken System Part II: Why Is There So Much Error in Capital Punishment, and What Can Be Done About It*.⁴⁰ The report was co-authored by Professor James Liebman and Jeffrey Fagan who we are very happy to have on our panel tonight. Most recently, within the last couple of days a new Gallup poll was released showing increased support in the last year for the death penalty. The recent Gallup poll shows that 72% of those that were questioned support the death penalty for murder, up from 68% last year. The poll also shows that two-thirds of those questioned believe that the death penalty is morally acceptable. When given a choice between life imprisonment and death, 52% chose death. Most disturbing, however, is a statistic that nearly half of those responding said that the death penalty is not imposed often enough, while only 22% responded that it was imposed too often and 24% responded that it is imposed just the right amount of times.⁴¹ That brings us to tonight's program; our distinguished panel will address the issue of who deserves to die. Robert Blecker suggests that there is a category of killers who are the "worst of the worst" and that they deserve to die, but who are they and how do we define who they are?

I will introduce tonight's panel now so that we don't have to interrupt the flow of the presentation. Professor Robert Blecker from New York Law School got his B.A. in 1969 from Tufts University, got his J.D. from Harvard in 1974, and he was a Balch Traveling and Playwright Fellow in 1969 and 1970. He received Harvard Law School's Oberman award for best graduating thesis in 1974, entitled *Root in a Flowing Stream Game and*

39. THE CONSTITUTION PROJECT, *MANDATORY JUSTICE: EIGHTEEN REFORMS TO THE DEATH PENALTY* (2001), available at <http://www.constitutionproject.org/dpi/MandatoryJustice.pdf> [hereinafter The Constitution Project].

40. JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT* (2002), available at <http://www2.law.columbia.edu/brokensystem2/report.pdf> [hereinafter Columbia Study II].

41. Jeffrey M. Jones, *Slim Majority of Americans Say Death Penalty Applied Fairly: Support for the Death Penalty Higher Than in Recent Years*, available at <http://www.gallup.com/content/login.aspx?ci=6031> (last visited May 1, 2004).

Sport, which was sponsored by Lawrence Tribe. He wrote an anti-federalist monologue entitled *Vote No!* which premiered at the Kennedy Center in Washington, D.C. After witnessing it every audience but one voted no on ratification of the Constitution. I trust he will be less successful with tonight's topic. He was a special assistant Attorney General in the office of special anti-corruption prosecution in New York State from 1974 to 1975. He was a Harvard Fellow in Law and Humanities in 1976 and 1977. He is currently a professor at New York Law School where he teaches a variety of courses in criminal law, including a course on the death penalty, which he co-teaches with another instructor. Originally he taught the course with Russell Neufeld, now he teaches it with Martin McClain, both of whom are very prominent capital defenders. From 1986 to 1999 he spent thirteen years and several thousand hours interviewing inmates at Lorton Prison. Among his writings on the death penalty are *Among Killers*, *Searching for the Worst of the Worst*, which was published in the Washington Post on December 3, 2000; also in that issue was *Getting the view from Lorton*. He is also the author of an upcoming book being published by Basic Books entitled *Who Deserves to Die*.

Our second panelist is the Honorable William M. Erlbaum, who received his B.A. in sociology from Brooklyn College, received an M.A. in sociology from the University of Connecticut, and received his J.D. from Brooklyn Law School. He is an Acting Justice of the New York State Supreme Court, Criminal Branch. This is his twenty-fourth year on the bench. He is an adjunct professor of law at Brooklyn Law School. He is also an adjunct professor of political science at York College, which is part of CUNY, where he teaches a seminar on the death penalty, entitled *Capital Punishment: The Politics of Death*. He is a former chair of the International Criminal Law Committee of the New York State Bar Association. He is also a member of the International Human Rights Committee of the State Bar. He is a member of the Project for the Homeless, here at the Association of the Bar of the City of New York, and he is also a member of the Capital Punishment Committee.

Our third speaker is Professor Jeffrey Fagan. He has a B.A. from New York University, 1968; Ph.D. from the University of Buffalo in 1975. He taught at the School of Criminal Jus-

tice at Rutgers University from 1989 to 1995. He was the editor of the *Journal of Research and Crime and Delinquency* from 1990 to 1995. He joined the faculty of Columbia School of Public Health in 1995 as a Professor and Director of the Center for Violence, Research and Prevention. He is a professor at the Columbia Law School. He is a member of the MacArthur Foundation of Research Program on Adolescent Development and Juvenile Justice. He is a former member of the National Researchers Committee on the Assessment of Family Violence and Interventions. He serves on the Editorial Boards of *Criminology*, *Journal of Quantitative Criminology*, *Crime and Justice* and the *Journal of Criminal Law and Criminology*. He has written quite extensively, and it would be impossible to list all the published works he has produced. Therefore, I will just mention that he is the co-author, along with Professor James Liebman, of *A Broken System, Error Rates in Capital Cases from 1973 through 1995*, and *A Broken System Part II: Why There Is So Much Error in Capital Cases and What Can Be Done About It*.

Jeffrey Kirchmeier is a professor at CUNY School of Law. He received his B.A. and J.D. degrees from Case Western Reserve University, which gave him the University's 1998 Young Alumni Award for achieving distinction in a profession. Prior to coming to CUNY School of Law, he was a Forrester Teaching Fellow and Lecturer in Law at Tulane Law School. Before that he was a staff attorney at the Arizona Capital Representation Project where he represented indigent capital defendants in state appeals, state post conviction proceedings, federal habeas corpus proceedings, and clemency hearings. Additionally, he was an adjunct professor at Arizona State University Law School. He was the editor of a quarterly publication on legal developments in the death penalty area. The author of several articles about the death penalty, he remains active in this area, having worked on capital cases in a number of states. His most recent law review articles are about the Sixth Amendment Right to Counsel, the United States Supreme Court's death penalty jurisprudence and sources used by the United States Supreme Court.

David Von Drehle was twice honored by the American Bar Association for outstanding coverage of the justice system, in-

cluding his book *Among the Lowest of the Dead: The Culture of Death Row*, an examination of the death penalty as it has been applied in Florida. He is currently the senior writer on the national staff of the Washington Post.

Our moderator for tonight's program is Norman L. Greene. He is the chair of the Committee on Capital Punishment of the Association of the Bar of the City of New York and a member of the New York City law firm Schoeman Updike & Kaufman, LLP, where he practices civil litigation. He graduated from Columbia College in 1970 and New York University School of Law in 1974. He has published a number of book reviews on the death penalty in the *New York Law Journal* from 1998 through 2002. He has been interviewed on radio and elsewhere on the subject of the death penalty. He has made presentations on the death penalty before religious, professional and student groups and in 2000 published an extensive study of the death penalty in the *Capital University Law Review* in Columbus, Ohio. He and the Committee on Capital Punishment have also organized and sponsored a number of Association programs on capital punishment, including *Governor Ryan's Capital Punishment Moratorium and the Executioner's Confession: Views from the Governor's Mansion to Death Row*; *Sparing Cane: Executive Clemency and Capital Cases* (which featured Dr. Pat Robinson); *The Art of Execution*; *The Condemned, the Tinkerers and the Machinery of Death: Capital Punishment in New York Before 1965*; and *The Death Penalty In The Age of Terrorism*, which was just presented last month; and *The Ethics of Death*, a continuing legal education course on capital punishment. And now I would like to turn the podium over to Norman Greene.

Norman L. Greene

I am the moderator tonight, but Martin made my job a lot easier. These introductions were wonderful, and I have little to add at this time. I would like to thank Martin, in particular, who initiated the idea for this program. Martin came up with the idea, basically because Robert Blecker was his professor at New York Law School, Martin took five courses with him, and this is his sixth. I also am glad to be on the same panel as David Von Drehle. His book on the death penalty called *Among*

the Lowest of the Dead: The Culture of Death Row is a classic.⁴² That it is apparently not in print anymore is rather shocking, and I hope that this will be remedied soon. This is one of the first books that got me started in the capital punishment field, and I recommend it to all of you.

The program will run as follows. We are going to start with Robert Blecker. He thinks that his position is different than everyone else's. He has suggested that we have an abolitionist cabal here, and he wants to be the first speaker. After that we are going to hear from Jeffrey Kirchmeier, followed by Jeffrey Fagan, then Bill Erlbaum, and lastly, David Von Drehle. Then, keeping with the spirit of the program, there will be a rebuttal by Robert Blecker, and that will be followed by questions among the panelists.

In preparation for tonight's program, many if not all of the panelists have seen the tape of Robert Blecker's speech delivered in Oregon a few months ago at a death penalty forum.⁴³ I have watched it many times. "The past counts," Mr. Blecker, as you said in Oregon.

I am delighted that we have the Pace Law Review attending tonight and publishing this program. Having a publication by a first-class law review like Pace is very important to us, and I want to recognize Kevin Wilson, who is here with us tonight to witness the program, who is the incoming Editor-in-Chief of the Pace Law Review.

Finally, for those of you who are following our committee's work, we have a program on the death penalty next month, which is the last of three which we have grouped together this spring. That program is on death row, and I ask you to come.⁴⁴ The prior program was on death penalty and terrorism.⁴⁵ Bill Buckley, who is our program chair on the death row program, is here tonight as well.

We will start with Robert Blecker.

42. DAVID VON DREHLE, *AMONG THE LOWEST OF THE DEAD: THE CULTURE OF DEATH ROW* (1995).

43. Videotape: *Politics, Justice and the Death Penalty* (Wayne Morse Center for Law and Politics, University of Oregon 2002).

44. See Norman L. Greene et al., *Dying Twice: Incarceration on Death Row*, 31 CAP. U. L. REV. 853 (2003).

45. See Norman L. Greene et al., *Capital Punishment in the Age of Terrorism*, 41 CATH. LAW. 187 (2001).

Robert Blecker

At the outset, let me point out what this discussion is not about: it is not about the sport of capital punishment. As I define the difference between a game and sport, in a game, the move chosen is the move made—automatically. The critical moment is in the choice of the move, not in its execution. The game of chess, for example, could be played without a board and without pieces. The greatest chess player might be paralyzed and unable physically to make any moves, but proof that the game had been mastered would lie exclusively in selecting the right move.

A sport is more complex. Success requires not only *choosing* the right move, but also *making* it well enough. Thus, a football coach or baseball manager can call the plays. The quarterback or the batter has to execute the play called, actually throw the pass, or lay down the bunt. Executing well can be more important than choosing right. (Thus, most professional athletes get paid more than the coaches who call their plays for them). The law of the death penalty is like that too.

Many conferences on capital punishment these days focus on the sport—the process. Speakers recount all that can and does go awry between the choice of move—the legislature’s definitions of capital murder—and the execution chamber. They emphasize prosecutorial problems in deciding which cases among the potentially death-eligible to prosecute as capital; they explore class or race bias, political and media pressures in the determination of who gets prosecuted capitally. Experts may dwell upon the quality of the representation or sources of error in the sentencing phase, stemming from jury prejudice or misdirection.

Again, even in the apparent “capital sentencing game,” the interval between the choice of move and its execution is critical. The jury says “you should die;” but do the people actually put to death a condemned person? Those who would consider the sport of capital punishment sentencing may focus upon the appellate process with its necessary and unnecessary delay, or upon conditions in death row as the condemned awaits a legal fate, which will be more likely than not, pre-empted by nature.

Here today, I hope we will *not* focus on the execution, the performance, the process, the sport. I hope, instead, we can as-

sume that moves chosen will be made exactly as planned, knowing full well they can never and will never be made exactly as planned. I hope we will consider, instead, the plan itself and assume it will play out as we designed it. What would be the structure, the content of that plan? What materials would we use? How would we shape an ideal death penalty regime? Assume the legislature's formal declaration plays out in fact. Assume our representatives could and would define the most heinous crime and attach the appropriate penalty. Assume a jury could and would translate legislative commands into action. Of course, we should always remember that built into the game there is the jury spin, which determines in the sentencing phase whether or not this particular individual, a convicted murderer, already found to have committed a most heinous crime, although death eligible, deserves to die.

The capital sentencing process—the particular decision to condemn or not—remains the essential sport, somewhat indeterminate in its actual execution. But again, these comments today are about the “worst of the worst.” This is the substance of the death penalty law.

Consider several questions, all revolving around substance. Are some homicides objectively worse than others? Can the truly “worst of the worst” be described in advance? I hope we will move beyond the murders and address the murderers themselves as human beings. Are some really so much worse than others that they *deserve* society's ultimate punishment?

Eleven-year old Bobbie-Jo Brown went to make a telephone call at a convenience store near her house. On the way, she was swept into a truck by two strangers. They took her to a riverbank; they raped her; they mutilated her. They took pointed sticks and shoved them up her vagina so deeply inside her that they pierced her abdomen. When she begged for her life, they smashed her face with a brick. An hour later the child died.⁴⁶

They are the “worst of the worst.” They deserve to die. I know that. I feel certain; and those two words are crucial. *I feel certain*, therefore, I am certain. Feeling—emotion—informed emotion—is very much part of a jurisprudence that is necessary and sufficient for the death penalty. Feelings of moral certainty

46. State v. Brogdon, 426 So. 2d. 158, 163 (La. 1983).

drive the legislature to define and the jury to decide questions of life or death.

The United States Supreme Court made a huge mistake in my view, as did much of the legal profession since Aristotle, when they attempted to sever emotion from law and instead, confine themselves exclusively to rational questions in determining the Constitutional and moral status of the death penalty.⁴⁷ Emotions must and should be fundamentally part of any death penalty decision. The murderer's attitude counts, as do our feelings about his feelings at the moment he or she killed.

Some abolitionists and most advocates today believe that emotion is properly part of the death penalty. But what must we "feel certain" about? Surely that he did it. That determination of guilt or innocence is based largely on rational fact-finding. At sentencing, however, we search for more than guilt. We search for bad character, for evil, for the "worst of the worst" *criminal* and not merely the "worst of the worst" crime.

When we search for evil, when we determine who should die, are we chasing after anything real? This question goes to the foundation of western culture: "What there is" really? "You cannot step twice into the same river; for fresh waters are ever flowing in upon you," Heraclitus famously declared in the sixth century, B.C.⁴⁸ But he also insisted, "man's character is his fate."⁴⁹ The Sophists followed Heraclitus in denying that there was any reality. There was no "truth." Good and bad—the "worst of the worst"—was all a matter of how those in power defined and enforced it, how it could be made to appear at the assemblies and law courts. Everything was relative, subjective and arbitrary. Whatever a person could be convinced of, whatever a culture thought right or wrong became right or wrong for it, and nothing more could be said. There was no greater reality to be known and acted upon.⁵⁰

47. *Cf.* *California v. Brown*, 479 U.S. 538 (1987).

48. BERTRAND RUSSELL, *THE HISTORY OF WESTERN PHILOSOPHY* 45 (1945).

49. CHARLES H. KAHN, *THE ART AND THOUGHT OF HERACLITUS: AN EDITION OF THE FRAGMENTS WITH TRANSLATIONS AND COMMENTARY* 81 (2d ed. 1981).

50. Paul Woodruff, *Rhetoric and Relativism: Protagoras and Gorgias*, in *THE CAMBRIDGE COMPANION TO EARLY GREEK PHILOSOPHY* 290-310 (A.A. Long ed., 1999).

So from Heraclitus we have a vision of the universe, including the moral universe, as perpetually in flux and flow, a continuum with infinite distinctions constantly shifting. Nothing really repeats itself; truth isn't real.⁵¹ And from the Sophists we also have relativism. "Man is the measure of all things . . ."—the measure and measured.⁵² It's all appearance and spin, subjective and arbitrary; everything is all and only what it seems; truth isn't real.

Today, twenty-five hundred years later, contemporary skeptics insist that the death penalty is not only unworkable in practice, but also unreal in principle. They insist that this category that we seek, the "worst of the worst," simply is not real, or it is really only whatever we say it is.

Plato and Aristotle directed their main attack against this point of view. They insisted that essences were real and can be known.⁵³

Today's retributive advocate follows that lead. We insist that evil is real. Some people really deserve to die and not because we say so. Rather, we say so *because* they really deserve to die. Really, objectively, they are the "worst of the worst."

How do we know them? There are several ways. One is by enumeration. The killers of eleven-year-old Bobbie-Jo Brown are the "worst of the worst." Dr. Swango, the doctor who killed perhaps thirty, perhaps sixty, patients who were very sick, whose misery he was sparing, the young as well as the old, as he explained in his journal, simply because he enjoyed watching people die. It made him feel alive.⁵⁴

We can point to the "worst of the worst" without ever defining them. Richard Speck raped and killed eight student nurses in Chicago; it would have been nine, but he lost count and left alive the last terrified eyewitness as she hid under a bed.⁵⁵

51. Edward Hussey, *Heraclitus*, in *THE CAMBRIDGE COMPANION TO EARLY GREEK PHILOSOPHY*, *supra* note 50, at 93-101.

52. RUSSELL, *supra* note 48, at 77.

53. *See generally* 2 WILLIAM KEITH CHAMBERS GUTHRIE, *A HISTORY OF GREEK PHILOSOPHY* 4-6 (1962).

54. Associated Press, "Doctor Death" Given Life Term After Admitting to 1984 Killing, *HOUS. CHRON.*, Oct. 20, 2000, at A24. *See* JAMES B. STEWART, *BLIND EYE: HOW THE MEDICAL ESTABLISHMENT LET A DOCTOR GET AWAY WITH MURDER* (1999).

55. *See* Dennis L. Breo, *July 14, 1966*, *CHIC. TRIB.*, July 6, 1986 (Magazine), at 1; Sarah Helm, *Speck Case Stirs Debate about Parole for Violent Offenders*, *HOUS.*

Ted Bundy is profiled in David Von Drehle's beautifully written book—*Among the Lowest of the Dead: The Culture of Death Row*.⁵⁶ This powerful account is, however, radically ambiguous about whether the “worst of the worst” really exist, because it was written by an author who is radically ambivalent about this issue. Von Drehle wrote that “[o]ne person would be executed while the next one, whose crime might seem much worse would not.”⁵⁷ Why only “seem” worse? Why not flat out say “the crime *was* worse?” “[E]specially heinous, atrocious, or cruel,”⁵⁸ Von Drehle continues later, “was an attempt to define the undefinable.”⁵⁹ “The law was spongy at its core”⁶⁰ “[E]ach criminal and crime was subtly unique.”⁶¹ “Somehow, using the black-and-white of the criminal code, the system must determine the very nature of evil . . . [despite] the slippery heart of the new law[s]”⁶²

Here we profoundly disagree. The core is not slippery or spongy—it is hard and real obvious.

Even abolitionist studies such as Columbia's, co-authored by Jeffrey Fagan,⁶³ not only point out error but urge reform, principally by eliminating the midrange of seriousness and, instead, confining death eligibility to the “worst of the worst.” Studies like these, widely cited by abolitionists as support for ending the death penalty, nevertheless presuppose what Von Drehle seems to deny, that the “worst of the worst” are real and can be described in advance.

Now, whether this reformers' strategy embodied in the Columbia Study is merely a stop along the way to abolition, I leave for future events to reveal. Whether it stems from a post-September 11th realization that 90% of the American people might support the death penalty in *some* cases, or from a fear that some States with the penalty would expand it, while others who

CHRON., Sept. 13, 1987, at 7; Lynda Gorov, *Speck—The Man No One Can Forget*, CHIC. SUN TIMES, Aug. 25, 1987, at 7.

56. VON DREHLE, *supra* note 42.

57. *Id.* at 6.

58. *Id.* at 156.

59. *Id.*

60. *Id.* at 161.

61. VON DREHLE, *supra* note 42, at 165.

62. *Id.*

63. Columbia Study II, *supra* note 40.

have abolished it might reinstitute it, so that it is better to limit what we cannot yet eliminate, or from a genuine goal to attempt a morally refined death penalty, it suggests a convergence—a common search for the “worst of the worst.”

We insist that there exists such a category, the “worst of the worst,” and that it can be known in several ways. Again, let’s point to some: Hitler, Swango, Bundy, Dahmer, Idi Amin, Manson, McVeigh, Ng. and Rolling. We can point to them, and we can define them as a class—especially heinous, atrocious, or cruel.

We find support for the common understanding that some crimes and criminals are worse than others in longstanding cultural commitments. Going back thousands of years to the twin sources of Western culture in both ancient Athens and in the Old Testament in which homicide is different from other kinds of crimes, accidental killings are distinguished from intentional murders. In short, 2,500 years ago and today, not all killings are alike. Some are worse than others. In the Old Testament, one who kills another accidentally, or by today’s standards negligently, is less bad than a reckless killer (although the boundary between recklessness and aggravated depraved recklessness is subtle and challenging). In the Old Testament, a person who kills negligently or accidentally is permitted to flee to cities of refuge, where he or she will be exempt from the death penalty.⁶⁴ Whereas one who kills intentionally is rightfully the target of the blood avenger, the next of kin of the victim, and subject to being killed.⁶⁵ In short, for thousands of years, since its infancy, Western Culture has recognized that not *all killings* are alike.

Of course, that assumes the even more incontrovertible idea that not all crimes are alike and of equal moral gravity. Murder is worse than petty theft. This is not because of how we define things. The mass murdering rapist is worse than the petty thief not because we say he is. He is simply worse. We say he’s worse because he *is* worse. Really, objectively.

However arbitrary abolitionists will try to make it, there’s moral truth to the “worst of the worst.” At the end of the eight-

64. See *Deuteronomy* 19:4.

65. See *Deuteronomy* 19:11-12.

eenth century, 2,300 years after the ancient Hebrews and the ancient Greeks declared basic distinctions among homicides and acted on them, Pennsylvania first divided murder into degrees. This new first degree murder was composed of premeditated and felony murder for which alone the death penalty was reserved.⁶⁶ It was crude and underdeveloped, but it was a step forward.

Is the death penalty constitutional under the United States Constitution? According to the original intent of the ratifiers, it is undeniably constitutional. The First Congress, largely drawn from those in Philadelphia, enacted the first criminal code and included the death penalty, even for crimes other than murder.⁶⁷ This is primary evidence that the Framers intended that there be a death penalty. The Fifth Amendment clearly anticipates a death penalty.⁶⁸ It does not command it, but it anticipates and assumes it. So, if one is guided by original intent, unquestionably the death penalty is constitutional for the "worst of the worst," however poorly and broadly defined are those most pernicious criminals.

But standards of decency can evolve, and "cruel and unusual" can acquire new meaning. We mature. As well as denying objective standards, the Sophists also stood for progress.⁶⁹ The United States Supreme Court also embraced that idea of "evolving standards of decency that mark the progress of a maturing society."⁷⁰ Nobody concerned with human dignity in this culture today would embrace either the initial categories of death penalty offenses as propounded by that First Congress or the Old Testament itself. Some of these past death penalty offenses were worshipping a different God,⁷¹ committing adultery,⁷² engaging in consensual sodomy,⁷³ and disrespecting one's

66. ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1954: REPORT 485-86 (1953).

67. Act of Apr. 30, 1790, ch. 9, § 1, 1 Stat. 112; §§ 3, 8, 1 Stat. 113-14; § 14, 1 Stat. 115; see Roy K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 *FORDHAM URB. L.J.* 347 (1999).

68. See U.S. CONST. amend. V.

69. See WILLIAM KEITH CHAMBERS GUTHRIE, *THE SOPHISTS* 242 (Cambridge Univ. Press ed., 1971).

70. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

71. See *Deuteronomy* 17:1-6.

72. See *Leviticus* 20:11.

parents⁷⁴ (upon consideration, maybe that one's not so bad). No one seriously would embrace them today as offenses punishable by death. In fact the United States Supreme Court has declared they are not punishable at all.⁷⁵

So we know there exists the "worst of the worst," that we are out to find it, that it is real, that we have a responsibility to act on it, and yet, all the while we are progressively knowing it better.

Let me be clear. One can acknowledge that the "worst of the worst" is real, as does the Columbia Study,⁷⁶ without supporting the death penalty. One can even take the next step, which I expect many abolitionists secretly do, and acknowledge that some people are so evil, so vicious, so monstrous that they do deserve to die, without embracing a correlative obligation of society to kill them. Many abolitionists simply do not trust the State to do it right. Whatever the government gets involved in, including the death business, it inevitably screws up, they say. Since we are talking about something as solemn as the value of human life, we can't trust the government to take it. I find this a helpful caution, but ultimately a cynical rejection of government.

So, I hope we do engage in a dialogue about this here tonight. Searching for the "worst of the worst," reserving whatever the worst punishment that society may have, whether it is life, life without parole, or death, for those "worst of the worst" is a real requirement for a system of justice, however problematic at the periphery.

The problem is compound. "Worst of the worst," although real, is ambiguous. "Worst of the worst" what? The "worst of the worst" crimes, or the "worst of the worst" criminals? Which is it? *Who* is it that deserves to die? Reference was made to the Illinois report.⁷⁷ The Illinois report points out that a substantial minority "favoring the death penalty believe it retains an

73. See *Leviticus* 20:14.

74. See *Exodus* 21:18.

75. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

76. See generally Columbia Study II, *supra* note 40; cf. Robert Blecker & James S. Liebman, *Common Ground: Let's Break the Impasse on Death Penalty*, Hous. Chron., May 25, 2003 (where James Liebman, the Columbia Study's lead author, joins me in acknowledging this reality) (on file with the author).

77. Illinois Report, *supra* note 38.

important role in our punishment scheme in expressing, on behalf of the community, the strongest possible condemnation of a small number of the most heinous *crimes*.”⁷⁸ Professor Michael Radelet was commissioned as part of this to study whether “the death penalty was being applied to the ‘worst’ *offenders*”⁷⁹ So is it offenses, offenders, crimes or criminals when we talk about the “worst of the worst?”

We should untangle the ambiguity in my view, as we do now: In the first trial during the guilt or innocence phase, our focus is on the crime, and that’s what makes a person death eligible. Then we move onto the penalty phase, where the focus is upon the person and the character. Now, I know traditionally many devout Christians maintain after St. Augustine that we should “hate the fault and love the man.”⁸⁰ It violates human nature in the extreme to continue to love a mass murdering rapist; it forces us to abandon so much at the core of our culture. Our experience in the world forces us to confront vicious predators who destroy and denigrate human life with an attitude incommensurately cruel and callous. One hates the sinner in large part because of the sin. The vice, the viciousness reveals character by action. Acts and attitudes make up character, and a man’s character, as Heraclitus said wisely in the sixth century, B.C., “is his fate.”⁸¹

That which we ultimately condemn when we condemn the “worst of the worst” is the person, the character—who he or she is—which we know through this and other acts and attitudes. The “worst of the worst” are bad, really bad.

Major studies correctly urge us to shrink the aggravating circumstances so that we reduce the number of death eligibles. We should vastly reduce death row from the present 3,500 or so.⁸² Probably 80% are not *really* the “worst of the worst.” They are murderers, they are guilty, they are bad, they have done terrible things, but they are not the “worst of the worst.” The

78. *Id.* at pbml. iii (emphasis added).

79. *Id.* at 7.

80. ST. AUGUSTINE, THE CITY OF GOD 14:6 (Henry Bettenson trans., Penguin ed. 1984).

81. KAHN, *supra* note 49, at 81.

82. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, BULL. No. NCJ 201848, CAPITAL PUNISHMENT, 2002 1 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp02.pdf>.

other 20% also do not belong on death row; they should be dead. So, we have to resolve in our own minds, if we are committed to marking the “worst of the worst,” to what are we committed? It’s not enough to define the crime; we are also committed to defining the person. In doing that, we cannot ultimately be confined by a rational set of categories.

Here, again, Heraclitus was right: To capture flux and flow and progress as mathematicians have shown us, requires more than the rational. Reason alone is not enough. We need not so much an irrational as a non-rational richer language. We need emotion for a real idea of who deserves to die. The categories should limit us, but discretion to decide who lives or dies must be based on informed emotion, or “reflective intuition” as some moral philosophers call it.⁸³

Ultimately, the question of the death penalty is a moral question, and every moral question is at its base an emotional question. So, the “worst of the worst” are real; we can know them; we can be certain that they deserve to die. But we can only be certain because we *feel* certain. We can know those who deserve to die only by using a richer language of informed emotion. I am prepared to get specific about who they are and hope we will focus there.

Norman L. Greene

Our next speaker will be Jeffrey Kirchmeier.

Jeffrey L. Kirchmeier

I guess I will recommend David Von Drehle’s book too.⁸⁴ I have read it, and it is an excellent book. I have recommended it to several people.

I have to start with the process of the death penalty system. I cannot completely ignore the process issue, because my journey with the death penalty began with it. At one time if you had asked me, like Professor Blecker, I would have said that I was in favor of the death penalty. When I graduated from law school, I would have probably said that I was in favor of the death penalty. I would like to think I that have become smarter since that time, though I am not always sure if that is true.

83. See Hussey, *supra* note 51.

84. VON DREHLE, *supra* note 42.

I became involved with the death penalty when working for a large law firm, in Washington, D.C., on a pro bono case that the firm was handling. That leads me to another commercial break, because I also should say that if anyone is interested in finding out more about how your firm can get involved in doing a capital case, you should contact Norman Greene or me at the Committee on Capital Punishment of the Association of the Bar of the City of New York, because there are a lot of capital defendants around the country who need representation.

Anyway, my first exposure to the death penalty, at the law firm, raised a lot of procedural concerns for me. That experience was one of the reasons I eventually left to do death penalty cases full-time. Among my concerns about the death penalty were the racial compositions of death rows and the fact that often the sentence depends upon the race of the victim. Racial disparity is the concern that recently led Maryland to adopt a moratorium on executions, to look further at that problem.⁸⁵ Additionally, the death penalty is used predominantly on the poor, whether they are the “worst of the worst” or not.⁸⁶ Clinton Duffy, a former warden of St. Quentin said, “The death penalty is the privilege of the poor,”⁸⁷ and that’s true. Prosecutorial discretion results in not necessarily always finding the “worst of the worst.” The fact that the defendants are poor often results in poor representation, attorney’s errors, etc.

The firm where I worked handled a case that had substantial evidence of innocence but the previous lawyers had filed a notice of appeal one day late. Later, the courts would not look at that evidence because of the missed deadline.⁸⁸ There are several examples like that. Recently, the Illinois Commission on Capital Punishment came up with recommendations for reforming the death penalty because of concerns with problems in the system.⁸⁹ Professor Fagan’s report, which I am sure he will

85. Lori Montgomery, *Maryland Suspends Death Penalty; Glendennig Awaits Report on Racial Bias In Murder Prosecutions*, WASH. POST, May 10, 2002, at A1.

86. See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

87. IAN GRAY & STANLEY MOIRA, PUNISHMENT IN SEARCH OF A CRIME: AMERICANS SPEAK OUT AGAINST THE DEATH PENALTY 191 (1989).

88. See *Coleman v. Thompson*, 501 U.S. 722 (1991).

89. See Illinois Report, *supra* note 38.

talk about, also points out some of the problems with the system.⁹⁰ It is just the way the system works. It is set up now to try to get the “worst of the worst,” but it does not achieve that. It gets the “unluckiest of the worst,” or maybe the “unluckiest of the unlucky” in the cases where the defendants are innocent.

Tonight, unless something drastic happened while Professor Blecker was talking, Johnny Martinez was executed in Texas, while we were sitting in this room.⁹¹ His victim’s family was against his execution, and the clemency board voted nine to eight to let the execution go forward.⁹² So by one vote the determination was made as to whether someone lives or dies. One different person on the panel would result in a totally different outcome. It’s not the “worst of the worst,” it’s the “unluckiest of the worst.”

So the question raised by Professor Blecker is whether we can fix the system if we narrow down the category of those we execute. Even though the system is already designed to get the “worst of the worst,” maybe if we change it so that we have an even smaller group that we will call the “worst of the worst,” it will fix everything.

Throughout history, the goal always has been to get the “worst of the worst.” When England executed pickpockets, they thought they were getting the “worst of the worst.”⁹³ When we developed a system where all homicide defendants were executed in England,⁹⁴ then that system found the “worst of the worst.” But then we evolved, and we developed our current death penalty system, of not executing all killers, but only executing murderers with certain aggravating factors. And that resulted, as Professor Blecker mentioned, with more than 3,500 people on death rows across the United States.⁹⁵ That is so many condemned people that if we did not sentence anyone else to death and executed one a day for the next nine years, we still

90. See Columbia Study II, *supra* note 40.

91. Johnny Martinez was executed that night. See Diane Jennings, *Killer Executed After Giving Thanks to Mother of Victim, Woman Who Sought Commutation of his Sentence Doesn't Attend*, DALLAS MORNING NEWS, May 23, 2003, at A29.

92. See *id.*

93. See CARL T. ROWAN, *DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL* 386-87 (1st ed. 1993).

94. See *Woodson v. North Carolina*, 428 U.S. 280, 289 (1975).

95. See *supra* note 82 and accompanying text.

would not be able to execute everybody currently on death row in the United States.

The questions are whether we can come up with a more limited system to get a smaller category of the condemned and will such a system work? I guess I am in favor of having fewer executions. Yet, I see three problems with designing a system that would give us a smaller category of condemned and expecting that system to cure all of the current problems with the death penalty. First, politically, there is not a will for narrowing the death penalty. Second, there is still the difficulty of drawing the lines as to who are now the new group of the "worst of the worst." The third problem is the arbitrariness—which I assume is going to be discussed by Professor Fagan later⁹⁶—that is still in the system. These problems would not necessarily be eliminated.

The first problem is the political difficulty in coming up with a smaller category of cases for the death penalty. Martin Leahy mentioned the new Gallup poll showing that the general population seems to want more executions,⁹⁷ and that is the way it works in the legislatures too. Because the death penalty is a political issue and not a criminal justice issue, over the years politicians and legislators tend to expand the number of death penalty crimes instead of condensing the number.

In 1999, five states broadened their death penalty statutes or added aggravating circumstances to include more people.⁹⁸ In 1998, five states broadened their death penalty statutes.⁹⁹ In 1997 six states broadened their statutes, in 1996 again six states, and in 1995 nine states.¹⁰⁰ And that is not counting New York, which added the death penalty in 1995 with ten aggravat-

96. See generally *infra* notes 150-52 and accompanying text.

97. See *supra* note 41 and accompanying text.

98. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULL. No. NCJ 184795, CAPITAL PUNISHMENT, 1999 2-3 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp99.pdf>.

99. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULL. No. NCJ 179012, CAPITAL PUNISHMENT, 1998 2-3 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp98.pdf>.

100. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULL. No. NCJ 172881, CAPITAL PUNISHMENT, 1997 2-3 (1998), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp97.pdf>; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULL. No. NCJ 167031, CAPITAL PUNISHMENT, 1996 2-3 (1997), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp96.pdf>; BUREAU OF JUSTICE STATISTICS, U.S.

ing factors, which are now twelve aggravating factors.¹⁰¹ In 1994, seven states broadened their death penalty statutes, in 1993 again seven states, etc.¹⁰² Once society makes the decision that some people are going to be executed and that some people are deserving of death, it is impossible for legislators to draw the line. How do you compare one victim's family to another and say that one family is deserving of having the perpetrator killed and this other family is not deserving of such vengeance?

Difficulty with actually defining the "worst of the worst" is a current problem with the system too. The Supreme Court has said that guiding factors in categorizing who are the "worst of the worst," called "aggravating factors," must be clear and not vague, in order to give guidance to the sentencers.¹⁰³ But legislators have had difficulty in drafting clear factors. One aggravating factor that legislators have developed as an attempt to define the worst crimes has different formulations in different states, but it is often called the "heinous, atrocious or cruel"¹⁰⁴ or "heinous, cruel or depraved" aggravating factor.¹⁰⁵ Thus, if a crime is "heinous," then that is one that meets the standard to qualify for the death penalty. However, the aggravating factor has been used broadly, contrary to the Supreme Court's holding that states cannot execute every murderer, only the "worst" ones.¹⁰⁶ With these types of vague aggravating factors, the

DEPT OF JUSTICE, BULL. No. NCJ 162043, CAPITAL PUNISHMENT, 1995 2-3 (1996), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp95.pdf>.

101. See N.Y. PENAL LAW § 125.27 (McKinney 2003).

102. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULL. No. NCJ 158023, CAPITAL PUNISHMENT, 1994 2-3 (1996), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp94.pdf>; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULL. No. NCJ 150042, CAPITAL PUNISHMENT, 1993 (1994), available at <http://www.ojp.usdoj.gov/bjs/pub/ascii/cp93.txt>.

103. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (striking down the use of a vague aggravating circumstance that did not provide "clear and objective standards" to the sentencer) (citation omitted).

104. See, e.g., ALA. CODE § 13A-5-49(8) (1999) ("The capital offense was especially heinous, atrocious, or cruel compared to other capital offenses . . ."); KAN. STAT. ANN. § 21-4625(6) (1990) ("The defendant committed the crime in an especially heinous, atrocious or cruel manner.").

105. See, e.g., ARIZ. REV. STAT. § 13-703(F)(6) (2003) ("The defendant committed the offense in an especially heinous, cruel or depraved manner . . ."); CONN. GEN. STAT. § 53a-46a(i)(4) (2001) ("The defendant committed the offense in an especially heinous, cruel, or depraved manner . . .").

106. See Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. &

courts have not been able to distinguish between which homicide is heinous and which is not.¹⁰⁷ Obviously, all homicides are horrible, so how do you say that some are especially heinous, cruel or depraved and some are not?

Another way the courts have tried to define the “worst of the worst” is to say that if someone is a future danger to society, we will execute them. That aggravating factor is why Johnny Martinez is getting executed today in Texas; he was found to be a future danger even though he had no prior convictions for any type of violence.¹⁰⁸ Mental health experts agree that you cannot predict future dangerousness and that has been borne out in practice too, where people in juries have tried to predict future dangerousness.¹⁰⁹ Again, all current statutes are an attempt to predict who are the “worst of the worst.” Yet, the statutes necessarily end up being broad and including a large number of killers, and that is why we have ended up with so many people on death row in the United States.

The third problem in coming up with a narrow group of the “worst of the worst” murderers is that even if you come up with a smaller group than we have now, you will still have arbitrariness within the system. Even if you make the categories smaller, you will still end up, within that category, having discretion and arbitrariness. By making it a smaller group, you certainly will limit the available discretion, so I commend Professor Blecker in his attempt to try to limit discretion.¹¹⁰ However, even then you still will have an area where you are going to have discretion, because you allow prosecutors discretion in deciding whom to prosecute, you allow non-statutory aggravating factors to be considered, and you allow all mitigation to be

MARY BILL RTS. J. 345, 360-68 (1998) (discussing use of the especially heinous aggravating factor) [hereinafter *Aggravating and Mitigating Factors*]; see also *Godfrey*, 446 U.S. at 428; *Gregg v. Georgia*, 428 U.S. 153, 198 (1976).

107. See *Aggravating and Mitigating Factors*, *supra* note 106, at 364-68 (discussing inconsistencies in the application of the “especially heinous” aggravating circumstance).

108. See *Martinez v. Texas*, 924 S.W.2d 693 (Tex. Crim. App. 1996) (holding 5-4 that facts of homicide were sufficient by themselves to support a finding of “future dangerousness” without evidence of prior criminal activity by the defendant).

109. See *Aggravating and Mitigating Factors*, *supra* note 106, at 368-74 (discussing criticisms of the broad “future danger” aggravating circumstance).

110. See *supra* p. 130-31.

considered.¹¹¹ The Supreme Court has stated that once you find someone qualified for the death penalty, you can consider these other types of factors.¹¹² For example, the consideration of victim impact evidence, which focuses on the homicide's effects on the victim's family,¹¹³ may affect who gets the death penalty depending on the status of the victim.

So, in summary, there are these three main practical problems with narrowing the group of those we execute as a cure for the problems with the death penalty. They are: (1) the political problems in being able to accomplish this narrowing; (2) the problems with being able to define this new narrower version of the "worst of the worst" adequately and constitutionally; and (3) that problems of arbitrary discretion will still be there within the system. These are major obstacles to fixing the system by coming up with a smaller category. Again, I think we can improve the death penalty system, but you still end up with a system where you are getting, to some extent, the "unluckiest of the worst," instead of necessarily, the "worst of the worst."

Next, today's topic also asked about the morality of the death penalty. In looking at the moral aspects of the death penalty, I am not an expert on morality, so I am not going to stand up here and say that I am. Philosophers and religions disagree on the death penalty. Obviously, your morality has to come from your own self. Figure out what your moral basis is and what you believe in. But I will tell you what happened to me on my journey.

When I left the law firm to go do death penalty work full-time in Arizona, I went to an organization that handled capital cases all through the system. All the cases that were near execution would be given to us because other attorneys did not want to handle them. Even at that time, I would say that I was not necessarily morally opposed to the death penalty, but I was opposed to it because of the procedural concerns and problems.

111. See *Aggravating and Mitigating Factors*, *supra* note 106, at 360-91 (discussing some of the arbitrariness inherent in the current death penalty system).

112. See, e.g., *Zant v. Stephens*, 462 U.S. 862, 879 (1983) (holding that it does not violate the Constitution for a sentencer to consider nonstatutory aggravating factors after finding at least one statutory aggravating factor).

113. See *Payne v. Tennessee*, 501 U.S. 808 (1991).

That was the reason I left D.C. to go work on capital cases full-time.

In each case that I examined, I looked at the facts of the case and saw how horrible they were. All these cases are horrible and there is no way of getting around that. I would think of the victims and the suffering and my first reaction would generally be “well, maybe this is the one defendant who deserves to be executed.” Then I would begin to look at other things that were going on with the death penalty.

One of the things that first made me question the penalty as a solution is seeing how people close to the defendants were affected by it. Albert Camus said that “the relatives of the condemned man . . . discover an excess of suffering that punishes them beyond all justice,”¹¹⁴ and I found that to be true. I saw first-hand how families on both sides would suffer through the process. Members of one client’s family had to listen to people cheering outside their hotel while their loved-one was being executed. I sat with the mother of a defendant—a mother who tried all through her life to prevent her self-destructive son from committing suicide—and I was with her as her son was being executed. He had committed murder and gave up all of his appeals, and that was the one way he finally could get his wish to commit suicide. At the funeral of another client, one of his, my client’s, small nephews, trying to understand why his healthy uncle was now dead, went up to his mother and asked, “They killed Uncle Luis on purpose, didn’t they?” Without meaning to compare the impact of murder and executions on different victims, seeing the impact on the innocent relatives of the condemned made me question the morality of the death penalty, which seemed to add more suffering in the world.

Another moral problem that I saw is the issue of whether, even with a better legal system, human beings can ever actually know who are the “worst of the worst.” Criminologists and mental health professionals often recognize the role of a person’s background in contributing to violence. Especially when you get to the most heinous cases, the most bizarre murders, and the crimes that we cannot comprehend, you will see that

114. Albert Camus, *Reflections on the Guillotine*, in RESISTANCE, REBELLION, AND DEATH 205 (Justin O’Brien trans., 1961).

the defendants in these cases are often brain damaged, victims of childhood sexual and violent abuse, etc. This information raises the question that maybe these defendants are not the “worst of the worst,” but the “sickest of the sick.” A psychiatrist and professor from NYU and Yale, Dr. Dorothy Lewis, who has worked with a number of death row inmates describes her experience:

We found ourselves . . . in the company of a pathetic crew of intellectually limited, dysfunctional, half-mad, occasionally explosive losers. Long before these men wound up on death row, their parents . . . battered them. They used them sexually. They sold their child bodies to buddies in exchange for drugs or food or money. They neglected them. Sometimes they even tried to kill them It was a drama generations in the making. The mothers and fathers of our subjects held their children out of the open windows of moving cars; they set them on fire; they had shot at them; they slashed them with knives and machetes. But in spite of their efforts to destroy them, the children had lived to adulthood. They had lived to perpetuate on others the violence that had been visited upon them.¹¹⁵

Studies support this analysis, and you can see it in specific cases. We had a client with severe brain damage, who—when he was sixteen-years-old and had never been violent—was put into an adult prison where he was beaten and raped on a regular basis. He came out a violent and different person. Another executed client was mentally retarded, and when he was born his family thought he brought them bad luck, so he was severely abused as a child and that is where he learned about violence. Further, in neither of these cases did the courts consider that background evidence because of poor trial attorneys and subsequent procedural barriers to raising the claims.

The fact that not all mitigating evidence actually is considered is one of the moral failings of the death penalty. The Supreme Court has stated that the backgrounds of capital defendants are morally and legally relevant, as Professor Blecker pointed out, in determining who are the worst offend-

115. DOROTHY OTNOW LEWIS, *GUILTY BY REASON OF INSANITY: A PSYCHIATRIST PROBES THE MINDS OF KILLERS* 188 (1998).

ers.¹¹⁶ So in deciding whom to execute we are not just looking for the worst crimes, but we are looking for the “worst” individuals. If you try to determine who are the worst defendants, then this type of background information has to be considered. The Supreme Court said that you have to consider any aspect of the defendant’s character that is relevant in a case called *Lockett v. Ohio*.¹¹⁷

This mitigating evidence does not excuse the violence that occurs later, but it helps explain it, and—for both legal and moral purposes—it has to be weighed in the process of determining who are the “worst of the worst” defendants. Yet, because we never know everything about the defendant in the complete moral sense, one cannot determine exactly who is the “worst of the worst.” You cannot truly find the complete individualized sentencing that the Supreme Court says that we should have.¹¹⁸ If we are supposed to consider the entire person, who the entire person is, then we cannot consider that entire person when this information is lost or it is found too late.

In those cases that I mentioned, we found the mitigating evidence long after the original attorneys did not find it, and by then the courts would not consider it because it was too late. A lot of times this type of evidence regarding a defendant’s family’s background is not in *The Daily News*, and it is going to be difficult to find, and maybe impossible to find if witnesses are dead. The problem is that even with an ideal legal system, one is not able ever to get the whole moral picture of a person in these cases.

So the question becomes a moral one for us about how we treat these individuals. What does it say about us when we make a decision based on incomplete information in deciding to take a life? When the death penalty was debated in the House of Lords in England, Lord Chancellor Gardiner stated: “When we abolished the punishment for treason that you should be hanged, and then cut down while still alive, and then disemboweled while still alive, and then quartered, we did not abolish

116. See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that the Eighth and Fourteenth Amendments require individualized consideration of mitigating circumstances).

117. *Id.*

118. See *id.*

the punishment because we sympathized with traitors, but because we took the view that it was a punishment no longer consistent with our self respect.”¹¹⁹ And that’s the moral question: What does the death penalty say about us when we make decisions to kill a human being based on incomplete information? We know our initial reactions and feelings, but we do not really know the individual.

In conclusion, as I mentioned earlier, the normal reaction for me in these cases was to see how horrendous the crimes were and to think that maybe the defendants deserved to be executed. In one of those cases, in the mid-1990’s, I saw pictures of the victim, a woman who had been brutally murdered and saw that there was what seemed like convincing evidence against the defendant. At the time, I thought maybe that was one case where the defendant deserved to be executed. Well, last month that defendant, who had been on death row since then, was proved innocent by DNA evidence, and he was absolved of the crime and released. So I look at myself and I see that I am not capable of determining who is the “worst of the worst.” I cannot make that decision. If I had been a juror in Karla Faye Tucker’s case I would not have known that she would eventually turn her life around.¹²⁰ Had I been a juror in Wilbert Evans’ case, in Virginia, when the jurors decided that he was a future danger, I would not have known at that time that three months later he would save the lives of several guards on death row.¹²¹

The decision to kill is a moral decision we are making on incomplete information. Because human beings are a mystery, we cannot see the whole complete human. We cannot know with complete certainty what happened in the past and who is

119. *People v. Anderson*, 493 P.2d 880, 899 (Cal. 1972) (quoting 268 PARL. DEB., H.L. (5th ser.) (1965) 703).

120. For a further discussion of Karla Faye Tucker’s case, see Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1, 49-51 (2002).

121. After Wilbert Evans was sentenced to death in March 1984, in Virginia, for the shooting of a deputy sheriff because jurors determined he was a future danger, Mr. Evans saved the lives of several hostages and prevented the rape of a nurse during a riot at the prison. See Kirchmeier, *Aggravating and Mitigating Factors*, *supra* note 106 at 372-74. The courts would not consider this new evidence, and Mr. Evans was executed in Virginia’s electric chair on October 17, 1990. See *id.* at 373-74.

the “worst of the worst.” Although we do have a moral right to protect ourselves and to punish people, we do not have a moral obligation to kill people—especially when we are dealing with an imperfect system that kills the people who are the “unluckiest of the worst,” the “sickest of the sick,” or in the innocence cases, the “unluckiest of the unlucky.” Thank you.

Norman L. Greene

Our next speaker is Jeffrey Fagan, a Professor of Law and Public Health at Columbia University. He is a criminologist, but not a lawyer. He is also one of the scholars who participated in a Columbia Law School study, which is popularly known by the name of only one of its authors, Professor James Liebman, as the “Liebman Report,” without reference to the other authors. In deference to the other authors, we have decided tonight to call it the “Columbia Study.” This is the study, which Martin referred to, showing that 68% of convictions in death cases between 1973 and 1995 have been reversed.¹²²

Jeffrey Fagan

Thanks to the Association of the Bar for inviting me to join this Symposium. It’s only the Liebman Study when they want to attack Jim; it’s the Columbia Study when they want to cite it favorably. Judge Rakoff’s order in the *Quinones*¹²³ decision included comments that were very flattering to our study. He accorded it a level of scientific validity and status as evidence. Although we were grateful for his recognition, Judge Rakoff exceeded the limits of scientific and statistical inference in citing our work in a federal case. That is, the probative value of our study for *Quinones* was limited to death sentences in state courts; there were no federal cases in our study. Nevertheless, there are some enduring lessons from our study that may have relevance for the future of federal death penalty jurisprudence and practice.

There is a legendary story that circulates from time to time concerning the influence of the social science evidence on racial discrimination in the application of the death penalty that was

122. See Columbia Study II, *supra* note 40, at 8.

123. See *United States v. Quinones*, 205 F. Supp. 2d 256 (S.D.N.Y. 2002), *rev’d*, 313 F.3d 49 (2d Cir. 2002).

introduced in *McCleskey*,¹²⁴ in 1987. In *McCleskey*, the Supreme Court narrowly avoided overturning the federal death penalty statute on equal protection grounds. The vote was five to four and Justice O'Connor apparently was really quite undecided about how to vote until the very last minute. The Justices were challenged by the complex social science evidence—a study done by Professor David Baldus¹²⁵—about racial discrimination in the application of the death penalty in Georgia. This was an extremely complex and sophisticated study whose technical details were inaccessible to the Justices. According to this story, had the scientific evidence been more accessible, and were Justice O'Connor better able to understand its validity and full implications, she would have voted differently.¹²⁶

With this in mind, my goal tonight is to make our 617 pages accessible to you as an audience of lawyers, judges and hopefully some future judges. But, I think more importantly, I want to establish the factual basis for the most important public policy debate that I believe we can have in this country. In the Columbia study, we examined errors. We did not analyze the imposition of the death penalty, racial disparity, or executions. Instead, we asked how often, why, and in what places, were death sentences reversed?

We studied errors for two primary reasons; the first is that high error rates signify a dysfunctional system. We discovered that high error rates were in fact not the problem of a few jurisdictions that are atypical along any social or legal dimension, but actually were quite common and widespread among death sentencing states across the country.¹²⁷ The error rates range from zero in some places¹²⁸ to 100% in a small number of states that are just starting out on the path of the death penalty.¹²⁹ Such persistently high error rates have a contaminating effect on popular evaluations of the legitimacy of the law, and the le-

124. See *McCleskey v. Kemp*, 481 U.S. 279 (1987).

125. See *id.* at 286-87.

126. See generally EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT 182-217 (1998).

127. Columbia Study II, *supra* note 40, at 48.

128. Virginia's reversal rate of 13.4% ranked twenty-ninth in the country. See *id.* at 68-69. "This could mean there are disturbingly low rates of error detection . . . [or] commendably low rates of error . . ." *Id.* at 68; see also *id.* at 389-90.

129. See *id.* at 48-69.

gitimacy of the legal institutions that enforce the laws. Or as George Will said, “[c]apital punishment, like the rest of the criminal justice system, is [just another] government program”¹³⁰ High error rates also are important because as the Supreme Court,¹³¹ and several of the panelists, have noted, death is different; death is different both in terms of the commission of death by an offender, and in the state’s role in imposing a death sentence and the possibility of taking the offender’s life. The second reason for studying error is the horrifying specter of wrongful execution. As I describe the study, you will see how this nightmare haunts the administration of the death penalty and the normative views that animate it.

The study itself is a fairly simple to describe. What did we ask? We asked how much error is there in capital sentencing, where does error occur, when does error occur, and what factors can explain the patterns of error that we observed, both within states over time, and between states and over time generally? What did we do? We reviewed every single death sentence that was handed down following the *Furman*¹³² decision in 1972. We examined the outcome of each case at each of three stages of review: direct appeal, post-conviction review in state appellate courts, and federal habeas corpus review. Using contemporary social science theory and methods, we tested whether a series of social and legal factors that are related to the use of the death penalty itself in states and counties, also predicted the incidence of error and variations in errors both in states and counties.¹³³ These predictors included the social structure characteristics of states and counties, and the performance and behavior of the criminal justice system.¹³⁴

We also examined the results of habeas appeals, where information was available on the details of the offense, the offender, the victim’s social status, the crime itself, the

130. George F. Will, Op-Ed, *Innocent of Death Row*, WASH. POST, Apr. 6, 2000, at A23.

131. See *Furman v. Georgia*, 408 U.S. 238 (1972) (Stewart, J., concurring) (“The penalty of death differs from all other forms of criminal punishment, not in degree but in kind.”); see also *Gregg v. Georgia*, 428 U.S. 153 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Corbitt v. New Jersey*, 439 U.S. 212 (1978).

132. 408 U.S. 238.

133. See Columbia Study II, *supra* note 40, at 137-41 tbl.2.

134. *Id.*

background of the judge and defense attorneys, and several additional contextual factors, including aggravating and mitigating factors.¹³⁵ What methods did we use? We used both simple arithmetic—tabular methods—and complex multivariate statistical analyses using econometric models. First, we simply counted errors over time within states, and within counties. Second, we used econometric models to estimate models that would explain the combinations of factors that predict error rates within states and counties over time. To identify factors that produced these errors, we used a multivariate analytic methods including negative binomial and overdispersed Poisson regression, with very specific error terms and offsets to adjust the estimates both for time and for the supply of death penalty cases.¹³⁶

Despite the complexity of the statistical procedures, we actually asked a very simple question: Did the error rate in a state rise over and above that level that would be predicted simply by knowing the number of death sentences in that state? What we found was that very often it did, and we were able to identify several social, legal and political factors that either increased error rates above what would be predicted from the death sentencing and murder rates, or factors that kept error rates low.¹³⁷

The findings suggest that the system is indeed “broken.” Our analysis of more than 4,600 death sentences showed that 68% (better than two out of three) were reversed overall.¹³⁸ At direct appeal, 41% were reversed; 10% were reversed at state post conviction review, and 40% were reversed at federal habeas review.¹³⁹ Summing across cases, more than two in three, or 68%, were reversed.¹⁴⁰ What happened to the cases that were reversed? Most (82%) were re-sentenced to non-capi-

135. *Id.*

136. *See id.* at 99-117; *see also* WILLIAM H. GREENE, *ECONOMETRIC ANALYSIS* (5th ed. 2002).

137. *See generally* Columbia Study II, *supra* note 40.

138. *Id.* at 8-9.

139. *Id.* at 8; *see also* JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES*, from 1973 through 1995 1973-1995, 34-35 (2000), *available at* <http://justice.policy.net/cjedfund/jpreport/finrep.PDF> [hereinafter *Columbia Study*].

140. *Columbia Study*, *supra* note 139, at 35.

tal sentences; 11% were ultimately executed, and 7% were exonerated on actual innocence grounds.¹⁴¹ The trial and appeal processes were lengthy. It took approximately nine years from sentence to execution, and slightly more time (approximately eleven years) from sentence to reversal, for those that were finally released or re-sentenced to something less than death.¹⁴²

The political neutrality of reversal was noteworthy. Most reversals—more than 90%—were decided by elected judges with no or very little political incentive to reverse a death sentence.¹⁴³ Ninety-five percent of the reversals were made either by elected judges or judges who were appointed by conservative, Republican Presidents, since 1972.¹⁴⁴

The causes of error are alarming. We identified three main causes of error. The most common was ineffective assistance of counsel; about one in three reversals was caused by incompetent defense lawyering. The errors were not simply “technicalities,” such as late filings. Instead, we found lawyers committing such errors as failing to raise substantive issues relating to mitigation or exoneration, or to cross-examine key prosecution witnesses.¹⁴⁵ The second most common cause of error was judicial bias, both in jury instructions and by plain error in the way judges interpreted and applied the law.¹⁴⁶ Most alarming, we found that nearly one in five reversals (19%) occurred because of prosecutorial or police misconduct, such as concealing exculpatory evidence from the defense.¹⁴⁷

The primary cause of error rates in death sentences was the lack of selectivity in seeking the death penalty. “The higher the rate at which a state or county imposes death verdicts [for homicide], the greater the probability that [a] death verdict will have to be reversed because of serious error.”¹⁴⁸ In other words, the high rate of capital prosecutions and sentences, well beyond what would be predicted from the homicide rate, suggested that wrathful prosecutors were indiscriminate in their application of

141. *See id.* at 7.

142. *See id.* at 47.

143. *See id.* at 11.

144. *See id.* at 68-70.

145. Columbia Study, *supra* note 139, at 6.

146. *See id.* at 6-7 and accompanying notes.

147. *Id.* at 6-7.

148. *Id.* at ii.

the death penalty. Their blood lust produced very high rates of error. That is, death sentencing rates that are slightly above the national average produce error rates that are nearly double (43%, compared to 23%) the average error rate across the country. When you increase the death sentencing rate by 10% above the national average for seeking the death penalty, the error rate triples (74%, compared to 23%).¹⁴⁹ Plainly, we seek the death penalty too often.

The second source of error was another manifestation of the indiscriminate use of the death penalty. “[T]he more often states impose death sentences in cases” where there were no aggravating factors, or no highly aggravating factors, again, “the higher the risk of error.”¹⁵⁰ We found that “[f]or each additional aggravating factor, the probability of reversal drops by about 15%, when other conditions are held constant”¹⁵¹ Next, we identified two disturbing signs that social dynamics and social conflict more generally produced higher rates of error. First, when the ratio of white homicide victims to black homicide victims in a state and in a county approaches equality, the risk of error rates in death sentences imposed in that locale is twice as high as compared to when there is less of a balance.¹⁵² Second, we showed that “[t]he higher the proportion of African-Americans living in a state—and in one analysis, the more welfare recipients in a state—the higher the rate of serious capitol error.”¹⁵³

We also noted protective factors that lowered the rate of error in death sentences. States with more effective and efficient criminal justice systems, those that are able to detect and punish all forms of crime efficiently and at relatively a high rate as compared to other states, produced fewer errors.¹⁵⁴ It appears then, that the death sentencing system in the United States is a compensatory system that may be used to cosmetically conceal the flaws in general trends of criminal justice and punishment. We also found that political pressure is a very important factor.

149. *Id.* at 183.

150. Columbia Study, *supra* note 139, at ii.

151. *Id.*

152. *Id.* at iii.

153. *Id.* at iii.

154. See Columbia Study II, *supra* note 40, at iii.

“The more often and directly state trial judges are subject to popular election, and the more partisan those elections are, [again using standard social science measures,] the higher the state’s rate of serious capital error.”¹⁵⁵

Among individual or case-level factors, we did not detect racial imbalances, after controlling statistically for a large number of factors.¹⁵⁶ We did find racial imbalance in the aggregate, in terms of the racial dynamics of the states and counties.¹⁵⁷ We found states with fewer resources for defense counsel produce death sentences that are more often reversed, far more often.¹⁵⁸ We found quite simply and understandably and predictably, that good lawyers are critical to detecting reversible error at the federal habeas stage.¹⁵⁹

We drew several implications from this study. We find that the prosecutors are very often, disturbingly, party to, if not perpetrators of, error.¹⁶⁰ We find that legislators throughout this political land are the primary beneficiaries of the blood lust and zeal that motivates prosecutors to seek the death penalty at a very high rate relative to the overall homicide rate.¹⁶¹ Citizens bear the brunt of this zeal: prosecutors “write checks” that citizens have to cash in the form of extraordinary expenses in pursuing capital cases and then litigating appeals that last longer than a decade, and often end up being overturned. Nobody wins under the current system. We characterize prosecutorial misbehavior as an abuse of authority and ultimately a lack of accountability; we think that’s poisonous to democracy.

The “worst of the worst” argument is a policy prescription that would minimize error rates. I say this with full acknowledgement about the elasticity of the concept, as Jeffrey Kirchmeier reminds us. The current system, though, produces intolerably high rates of error and carries the extreme risk of a wrongful execution. It would be preferable to define the “worst of the worst” and confine the use of the death penalty to those individuals, with vigilance in the policing of the boundaries that

155. *Id.*

156. *Id.* at 158-59.

157. *Id.*

158. *Id.* at 244.

159. Columbia Study II, *supra* note 40, at 315-18.

160. *Id.* at 84.

161. *See generally id.*

define this category. We operationalize this policy in a fairly simple way, and in a way that is preferable to the delegated narrowing functions of current case law precisely because it promises to open a broader deliberative process on the role of the state in seeking death. We suggest that proof be required beyond *any* doubt, not a reasonable doubt, but “beyond any doubt that the defendant committed a capital crime.”¹⁶² We would require that aggravating factors substantially outweigh mitigating factors, not just by one extra aggravator, but two or even three.¹⁶³ We suggest that the death penalty be barred for “defendants with inherently extenuating conditions—the mentally retarded persons, juveniles, [and] severely mentally ill defendants.”¹⁶⁴ We think “[m]aking life imprisonment without parole an alternative to the death penalty and clearly informing juries of that option,” would also reduce error.¹⁶⁵ We suggest abolishing judicial overrides of jury verdicts that impose life sentences.¹⁶⁶ We suggest a “comparative review of murder sentences to identify what counts as the ‘worst of the worst’ in [each] state, and overturning outlying death verdicts,”¹⁶⁷ a regulatory function that can be a vehicle for democratic deliberation on death cases. We suggest “[b]asing charging decisions in potentially capital cases on full and informed deliberations,”¹⁶⁸ even transparent deliberations where the public becomes a party, so that they can understand the internal machinery. We suggest “[m]aking all police and prosecution evidence bearing on guilt vs. innocence, and on aggravation vs. mitigation, available to the jury at trial.”¹⁶⁹ This recommendation reflects the principles articulated in *Apprendi*¹⁷⁰ and *Ring*,¹⁷¹ the law of the land on capital sentencing. And, whenever possible, we suggest “[i]nsulating capital-sentencing and appellate judges from political pressure.”¹⁷² The last suggestion is to identify and appoint

162. *Id.* at v.

163. *Id.*

164. Columbia Study II, *supra* note 40, at v.

165. *Id.*

166. *Id.*

167. *Id.* at vi.

168. *Id.*

169. Columbia Study II, *supra* note 40, at vi.

170. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

171. *Ring v. Arizona*, 536 U.S. 584 (2002).

172. Columbia Study II, *supra* note 40, at vi.

capital defense counsel in a manner that would attract well qualified, well educated, well compensated, and experienced lawyers to do this work.¹⁷³

Is there political will to implement these reforms, and reduce the unacceptably high rate of capital error? Admittedly, implementation of these reforms would be politically complex and demands will that the legislatures thus far have not shown. The debate in the Illinois legislature following the release of the *Report of the Governor's Commission on Capital Punishment* is a cautionary tale: some recommendations were quickly adopted, others sparked contentious debate that still persists.¹⁷⁴ But the most important question is whether these reforms would mitigate error. Assume for the moment that they are implemented with the level of efficiency and zeal that greet other reforms introduced throughout the criminal justice system. In many other cases, non-capital cases, errors persist. Will errors still haunt and defy the system even under these tightened circumstances? This is an empirical question, and yes, we would like to shift the debate there.

Norman L. Greene

I would like to make a few comments before I introduce Bill Erlbaum, who is the next speaker. In all the programs that we have sponsored, we have had few judges, and the ones we have had have been rather circumspect. Bill Erlbaum has taught us a lot, arguably some of which is counterintuitive. Among other things, Bill has made it very clear that a judge has First Amendment rights which he is free to exercise. We have had very many private conversations, however, and therefore I have some idea of his approach. I never found it to be a problem to have a judge on the death penalty committee, but for a long time it was hard to attract one. Now we have two judges. But there is nothing inherent in being a judge requiring that one stop being a scholar, stop being an interested person, and stop being a citizen with full rights. I am very interested to hear what Bill Erlbaum is going to say tonight on capital punishment. Judge Bill Erlbaum.

173. *Id.*

174. See Illinois Report, *supra* note 38, at 107-206.

Honorable William M. Erlbaum

Thank you and good evening. I am very pleased to be here. I participate in this program as a member of the legal community. I do not speak as a judge, nor does what I say have any bearing upon any decision that I might make were an issue to come before me as a judge. That is a distinction that is well understood and relied upon.¹⁷⁵

The program includes the question of whether even a death penalty limited to the “worst of the worst”¹⁷⁶ would “be support-

175. See, e.g., Judge Jack B. Weinstein, *Death Penalty: The Torah and Today*, N.Y. L.J., Aug. 23, 2000, at 2; Judge Judith S. Kaye, Lecture at the Association of the Bar of the City of New York (Feb. 26, 1987), available at http://www.courts.state.ny.us/history/elecbook/kaye_cardozo/pg1.htm; Mary Beth Pfeiffer, *Drug Treatment Successes Fall Short of Advocates' Goals*, POUGHKEEPSIE J., Nov. 16, 2000, available at <http://www.poughkeepsiejournal.com/projects/prison/po111600s3.shtml> (includes statement by then Judge George Marlow); Thomas Healy, *Death Penalty Support Drops as Debate Shifts*, BALT. SUN, July 25, 2001, at A1 (includes statement by Justice Sandra Day O'Connor); Press Release, The Pew Forum on Religion & Public Life, *Scalia Calls Death Penalty Constitutional, "Not Immoral": Supreme Court Justice Speaks on Religion, Politics and the Death Penalty at Pew Forum Conference* (Feb. 4, 2002), available at <http://pewforum.org/press/index.php?ReleaseID=11>; Justin Scott & Missy Maynarich, *Death Penalty Debate Revived*, DAILY NEXUS, Jan. 28, 2003, at 1 (includes presentation by Judge Alex Kozinski), available at <http://www.dailynews.com/news/1969/4294.html>; Ian Urbina, *New York's Federal Judges Protest Sentencing Procedures*, N.Y. TIMES, Dec. 8, 2003, at B1.

176. The category the “worst of the worst” is vague. Like an earlier formulation, the “abandoned and malignant heart,” it constitutes “not a standard but a pseudo-standard . . . an invitation to arbitrariness and passion, or even to the influence of dark unconscious factors.” Charles L. Black, Jr., *Capital Punishment: The Inevitability of Caprice and Mistake*, in THE LANAHAN READINGS IN CIVIL RIGHTS AND CIVIL LIBERTIES 235-36 (David M. O'Brien ed., 2d ed. 2003). Professor Robert Blecker, given his druthers, would add a new class of death-eligible defendants from a group he describes as “red-collar killers—who maintain lethal workplaces or sell lethal products.” Robert Blecker, *Among Killers, Searching for the Worst of the Worst*, WASH. POST, Dec. 3, 2000, at B1. Blecker complains that, “corporate executives who knowingly perpetuate dangerous conditions because of cost considerations—Blecker cited Ford executives who declined to recall the Pinto after calculating that lawsuits resulting from potential deaths would be less expensive than the recall—never face the death penalty.” Rick Halperin, *Death Penalty News—USA/PENN., COLORADO, FLORIDA*, at <http://venus.soci.niu.edu/~archives/ABOLISH/rick-halperin/mar00/0143.html> (Mar. 29, 2000). Finally, tonight, Blecker stated:

My first choice for who should die in this context is Robert Courtney, the pharmacist in the Midwest, worth \$10 million, who diluted chemotherapy to 3% strength which he distributed to cancer victims desperate for a cure. This was a case of a pharmacist worth millions of dollars diluting cancer patients' chemo for money. Can you imagine anything more depraved? *It*

able morally, philosophically?" That is the main issue that I will address, not whether there should be fewer executions. For the abolitionist, reducing the number of people who are executed is desirable in itself. I believe that the death penalty is not ethically supportable for any criminal, not even for "moral monsters"¹⁷⁷ like Hitler or Stalin.

A threshold question concerns who has the burden of proof on this issue. The political status quo in America is that thirty-eight states, the federal government, and the United States military have established capital punishment.¹⁷⁸ At first blush one might conclude that the burden of proof is upon the abolitionist, the side seeking a departure from that status quo. Here, however, we are not dealing with a political question but with an ethical question: Ought we to have executions? We might reasonably suppose that abolitionists, retributionists, and all of us alike start this discussion on common ground: Respect for human life and respect for justice. Retributionists, like Professor Robert Blecker, argue for the necessity of executing the worst of the worst even in those jurisdictions which do not presently have the death penalty. Accordingly, the status quo in those jurisdictions gives retributionists no support. From an ethical standpoint, it would appear that the side that promotes execution has the burden of demonstrating that the death penalty is compatible with a proper respect for life and justice.

Apparently, Professor Blecker is prepared to assume that burden. After describing a particularly gruesome kidnapping,

cannot be proven yet that he killed anybody. Because of his callous indifference to human life, he deserves to die. Another candidate is Richard Reid, "the shoe bomber," who, but for the last second intercession by alert passengers and crew, would have blown a commercial jet full of people out of the sky. *He deserves to die, although he did not kill anyone.* And a third, is a guy named Bethely, in Louisiana, who raped three children, nine, seven and five—one of them was his own—while he was HIV positive and knew it. *Whether or not the children live, he deserves to die.*

Infra p. 178-79 (emphasis added). And how should they die? Blecker says it should be "a quick and painful death." Robert Blecker, *When the State Kills: Capital Punishment and the American Condition*, by Austin Sarat, N.Y. L.J., May 11, 2001, at 2 (book review).

177. The expression is that of Professor Stephen Nathanson. NATHANSON, *supra* note 14, at 140. This penetrating work has influenced me in diverse ways throughout this writing.

178. Afiya Jordan, *A State-By-State Look at Capital Punishment*, N.Y. L.J., Apr. 16, 2002, at 7.

rape, mutilation, and murder of an eleven year old girl¹⁷⁹ by two strangers, he states: “They are the ‘worst of the worst.’ They deserve to die. I know that. I feel certain.”¹⁸⁰

That seems to be the essence of Professor Blecker’s argument, his feeling of certainty that the worst of the worst deserve execution. If Blecker’s certainty is evidence, then here is mine: They don’t deserve to die. I know that. I feel certain. The two testimonials nullify one another, leaving the retributionist at square one.

Conceptually, the Mosaic notion of “an eye for an eye; a tooth for a tooth” (the so-called *lex talionis*), fails to provide a workable theory of punishment for deviant behavior in general. For example, the *lex talionis* cannot be coherently applied to the perjurer, the arsonist, or the extortionist. It is not a theory of punishment at all but a cliché, a catchy slogan, and thus gives no aid to the retributionist. All that “an eye for an eye” soundly reflects in the criminal law field is the idea of proportionality, that society should punish murder more severely than it punishes shoplifting. It does not follow that the punishment for murder need ever be set at death.

The wisdom of the death penalty is an old, old debate. People have strong views on the subject. It may be that at the end of the day, nobody’s opinions will change. Rational discourse, however, may help to bring us closer together. As my contribution, I will discuss the more significant lessons that I have learned about the death penalty.

First, an execution is not an act of self-defense. It permits the killing of a person, even the worst of the worst, on a standard less than self-defense.¹⁸¹ The person strapped to a gurney is then and there under our control, disarmed, and, therefore, does not pose an imminent threat to the life or safety of the executioner. Whatever the condemned may have done in the

179. Her name was Barbara Joe Brown. See Robert Blecker & Jeffrey L. Kirchmeier, *Point/Counterpoint: To Live or Die?*, N.Y. L.J., Sept. 9, 2002 (Magazine), at 10.

180. *Supra* p. 123.

181. Short of an “imminent” attack upon another, or a reasonable belief that an “imminent” attack is taking place, there is no available claim of self-defense. 2 FRANCIS WHARTON, WHARTON’S CRIMINAL LAW § 189 (Charles E. Torcia ed., 15th ed. 1993); 6A C.J.S. *Assault & Battery* § 88 (2003); N.Y. PENAL LAW § 35.15 (McKinney 2003).

past, no application of the justification provisions of our nation's penal laws legitimates an execution under any self-defense theory. The imposition of the death penalty is a gratuitous killing.¹⁸²

182. See Antonin Scalia, *God's Justice and Ours*, in 123 *FIRST THINGS* 17 (2002). In that statement, Justice Scalia adopts the view of St. Paul that *individuals* lack the right to take vengeance by putting wrongdoers to death. *Id.* at 19. He concedes that capital punishment "is undoubtedly wrong unless one accords to the state a scope of moral action that goes beyond what is permitted to the individual." *Id.* at 18. He states that in his view, "the major impetus behind modern aversion to the death penalty is the equation of private morality with government morality." *Id.* The problem that arises is that in a secular democratic nation like ours, where the citizens themselves are said to lack individual moral authority to put others to death and thus have no such power to delegate to their government, Justice Scalia's analysis lacks a *source* for the asserted government authority to perform executions. In an apparent effort to circumvent that problem and find that source for the state's supposed "scope of moral action that goes beyond what is permitted to the individual," *id.*, Scalia is forced to deny the secular character of our government and to resurrect rule by divine right. Here are his words:

The reaction of people of faith to this tendency . . . to obscure the divine authority behind government should not be resignation to it, but the resolution to combat it as effectively as possible. We have done that in this country . . . by preserving in our public life many visible reminders that—in the words of a Supreme Court opinion from the 1940s—"we are a religious people, whose institutions presuppose a Supreme Being." These reminders include: "In God we trust" on our coins, "one nation, under God" in our Pledge of Allegiance, the opening of sessions of our legislatures with a prayer, the opening of sessions of my Court with "God save the United States and this Honorable Court," annual Thanksgiving proclamations issued by our President at the direction of Congress, and constant invocations of divine support in the speeches of our political leaders, which often conclude, "God bless America." All this, as I say . . . helps explain why our people are more inclined to understand, as St. Paul did, that government carries the sword as "the minister of God," to "execute wrath" upon the evildoer.

Scalia, *supra*, at 19-20. In light of Scalia's theological justification for the death penalty in America, future research should explore whether capital punishment is an establishment of religion or breaches the separation of church and state—contrary to the First Amendment. Cf. Gary J. Simson & Stephen P. Garvey, *Knockin' on Heaven's Door: Rethinking the Role of Religion in Death Penalty Cases*, 86 *CORNELL L. REV.* 1090 (2001). Meanwhile, we are left with state terminations of life on a standard less than self-defense. Is that the lesson that the government should be teaching—that it is allowable to kill, even when there is no imminent risk to the killer's life? As Justice Brandeis said in his dissenting opinion in *Olmstead v. United States*, 277 U.S. 438 (1928), "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." *Id.* at 485.

Second, an execution is a ritual killing,¹⁸³ a rite. The ceremony at the “death house” is totally scripted and rehearsed, pre-defined down to the last detail in the execution protocols¹⁸⁴ of the jurisdictions which punish by death. That type of death, a death by appointment, is no less a rite than those practiced in the so-called primitive societies described by anthropologists like Franz Boas, Margaret Mead, and others.

A further dimension of capital punishment relates to the developmental consequences of the state’s employment of some of its citizens to be the executioners of other members of their own community. People being paid to kill other people. In states with high rates of execution, the state’s executioners kill frequently. What happens to workers who participate in performing scheduled terminations of life?¹⁸⁵ Can one be summoned periodically to the death house to do that work without suffering demoralization and brutalization? Does one risk post-traumatic stress disorder¹⁸⁶ or something akin to it? How

183. See MARK COSTANZO, JUST REVENGE: COSTS AND CONSEQUENCES OF THE DEATH PENALTY 53-58 (1997); Gene C. Toews, *The Execution of Timothy McVeigh: Ritual Sacrifice in America*, at <http://www.headlinemuse.com/askhermes/sacrifice.htm> (2001).

184. See, e.g., Committee on Criminal Justice—The Florida Senate, *A Monitor: Methods of Execution & Protocols*, at <http://www.fcc.state.fl.us/fcc/reports/monitor/contmon.html> (Sept. 1997).

185. According to Mark Costanzo, prison workers who have aided in carrying out executions have been “deeply affected.” COSTANZO, *supra* note 183, at 56. He observes that, “Donald Cabana, a former prison warden, described an execution he presided over as the most difficult experience of his life.” *Id.* Costanzo notes, quoting Cabana: “I watched the terrible pain of guards who had worked for eight years with this young man and who would turn their face from you, not in shame, but because they didn’t want you to see the emotions and the pain and the burden on them.” *Id.* (citation omitted).

186. See comments by Fred Allen who participated in 130 executions at the Walls Unit in Huntsville, Texas.

I was just working in the shop and all of a sudden something just triggered in me and I started shaking. And then I walked back into the house and my wife asked “What’s the matter?” and I said “I don’t feel good.” And tears—uncontrollable tears—was coming out of my eyes. And she said “What’s the matter?” And I said “I just thought about that execution that I did two days ago, and everybody else’s that I was involved with.” And what it was was something triggered within and it just—everybody—all of these executions all of a sudden all sprung forward . . . Just like taking slides in a film projector and having a button and just pushing a button and just watching, over and over: him, him, him. I don’t know if it’s mental breakdown, I don’t know if . . . probably would be classified more as a traumatic stress, similar to what individuals in war had. You know, they’d come back from war, it

does one define one's existence? How does one list one's occupation on a tax return? How does one present oneself to one's neighbors? Or one's children? Are we not morally responsible for the impact we have on other human beings? Those designated to kill for the state have suffered very destructive effects.¹⁸⁷

A fourth aspect of the death penalty involves its contravention of a basic tenet of our national culture: "You don't kick someone when they are down." Regardless of the perpetrator's past behavior, to kill that person when he or she is subdued, strapped to a gurney, already down and helpless, is a denial of fair play. Because capital punishment violates this venerable

might be three months, it might be two years, it might be five years, all of a sudden they relive it again, and all that has to come out. You see I can barely even talk because I'm thinking more and more of it. You know, there was just so many of 'em.

All Things Considered: Witness to an Execution (NPR radio broadcast, Oct. 20, 2000), available at http://www.soundportraits.org/on-air/witness_to_an_execution/transcript.php3 (last visited Jan. 26, 2004).

187. *See id.* Research by Michael Osofsky, an undergraduate psychology student at Stanford University, concerning the impact upon prison workers who assisted in executions was done at the Louisiana State Penitentiary at Angola. It was discovered that some participants would "break down," suffered "considerable anxiety," or experienced "guilt" worrying about their salvation. Meredith Alexander, "Inside the Mind of an Execution Team" *Sophomore's Research Examines the Emotions of Individuals Who Interact with Death Row Inmates*, STAN. REP., May 8, 2001 (citing Michael Osofsky, *Along the Death Trail: Inside the Mind of an Execution Team* (May 6, 2001) (unpublished paper presented at the 154th Annual Meeting of the American Psychiatric Association) (on file with the author)), available at <http://news-service.stanford.edu/news/2001/may9/osofsky-59.html>. One staff member "never sleeps on the night after an execution and wonders how society will judge him and his coworkers in 500 years." Ken Hausman, *Researcher Enters Minds of Death-Row Officers*, 36 PSYCHIATRIC NEWS 6 (2001) (citing Osofsky, *supra*), available at <http://pn.psychiatryonline.org/cgi/content/full/36/12/6>. Osofsky observed that the "majority of officers seem to suppress their feelings and do not have any cathartic outlets for talk. Instead . . . members of the death team generally do not talk about the prison, and especially the execution process once returning home, putting on their 'tough guy' facade." Osofsky, *supra*. Osofsky discovered "an unusually high incidence of divorce among the execution team. While the national average rate of divorce is around fifty percent, nearly three-fourths of this group of officers had been divorced at least one time." *Id.*; Hausman, *supra*; Alexander, *supra*. The write up of Osofsky's research contains a very graphic account of the execution process and its effects upon those who carry it out. It cites earlier studies of the subject. *See Osofsky, supra*.

cultural precept,¹⁸⁸ it is un-American. Executions corrode our tradition.

Fifth, death as punishment, is unsupported by the stated objectives of American criminal law. These objectives, as set forth in the public policy purpose clauses¹⁸⁹ of our nation's criminal codes, include deterrence, rehabilitation, and incapacitation, but contain no explicit¹⁹⁰ legitimization of vengeance, the cornerstone¹⁹¹ of the retributionist position.¹⁹²

188. This aspect of American national character has been applied in a wide variety of contexts as reflected in the output of the search engines "Google" and "Yahoo!" using the search terms "You don't kick someone when they are down;" "when they're down;" "when he's down;" and "You don't kick 'em when they're down."

189. See ALA. CODE § 13A-1-3 (2003); ALASKA STAT. § 11.81.100 (Michie 2003); ARK. CODE ANN. § 5-4-101 et seq. (Michie 2003); CAL. PENAL CODE § 12 (West 2003); CONN. GEN. STAT. ANN. § 53a (West 2003); DEL. CODE ANN. tit. 11, § 6502 (2003); FLA. STAT. ANN. § 775.012 (West 2003); GA. CODE ANN. § 16-1-2 (2003); HAW. REV. STAT. § 701-103 (2003); IDAHO CODE § 18-106 (Michie 2003); 720 ILL. COMP. STAT. ANN. 5/1-2 (West 2003); IND. CODE §§ 11-8-4-1, -8-4-8, -12-1-2 (2003); KAN. STAT. ANN. § 21-4601 (2003); KY. REV. STAT. ANN. § 439.304 (Banks-Baldwin 2003); LA. CODE CRIM. PROC. ANN. art. 894.1 (West 2003); ME. REV. STAT. ANN. tit. 17-A, § 1151 (West 2003); MD. CODE ANN. CRIM. PROC. § 6-202 (2003); MD. CODE ANN. CORR. SERV. § 3-502 (2003); MINN. STAT. § 364.01 (2003); MISS. CODE ANN. §§ 47-5-3, -5-10 (2003); MO. REV. STAT. § 217.015 (2003); MONT. CODE ANN. § 46-1-103 (2003); NEB. REV. STAT. § 28-102 (2003); NEV. REV. STAT. §§ 169.035, 179A.020 (2003); N.H. REV. STAT. ANN. §§ 651:61-a, 621:2 (2003); N.J. STAT. ANN. § 2C:1-2 (West 2003); N.M. STAT. ANN. §§ 31-21-4, 33-1-6, 33-8-3 (Michie 2003); N.Y. PENAL LAW § 1.05 (McKinney 2004); N.C. GEN. STAT. §§ 148-22, -22.1 (2003); OHIO REV. CODE ANN. § 2929.11 (West 2003); OKLA. STAT. ANN. tit. 22, § 1514 (West 2003); OR. REV. STAT. § 161.025 (2003); 18 PA. CONS. STAT. ANN. § 104 (West 2003); S.C. CODE ANN. § 24-1-20 (Law. Co-op. 2003); S.D. CODIFIED LAWS § 23A-1-2 (Michie 2003); TENN. CODE ANN. § 39-11-101 (2003); TEX. PENAL CODE ANN. § 1.02 (Vernon 2003); UTAH CODE ANN. § 76-1-104 (2003); VT. STAT. ANN. tit. 13, § 7030, tit. 28, § 1 (2003); VA. CODE ANN. § 53.1-67.8 (Michie 2003); WASH. REV. CODE ANN. § 9A.04.020 (West 2004); W. VA. CODE ANN. § 25-1-1a (Michie 2003); WIS. STAT. ANN. § 938.01 (West 2003); WYO. STAT. ANN. § 7-9-106 (Michie 2003).

190. In the case of one non-death penalty state, Rhode Island, its purpose clause includes the phrase "the retributive goal of sentencing." R.I. GEN. LAWS § 12-19-23.1(3) (2003). Six other jurisdictions speak of "just and deserved punishment," the "sentence he deserves," "merited punishment," "just punishment," (two jurisdictions) and "fair punishment," respectively. ARK. CODE ANN. § 13-101 (Michie 2003); COLO. REV. STAT. § 18-1-102.5 (2004); N.D. CENT. CODE § 12.1-01-02 (2003); 18 U.S.C. Appx. § 1A1.1 (2004) (federal sentencing guidelines); D.C. CODE ANN. § 24-112 (2003); 33 P.R. LAWS ANN. § 3284 (2003). As to three other states, Iowa, Massachusetts, and Michigan, all non-death penalty jurisdictions, research has failed to disclose purpose clauses in their criminal codes.

191. Justice Antonin Scalia has spoken of "the authority of a government to exact vengeance . . ." and that "just retribution is a legitimate purpose (indeed, the principal legitimate purpose)" of the death penalty. Scalia, *supra* note 182, at 19-

20. The retributionist, Walter Berns, confirms the role of revenge in capital punishment. See WALTER BERNS, *FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY* (1991). In Berns' words: "anger is accompanied not only by the pain caused by him who is the object of anger, but by the pleasure arising from the expectation of exacting revenge on someone who is thought to deserve it." *Id.* at 153 (citations omitted). And later: "Shakespeare shows us vengeful men because there is something in the souls of men—men then and men now—that requires such crimes to be revenged." *Id.* at 168. Professor Blecker appears to display vengeful feelings, when, advocating a "quick and painful death," he speaks of his willingness to attend Timothy McVeigh's execution: "I would . . . hate him as he takes his last breath and feel satisfaction that he is being put to death justly, if too gently." Blecker, *supra* note 176. Elsewhere, Blecker quotes Professor Herbert L. Packer: "The retributive view rests on the idea that it is right for the wicked to be punished: because man is responsible for his actions, he ought to receive his just deserts. The view can take either of two main versions: the revenge theory or the expiation theory." Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149, 1167 n.35 (1990) (citation omitted) [hereinafter *Haven or Hell?*]. See generally SUSAN JACOBY, *WILD JUSTICE: THE EVOLUTION OF REVENGE* (1983).

192. A principal reason given in support of the death penalty is the avoidance of mob rule, vigilantism, and lynching. According to Professor Blecker, "Justice Holmes, who found retribution morally repulsive, believed it socially necessary to gratify our feelings of vengeance. Only a prospect of official retribution after due process of law restrains an angry mob, sometimes a majority mob." *Haven or Hell?*, *supra* note 191, at 1167; see NORMAN DORSEN & LEON FRIEDMAN, *DISORDER IN COURT: REPORT OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON COURTROOM CONDUCT* 13-15 (1973). Indeed, the connection between lynching and capital punishment seems to be a very close one. According to Franklin E. Zimring: "modern executions are concentrated in those sections of the United States where the hangman used to administer popular justice without legal sanction [T]he propensity to execute in the twenty-first century is a direct legacy of a history of lynching" FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 89 (2003). Pam McAllister has noted that: "[w]hen lynching subsided in the 1930s, the number of legal executions rose." PAM McALLISTER, *DEATH DEFYING: DISMANTLING THE EXECUTION MACHINERY IN 21ST CENTURY U.S.A.* 20 (2003). The Supreme Court put forth the prevention of lynching as its justification for capital punishment. Speaking for the Court, Justice Potter Stewart wrote:

The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy of self-help, vigilante justice, and lynch law.

Gregg v. Georgia, 428 U.S. 153, 183 (1976) (Stewart, J., concurring) (quoting *Furman v. Georgia*, 408 U.S. 238, 308 (1972)). In my view, this rationale for the death penalty is seriously flawed:

We, in the due process tradition, condemn mob-dominated trials like that of Leo Frank, where the cries for the defendant's blood by the throngs outside the courthouse were heard and felt by the jurors. If Justice Stewart [is]

A sixth aspect of capital punishment concerns the large number of inhabitants of our nation's death rows who are psychotic, neurologically or developmentally damaged, and otherwise mentally ill or impaired.¹⁹³ We are executing many seriously deranged and defective people.¹⁹⁴ For example, when one

correct that to avoid vigilantism the law must do in the courtroom what the larger society outside insists on and would do for itself if the law failed to do it on its [sic] behalf, then have we not succumbed to vigilantism *right inside the courtroom*? Public justice is not private justice. Is it not intolerable for the ministers of the law to ask the larger society concerning the accused, "Do you want a piece of him?" Would the judicial robe or all the pomp, dignity and wood paneling in the world mask the . . . bottom-line meaning, "We have ordered that the condemned be put to death, for if we don't, the mob outside will"?

William M. Erlbaum, Editorial, *THE NATION*, Feb. 4, 2002, at 2.

193. According to Professor Kirchmeier, the condemned "are severely damaged human beings . . . 'the sickest of the sick' in that they are people with mental illnesses and brain damage, and they are people who suffered horrible brutality as children." Blecker & Kirchmeier, *supra* note 179, at 11. To the same effect, see ELLIOTT CURRIE, *CONFRONTING CRIME: AN AMERICAN CHALLENGE* 181-221 (1985). There are a "large number of seriously mentally ill inmates" in our prisons. Abraham L. Halpern, M.D. & Alfred M. Freedman, M.D., Editorial, *N.Y. REV.*, Dec. 4, 2003, at 62. See also HUMAN RIGHTS WATCH, *ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS* (2003), available at <http://hrw.org/reports/2003/usa1003/usa1003.pdf>; Fox Butterfield, *Study Finds Hundreds of Thousands of Inmates Mentally Ill*, *N.Y. TIMES*, Oct. 22, 2003, at A14; Paul Von Zielbauer, *Report Says Many Inmates in Isolation are Mentally Ill*, *N.Y. TIMES*, Oct. 22, 2003, at B1; Correctional Association Report, *Prison Mental Health Project*, at <http://www.correctionalassociation.org/PMHP/description.pdf> (last visited Jan. 26, 2003); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *BULL. No. NCJ 188215, SPECIAL REPORT, MENTAL HEALTH TREATMENT IN STATE PRISONS* (2001), available at www.ojp.usdoj.gov/bjs/pub/pdf/mhtsp00.pdf.

194. LEWIS, *supra* note 115; Sally Satel, M.D., *It's Crazy to Execute the Insane*, *WALL ST. J.*, Mar. 14, 2002, at A18. Illustrative, is the case of Rickey Ray Rector,

[T]he mentally impaired death row inmate in Arkansas who became famous when Governor Bill Clinton flew home from the campaign trail in 1992 to oversee his execution Taken from his cell for his death walk, the prisoner asked guards to save the piece of pecan pie left on his tray for when he returned. A few minutes later, on the hospital gurney in the death chamber, he helped the executioners find a vein for the IV because, as Christopher Hitchens observed, "he thought they were doctors come at last to cure him."

ROBERT JAY LIFTON & GREG MITCHELL, *WHO OWNS DEATH?: CAPITAL PUNISHMENT, THE AMERICAN CONSCIENCE, AND THE END OF EXECUTIONS* 100-01 (2000). Psychiatric impairment also appears in cases involving "moral monsters" like Timothy McVeigh, the Oklahoma bomber. See William M. Erlbaum, *American Terrorist: Timothy McVeigh & the Oklahoma City Bombing*, by Lou Michel & Dan Herbeck, *N.Y. L.J.*, June 8, 2001, at 2 (book review). See also RON ROSENBAUM, *EXPLAINING HITLER: THE SEARCH FOR THE ORIGINS OF HIS EVIL* (1998). It should not go unnoticed that the elimination of defectives was one of the hallmarks of Nazi Germany.

considers the pathology and violence in the lives of murderers, it is paradoxical how docilely they cooperate in their own elaborate execution ceremonies. Talk about "death with dignity!" They go so quietly.¹⁹⁵ It is very rare for even violent criminals to resist. Is this because it would be futile? It seems more likely that after years shut away in the house of death, the condemned criminal is half dead already.¹⁹⁶

A further lesson of the death penalty in America is that it wastes billions of tax dollars. Executions are many times more expensive to produce than any other existing form of punishment.¹⁹⁷ In contrast, it costs pennies a day to feed or vaccinate

See INGO MÜLLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* 120-28 (1991).

195. "In his moving book *Death Work*, Robert Johnson notes that very few condemned prisoners have to be forcibly dragged to the execution chamber." COSTANZO, *supra* note 183, at 55. Michael Osofsky makes the same observation: "[e]ven the members of the strapdown team are awed by how the inmates are able to do it. Many admitted that in a similar position, they would have to be carried to their death." Osofsky, *supra* note 187.

196. Professor Costanzo observes:

A psychiatrist who worked with the condemned concluded that confinement on death row "invariably results in claustrophobia, and often results in chronic anxiety and depression. Prisoners . . . eventually lose the will to live. The prolonged confinement in a small cell with a light kept burning by night could be regarded as a form of psychological torture." If torture, as defined by the United Nations, consists of "severe pain or suffering, whether physical or mental," then waiting for several years on death row for an appointment with the executioner surely qualifies as psychological torture. According to the testimonies of torture survivors around the world, "The threat of execution is one of the most terrifying forms of torture . . ." Indeed, many condemned prisoners become so despondent that they decide to abandon further appeals and ask the state to carry out the execution. They submit to a sort of state-sponsored suicide. Death starts to seem like the only way to escape their miserable existence.

. . . .
 Condemned men have already been tamed and exhausted by years of confinement. Something resembling emotional death has already been accomplished and all that remains is to kill the body.

COSTANZO, *supra* note 183, at 52-53, 55 (citations omitted). See Greene *supra* note 44.

197. THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 401-10 (Hugo Adam Bedau ed., 1997); ACLU Report, *The High Costs of the Death Penalty*, at <http://www.moratoriumcampaign.org/facts/highcost.DOC> (last visited Apr. 2, 2004); Daniel Wise, *Capital Punishment Proves to be Expensive. Costs are Tough to Pin Down, but Defense Attorney's Fees Alone Exceed \$68 Million*, N.Y. L.J., Apr. 30, 2002, at 1; Fox Butterfield, *Study Finds Steady Increase at All Levels of Government In Cost of Criminal Justice*, N.Y. TIMES, Feb. 11, 2002, at A14.

a child and save a life.¹⁹⁸ By maintaining the death penalty, we forego the opportunity to save millions of innocent children and their families from malnutrition, disease, and untimely death.

Eighth, capital prosecutions seriously damage our nation's courts and harm the communities that need and depend on those courts. Because capital prosecutions are so labor intensive, the death penalty has become the great "black hole" in our court systems, siphoning off a disproportionately large volume of their adjudicative capacity.¹⁹⁹ The non-capital cases of the judge presiding over a capital case may be put on hold for weeks, if not months, forcing other litigants to "cool their heels" until the judge finds time to deal with their cases. Capital cases generate a staggering number of written pre-trial motions. Capital jury selection alone often requires that hundreds of prospective jurors be summoned to the courthouse and questioned, a procedure that can itself take weeks to complete. Meanwhile, the diminished pool of available jurors results in other courtrooms being unable to get the jurors they need. Court officers and court reporters are diverted to capital courtrooms, depleting other court parts of needed staff. While the hoopla, hysteria,²⁰⁰ and media tumult²⁰¹ of a capital case is occurring, judges

198. See, e.g., World Health Organization, *Unfinished business: Global Push to Save 11 Million Children*, at <http://www.who.int/inf/en/pr-2002-18.html> (Mar. 12, 2002); Society For Biomaterials, *Ten Dollars That Could Save a Life*, at <http://web.archive.org/web/20030124233608/http://biomaterials.org/pubs/v23i6/ten.htm> (last visited Apr. 2, 2004); UNICEF, *Make a Promise, Save a Life*, at <http://web.archive.org/web/20011217110521/http://www.unicefusa.org/pledge.html> (last visited Apr. 2, 2004).

199. See, e.g., TIMOTHY R. MURPHY, ET AL., *MANAGING NOTORIOUS TRIALS* (1998). The strain upon the courts was dramatically illustrated recently when the United States Court of Appeals for the Fifth Circuit failed to timely pass upon an application for a stay of execution in a death case affecting three Texas inmates who were scheduled to be executed that night, leaving the prison authorities uncertain as to whether to proceed with the executions. According to a published report, "for the first time anyone could remember, a federal appeals court had essentially thrown up its hands, declining to decide on deadline whether to let Mr. Vickers die by lethal injection or stay his execution." Ralph Blumenthal, *3 Inmates' Lives Spared In Texas by Court Inaction*, N.Y. TIMES, Dec. 13, 2003, at A11.

200. Perhaps the most extreme modern example of this phenomenon, one of countless others before and after, was the trial of Bruno Richard Hauptmann. On appeal, the court referred blandly to the "great popular excitement" and the "crowded courtroom at all stages of the case." *State v. Hauptmann*, 180 A. 809, 813 (N.J. 1935). Some years later, another court, more aptly described the Hauptmann trial atmosphere as "primitive and disgusting." Maurice River Town-

in other courtrooms are presiding over court calendars of 150 to 200 domestic violence and other difficult and sensitive cases each day leaving them scarcely two or three minutes to handle each case. Nor is the harm caused by capital cases limited to trial courts; appellate courts, too, labor under the severe burdens of capital appeals, proceedings that involve the need to read and study massive court transcripts, lengthy preparation for oral argument, and huge investment of judicial manpower, all of which cause bad skewing of the operations of those courts.²⁰²

A final aspect of the death penalty that I would like to discuss concerns the posture that supporters of execution take toward murder victims' surviving family members and friends, whom I call the secondary victims. Retributionists such as Attorney General John Ashcroft have offered these secondary victims the promise that they will find "closure" through the execution of the murderer.²⁰³ Instead of offering them anything

ship Bd. of Educ. v. Maurice River Township Teachers Ass'n, 455 A.2d 563, 564 (N.J. Super. Ct. Ch. Div. 1982).

201. An extreme case, one of many, is *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

202. One case in point is the Florida Supreme Court which was severely affected by the staggering burden of reviewing death cases. See generally *VON DREHLE*, *supra* note 42. The New York Court of Appeals has suffered a similar impact. With trial records each many thousands of pages, and briefs each hundreds of pages, the court and each of its judges have had to hire additional staff. Capital case review has been described as possibly "the greatest challenge facing the Court . . ." Roy L. Reardon & Mary Elizabeth McGarry, *New York Court of Appeals Roundup*, N.Y. L.J., Oct. 12, 2001, at 3.

203. Defending the anticipated execution of Timothy McVeigh, Attorney General John Ashcroft said: "My time with these brave survivors changed me. What was taken from them can never be replaced nor fully restored. Their lives were shattered. And I hope that we can help them meet their need to close this chapter in their lives." John Ashcroft, *Witness to an Execution*, Online NewsHour, at http://www.pbs.org/newshour/bb/law/jan-june01/mcveigh_5-12.html (Apr. 12, 2001). On that same television broadcast, Bonnie Bucqueroux, Executive Director of Crime Victims for a Just Society, said:

[T]here is this assumption that victims are monolithically in support what have [sic] is happening to Tim McVeigh. I would point out that in the crime victims group that I work with, one of our board members is Bud Welch whose daughter was a victim of the blast. And, yet, he is an active opponent of the death penalty. And I'm sure that [the day of the execution] will be a very troubling day for him.

. . . .

[W]ouldn't you agree . . . that victims and victim families are being manipulated by politicians who are really trying to use them for their own pur-

substantive, such as free counseling or college scholarship money for their children or funds to pay off a mortgage, they are offered the illusory comfort of retribution. Money wasted to mount extravagant capital prosecutions could better be spent doing something real for those victims. Instead, politicians find funds to support executions, exploit homicides to promote their careers, and turn different segments of the community against one another, all the while not doing a blessed thing for the survivors. This rabble-rousing does not necessarily mean that those politicians actually believe in the death penalty. It may simply be a tactical ploy to garner votes.²⁰⁴ There is also the related phenomenon of elected judges in death penalty states leaning heavily toward executions in order to be reelected to the bench²⁰⁵ because they want to appear “tough on crime.” Is this not careerism at the expense of the lives of others?

Secondary victims do not speak with one voice. Follow-up studies have shown that many do not seek to find closure through execution and do not seek to kill for comfort. Many ultimately strive to understand the murderer, to reconcile, and to

poses? I think in this case McVeigh has been made a poster child to try to gin up support for the death penalty, which is clearly waning in the culture.

Bonnie Bucqueroux, *Witness to an Execution*, Online NewsHour, at http://www.pbs.org/newshour/bb/law/jan-june01/mcveigh_5-12.html (Apr. 12, 2001). See Mark Hamblett, *Ashcroft Memo Discourages Plea Bargains*, N.Y. L.J., Sept. 23, 2003, at 1; William Glaberson, *Judge Denounces Attorney General's Death-Penalty Push*, N.Y. TIMES, Dec. 24, 2003, at B3.

204. As Alan Berlow has observed:

For most members of Congress, ensuring fairness in the death penalty process is less urgent than demonstrating that they're “tough on crime.” How else to explain Congress's decision to defund postconviction defender organizations that once provided a useful mechanism to check legally flawed death sentences? Or Congress's passage, one year after the Oklahoma City bombing, of the Anti-Terrorism and Effective Death Penalty Act, which decimated *habeas corpus* review not just for death row inmates but for everyone else as well?

Alan Berlow, *The Broken Machinery of Death*, in THE LANAHAN READINGS IN CIVIL RIGHTS AND CIVIL LIBERTIES 240 (David M. O'Brien ed., 2d ed. 2003); see Stephen B. Bright, *The Politics of Crime and the Death Penalty: Not “Soft on Crime,” but Hard on the Bill of Rights*, 39 ST. LOUIS U. L.J. 479 (1995).

205. See Bright & Keenan, *supra* note 33; Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1806 (2000). Compare *Tumey v. Ohio*, 273 U.S. 510 (1927); *Ward v. Vill. of Monroeville*, 409 U.S. 57 (1972).

find closure through forgiveness.²⁰⁶ After “liberty” and “equality,” the third concept in the motto of the French Revolution is “fraternity.” It is the cornerstone of the so-called “third generation” of international human rights, the right to human solidarity.²⁰⁷ That ideal is embraced in Article 1 of the Universal Declaration of Human Rights: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”²⁰⁸ Act in a spirit of brotherhood. A brother or sister in the human family may wrong another, even grievously,

206. In contrast to victim groups seeking closure through execution, consider such groups as Murder Victims’ Families for Reconciliation (<http://mvfr.siteinhouse.com/index.jsp>), the American Friends Service Committee’s Religious Organizing Against the Death Penalty Project (<http://www.deathpenaltyreligious.org>), the Living Theatre’s “Not In My Name” (<http://www.livingtheatre.org/nimn/>), Crime Victims for a Just Society (<http://www.crimevictims.net/>), and Fellowship of Reconciliation (<http://www.forusa.org/>). Some groups and individuals aspire to pursue truth and reconciliation and forgiveness as their path to closure. Consider, for example, Robert Rule, whose sixteen-year old daughter, Linda, was one of forty-eight victims murdered by serial killer Gary L. Ridgway, the “Green River killer.” At his sentencing, a number of the secondary victims expressed their hatred of him. According to a press report:

Mr. Ridgway . . . appeared largely unaffected by their words until Robert Rule, a sometime Santa Claus impersonator with a long white beard and rainbow suspenders, approached the microphone As Mr. Rule spoke, Mr. Ridgway wiped away tears. “Mr. Ridgway, there are people here that hate you,” Mr. Rule said. “I’m not one of them. I forgive you for what you have done.”

Matthew Preusch, *Families Speak as Green River Killer Gets 48 Life Terms*, N.Y. TIMES, Dec. 19, 2003, at A24. See Susan Sachs, *Q&A: Punishing a Terrorist by Showing Him His Victim’s Humanity*, N.Y. TIMES, Apr. 6, 2002, at B9.

207. See RICHARD B. LILICH, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE* 179 (2d ed. 1991).

208. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., pt. 1, U.N. Doc A/810 (1948). For the fascinating history of the creation of the Universal Declaration of Human Rights, see JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT* (1999). From its inception, our Constitution has embraced the “Law of Nations.” See U.S. CONST. art. I, § 8. As the Supreme Court observed in *Paquete Habana*, 175 U.S. 677 (1900), “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.” *Id.* at 700. Moreover, every treaty to which our nation is a party is “the supreme law of the land.” U.S. CONST. art. VI. See *LaGrand Case (Germany v. United States)*, 2001 I.C.J. 104 (June 27), available at <http://www.globalpolicy.org/wldcourt/icj/2001/german.htm>. There is also a growing accountability for violations of international human rights law, one that embraces even heads of state and other government officials. See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Regina v.*

yet the wrongdoer is still part of the family—never a stranger. It is actually a desecration of our humanity to put our brethren to death.²⁰⁹

Norman L. Greene

I have to think about that one for a while. David Von Drehle is the one on this panel who has had most of the experience with death row. Who is down there, what are these people like, and what are their lives like? Please come up here and tell us about them.

David Von Drehle

I hadn't planned to do that. I'd be happy to. Although I feel a little like I should just sit down and let Bill and Robert go at it. This sounds like it could be juicy. You know, one of the things that struck me listening, having had the opportunity to listen to all of the panelists, is that I've been attending and participating in panels like this for about a dozen to fifteen or so years, and the quality of information is so much higher than it once was. It's absolutely astonishing. We talked about many of these issues twelve to fifteen years ago, but really did not know what we were talking about. Professor Fagan's study,²¹⁰ for example, has put actual numbers on things that we've groped around with for years, and, beyond that, I was struck by the fact that Robert Blecker, I found, for the first time is really a proponent of the death penalty who has generally engaged the reality of the system as it exists today. He understands it. He understands the issues with it and this is very heartening, because I am often asked by journalists working on studies: "who can I talk to who is in favor of the death penalty?" Most people, who like the idea, because they are in the dominant public policy positions, don't have much incentive to spend a lot of time studying it. And so I have a hard time recommending people who are knowledgeable proponents, and I will no longer be in that

Bartle and the Commissioner of Police for the Metropolis and Others *Ex Parte* Pinochet, 38 I.L.M. 581 (1999).

209. Much appreciation is expressed to Elise Rucker for extensive research assistance, Carol Crawford for editorial help, Crystal Roberson for secretarial support, and friends and colleagues for numerous helpful discussions.

210. See Columbia Study II, *supra* note 40; see also Columbia Study, *supra* note 139.

situation. Finally, I was struck in hearing, from Judge Erlbaum, the classic, old-fashioned tub-thumping moral case against which, again because we have so much more information and we now talk at a rarified level of the systemic problems that Jeffrey laid out so brilliantly, we don't get to hear it as much as we used to, and it's nice to hear it from time to time. I probably revealed myself now as being just as morally ambivalent as Robert Blecker accused me of being.²¹¹ I'm not morally ambivalent; I agree with him that there are the "worst of the worst." I agree with him that they deserve to die. I'm not sure where that takes us in terms of the public policy position, however, because I've always felt as Shakespeare has said in Hamlet, let's say, that if we all got what we deserved, few of us would escape a whipping.²¹² So, obviously, none of us here deserve to be born in the richest country in the world, at the best time in history to be alive. I know for a fact that the children dying in Malawi didn't deserve to be born there or starve to death in childhood.²¹³ What Robert Blecker has put his finger on, and that I think is most valuable, is the fact that a narrowing of the current death penalty undertaking is necessary if it's going to continue as a valuable public policy. Let me tell you, quoting from myself, about the failure, thus far, to identify and execute the "worst of the worst." I covered the execution of Ted Bundy²¹⁴ and he certainly met my standard of the "worst of the worst." But at the time I finished this book, that so many people have been so nice about, this was the condition of things in the State of Florida. The State had just executed its twentieth inmate, in the modern system, who was a brain damaged, and abused child.²¹⁵ But at the same time:

[M]en like Gerald Stano survived. Stano confessed to killing more than two dozen women. As of this writing, Gerald Stano is still alive. Thomas Knight, who murdered a prison guard while awaiting execution for two other murders, is still alive—twenty years [now 30 years] after his first death sentence. Jesus Scull, who

211. See *supra* notes 56-57 and accompanying text.

212. See WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK* act 2, sc. 2.

213. See Peter Goodspeed, *Famine Stalking Southern Africa: Millions of People in Six Countries Face Threat of Starvation*, NAT'L POST, May 7, 2002, at A13.

214. VON DREHLE, *supra* note 42, at 385-400.

215. *Id.* at 407-08.

robbed and murdered two victims and burned their house around them, is alive. Howard Douglas, who forced his wife to have sex with her boyfriend as he watched, then smashed the man's head in, is alive. Robert Buford, who raped and beat a seven-year-old girl to death, is alive. Eddie Lee Freeman, who strangled a former nun and dumped her in a river to drown, is alive. Jesse Hall, who raped and murdered Susan Routt and killed her boyfriend on Dunedin Beach, is alive. Derreck Manning, who shot two deputies to death as they tried to arrest him for rape, is alive.²¹⁶

And so on.

The system that the State of Florida had at that point was clearly failing to execute the "worst of the worst." And the reason it was failing, I believe, is that the death penalty that we have come to live with in the United States is rested fundamentally on questions of feeling in deference to Professor Blecker and, if it doesn't sound too bad, I might say questions of taste. In other words, the personal attitudes and preferences that I have found in the course of interviewing over 100 people intimately involved with the system, vary enormously, whether they support the death penalty or oppose it. One judge can think the worst possible case is X and the next judge will say, "no, that's not the worst, the worst is something else." And that the long running, now thirty year, attempt to identify and separate those out has not brought us any closer to the solution. I wrote about a lawyer, unfortunately dead now, named Craig Barnard, who was a great anti-death penalty lawyer and scholar in Florida.²¹⁷ And in 1989 he decided to take a look at capital cases in Florida, and how they were being applied.²¹⁸ I think this is still relevant to the question of personal feelings and of taste. And this is what he found.

Barnard looked at the way the Court treated one of the simplest aggravating factors in the Florida statutes called "previous conviction for a capital or violent felony."²¹⁹ Now that sounds like a clear-cut, straightforward, factual definition. And he noted that the Florida Supreme Court could not agree on the meaning of the word "previous." That at one point they had

216. *Id.* at 408.

217. *Id.* at 177-81.

218. *Id.* at 402.

219. VON DREHLE, *supra* note 42, at 402.

ruled that contemporaneous acts of violence on a single victim could count as previous. In other words, in a rape murder case, if the person is convicted of the rape and the murder, the rape could be a previous capital offense for the murder. But, three years later they reversed themselves and said, “no, it had to be separate crimes.”²²⁰ I haven’t looked back to see if they changed back yet. It wouldn’t surprise me. He looked at a great risk of death to many persons, which is another classic aggravator. “In 1980, the court had declared that a fire set to cover up a murder constituted a ‘great risk’ to ‘many persons’ because the fire may have spread to neighboring homes.”²²¹ A reasonable decision. But in 1987, reconsidering the very same case they found that that was not the case.²²²

More esoteric, if you will, aggravators are even more difficult. The classic being that the murder is “cold, calculated, and premeditated . . . without any pretense of moral or legal justification.”²²³ I suspect that that would come close to a classic aggravator in Professor Blecker’s world:

In the cases he had examined, Barnard had found the court absolutely flummoxed by its meaning. The justice had decided that the factor[s cold, calculated and premeditated] applied to one James Card, who robbed a store, abducted the clerk, drove eight miles to an secluded spot, and cut her throat.²²⁴

Robert Preston’s case then came before them and the facts were these. “He also robbed a store, abducted the clerk, drove her to a remote spot, and cut her throat.”²²⁵ In that case, the same court the same identical seven justices found the aggravator did not apply:

The justices accepted the “cold, calculated” factor in the case of a man who shot his victim nine times, because they felt he could have reconsidered while reloading. But they rejected the factor in a case where the killer stabbed the robbery victim one hundred and ten times time. (Eventually, the Florida Supreme Court [wisely, well wisely now, I didn’t write it in the book,] threw up its

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 403 (quotations omitted).

224. VON DREHLE, *supra* note 42, at 403.

225. *Id.* at 374.

hands and struck “cold, calculated” from the books, saying it was too vague to be lawful).²²⁶

And it wasn't just the Florida Supreme Court, the United States Supreme Court had these same problems. For fourteen years and more than twenty executions it found that Florida's aggravating circumstance—the one Jeffrey mentioned earlier²²⁷—“heinous, atrocious, or cruel”²²⁸ was absolutely constitutional,²²⁹ and after twenty executions and fourteen years they rejected it as unconstitutionally vague.²³⁰ In other words, the effort to choose the “worst of the worst” has been going on, has been mandated in fact, by the United States Supreme Court since 1976,²³¹ and it has failed. Now it occurs to me that it is theoretically possible that the system could work if questions of personal feeling and, if you will taste, about these crimes could be defined out of the system and aggravators became clearly and unquestionably simple matters of fact. I think that I've showed how difficult this could be in some of the examples given. But a classic death penalty case has always been considered to be treason against your country in wartime. That might possibly be such a case if you prove treason and you prove there's a declaration of war on at the time, you would have proved the aggravators. Conceivably, mass murder you'd have to set the number from mass, conceivably genocide. I have a harder time with Adolph Hitler than Judge Erlbaum does.²³² Serial killing conceivably, if you could define serial in such a way that it was not covering someone who went from office to office in a single episode, perhaps. Another classic, killing a law enforcement officer in the line of duty. That's a classic death penalty case. And that seems largely factual to me. And finally, classic death penalty case, killing while under sentence of life without parole. In other words, a case in which there is nothing more we can do to you, under the current system, you already have the maximum punishment and you're serving it,

226. *Id.*

227. See *supra* notes 103-06 and accompanying text.

228. See FLA. STAT. ch. 921.141(5)(h) (1996).

229. See *Proffitt v. Florida*, 428 U.S. 424 (1976).

230. VON DREHLE, *supra* note 42, at 403 (citing *Hitchcock v. Dugger*, 481 U.S. 393 (1987)).

231. See *Proffitt*, 428 U.S. 424.

232. See *supra* note 177 and accompanying text.

and you go and kill somebody, what do you do then. Unfortunately, or fortunately, or however you view this issue, I think an issue would remain and that's how I read the jurisprudence of the United States Supreme Court,²³³ mandatory death penalties, even for these crimes would be unconstitutional and all of these would continue to require hearings of mitigation after the sentencing. And I think Professor Fagan could speak better than I to the near inevitability of lengthy appellate argument over the findings of what are ultimately, hugely subjective findings of mitigation. So what then if I am morally in fact ambivalent, which I'm uncomfortable with, having been a moral philosophy major in college and writing my paper on Kant, who is not really considered much of a waffler but, if I am morally ambivalent, I guess that I would ask this question: Which is the higher value, at this point for the United States, is it to attempt to issue a punishment that, I would agree, is absolutely deserved, but that the delivery of which punishment has proven over many, many years and in every jurisdiction to leave the justice system tied up in knots, contradicting itself and ultimately failing to deliver the punishments it claims to be meting out? Professor Blecker mentioned that there are 3,500 people on death row today.²³⁴ Fewer than 100 of them will be executed this year.²³⁵ That's a one in thirty-five chance. A total of 885 people have been executed in the United States since the death penalty was reinstated in 1976.²³⁶ That's out of, how many sentences would you estimate, 7,500, something like that, 6,500. So that's, less than 12%. The chances are that a death penalty meted out in the United States by a court, will never be carried out, and I agree wholeheartedly with Professor Fagan that this is a severely, corrosive state of affairs for our justice system.²³⁷ Is it worth it to us, to pursue this rarified, philosophical idea of desert, at the cost of disfiguring the system of justice otherwise, I came to the conclusion it's not. But I am very pleased to be a part of a very provocative discussion of this issue

233. See *Lockett v. Ohio*, 438 U.S. 586 (1978).

234. See *supra* note 82 and accompanying text.

235. See generally BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, KEY FACTS AT A GLANCE: EXECUTIONS (2004), at <http://www.ojp.usdoj.gov/bjs/glance/tables/exetab.htm>.

236. *Id.*

237. See *supra* notes 127-31 and accompanying text.

and a better one than I've seen or heard in many years. Thank you very much.

Norman L. Greene

Robert Blecker for his rebuttal. However, I am not sure that he needs a rebuttal, because I think that he received a good deal of support tonight.

Robert Blecker

First, Jeffrey Kirchmeier, as to "heinous, atrocious, or cruel,"²³⁸ the proper designation is "*especially* heinous, atrocious, or cruel." Let's not forget what cruelty is. Oxford English Dictionary defines "cruel" as follows: "[o]f persons . . . [d]isposed to inflict suffering; indifferent to or taking pleasure in another's pain or distress . . . [o]f actions, . . . [p]roceeding from or showing indifference to or pleasure in another's distress."²³⁹ That's the essence of cruelty, taking pleasure in or being indifferent to another's pain. The attitude that we condemn is at the extreme and ONLY at the extreme—"especially heinous, atrocious and cruel."

Jeffrey Kirchmeier's other mistake, in my view, is to equate arbitrariness with discretion. There is inevitably discretion. In an individual case, this forces us outside specific predictability. "Law can never issue an injunction binding on all which really embodies what is best for each: it cannot prescribe with perfect accuracy what is good and right . . ." Plato observed. It hasn't changed. That's the essence of law. Aristotle talks about equity, which is the "rectification of law in so far as the universality of law makes it deficient."²⁴⁰ Law can never determine all things precisely in advance. According to Aristotle, "on some matters legislation is impossible, and so a decree is needed. For the standard applied to what is indefinite is itself indefinite . . ."²⁴¹ Ultimately, the death penalty is not arbitrary, but indefinite.

238. See *supra* notes 103-07 and accompanying text.

239. 4 OXFORD ENGLISH DICTIONARY 78 (2d ed. 1989) (definition 1a, c).

240. ARISTOTLE, NICOMACHEAN ETHICS, *reprinted in* CLASSICS OF MORAL AND POLITICAL THEORY 315 (Michael L. Morgan ed., 2d ed. 1996).

241. *Id.*

Jeffrey Fagan's study²⁴² is very serious and important, but it has its methodological critics.²⁴³ Mainly, as Ron Eisenberg, Deputy District Attorney of Philadelphia, points out, the odd fact is that death penalty cases are being reversed much more frequently than are non-death penalty murder cases, although they are presented by the same prosecutors, defended by the same defense attorneys and before the same judges.²⁴⁴ Why is that? Why should error be much *more* common in death penalty cases? You think they're not being taken seriously? The much higher reversal rate of capital penalties reveals a persistent anti-death penalty bias of judges. The essential flaw in what Professor Fagan said was "we studied error"²⁴⁵—as if error is real whenever a death penalty is reversed. Error and being reversed are not one and the same thing. He was candid, and I congratulate and admire him for observing that Judge Rakoff, who just declared the whole federal death penalty unconstitutional on the basis of the Columbia Study,²⁴⁶ which was not drawn at all from the federal death penalty context, is a typical, abolitionist judge who has a whole judicial history behind him. It goes all the way back to the Sanhedrin, the ancient abolitionist Hebrew high court, which artfully conceived proceduralist tricks to avoid the obvious command of the Old Testament that

242. See Columbia Study, *supra* note 139; Columbia Study II, *supra* note 40.

243. See, e.g., Press Release, Criminal Justice Legal Foundation, Death Penalty Study Called Biased, Dishonest (Feb. 8, 2002), available at <http://www.cjlf.org/releases/02-01.htm>; Press Release, Criminal Justice Legal Foundation, Death Penalty "Error" Study Has Error's of It's Own (June 19, 2000), available at <http://www.cjlf.org/releases/00-11.htm>; Press Release, State of Nevada Office of the Attorney General, Nevada's Death Penalty System is Working: Report Issued by University Professor is Extremely Flawed (Sept. 19, 2000), available at http://ag.state.nv.us/agpress/2000/00_0919a.pdf; Ronald Eisenberg, *Prosecutor Comments on Latzer and Cauthen*, PROSECUTOR, Jan.-Feb. 2001, at 16; Barry Latzer & James N.G. Cauthen, *Another Recount: Appeals in Capital Cases*, PROSECUTOR, Jan.-Feb. 2001, at 25; Edward J. Erler & Brian P. Janiskee, *Not Light, But Heat: A Flawed Study Skews The Debate Over Death Penalty*, INVESTOR'S BUS. DAILY, Jan. 19, 2000, at A24; Paul G. Cassell, *We're Not Executing the Innocent*, WALL ST. J., June 16, 2000, at A14.

244. See Ron Eisenberg, "Innocence" and the Death Penalty, PA. DISTRICT ATT'YS ASS'N NEWSL., available at <http://www.prodeathpenalty.com/Liebman/Pennsylvania.htm> (last visited Jan. 4, 2004).

245. See *supra* p. 143.

246. See *United States v. Quinones*, 205 F. Supp. 2d 256 (S.D.N.Y. 2002), *rev'd*, 313 F.3d 49 (2d Cir. 2002).

the murderer shall die.²⁴⁷ We have a history in this country of abolitionist judges going outside their appropriate role. I would like to know, for example, how many death penalties were reversed by judges who *later affirmed* other death penalties. So, a study that analyzes error by equating error rates with reversal rates is ultimately grounded on wishful thinking.

I want to emphasize constructive overlap in the Columbia Study and what we're talking about tonight, because the study's central reform was to limit it to the "worst of the worst." Professor Fagan did actually recite the principal recommendations.²⁴⁸ I'd like to go through them very briefly in terms of the "worst of the worst" and react to them, as well as the recommendations of The Constitution Project,²⁴⁹ and the Illinois Commission.²⁵⁰ There is an overlap, as we would hope.

First, requiring proof "beyond any doubt" is absurd. In this world, we never have proof beyond a doubt. You don't have proof beyond all doubt that the ceiling is not going to cave-in, collapse and kill us all while we sit here.

You, in fact, risk your lives to attend this discussion. And you, as I, will walk our children in a stroller on a city street, where a truck may jump the curb and kill us. The fact is that proof to an absolute certainty is an impossibility in life. It cannot be a workable part of the death penalty. It is not going to be part of anything else you do in life. But the call for this standard does suggest importantly that proof beyond a reasonable doubt is not sufficient in the death penalty context. Something more is required, and that is proof beyond a reasonable doubt *and* to a moral certainty. They are not identical, which takes me back to a main theme in the opening comments: the emotional component of the death penalty decision. Every moral decision is partly emotional. Proof to a moral certainty does not attach itself strictly to the rational faculty; it attaches itself to the emotional faculty. One of the recommendations of the Illinois Commission is that the jury be specifically instructed that notwithstanding the fact that they have found at least one ag-

247. THE BABYLONIAN TALMUD, MAKKOTH 7a (I. Epstein ed., Soncino Press 1960).

248. See *supra* notes 162-73 and accompanying text.

249. The Constitution Project, *supra* note 39.

250. Illinois Report, *supra* note 38.

gravating circumstance, and no mitigating circumstances, nevertheless, they may still *feel* that death is not the appropriate penalty.²⁵¹

Theirs is exactly the right kind of recommendation because it goes to what the issue is here, which is moral doubt, even when there is no rational doubt. I applaud the spirit of the recommendation even though “proof beyond any doubt” is stated absurdly. Proof to a moral certainty is fundamentally responsive to the kind of jurisprudence necessary for a death penalty that is just and humane.

Requiring that the aggravators substantially outweigh the mitigators, I think is an excellent policy and the best way I know how to go about it. However, I don’t think it is necessarily *constitutionally* mandated. I would certainly vote for it, advocate for it, and lobby for it.

Professor Fagan gets caught in an old trap when he emphasizes the number of aggravators. When a jury fills out a form in which it lists the aggravators, it lists mitigators, it adds them up and says, “oh, four aggravators, one mitigator, OK, death.” That’s the wrong kind of decision making, it seems to me. It’s not the number of aggravators because that allows a jury in fact to avoid its responsibility by deluding itself into believing it is engaging in a weighing process whose outcome is predetermined by the legislative list. It’s not the numbers; it’s the quality. We need a richer language, a richer language that weighs in terms that are not merely numerical.

Mental retardation is obviously a very complex subject. In almost all cases, I think it constitutes a diminished capacity, which should be a mitigator. But, almost all is not all.

The United States Supreme Court, as many of you know, has decided the *Atkins*²⁵² case and outlawed the death penalty for the mentally retarded. But *Atkins* himself, had an IQ of fifty-nine.²⁵³ Nevertheless, he correctly used words like “*déjà vu*” and “orchestra,” knew the recipe for making chicken, could count change, knew that J.F.K., Jr. was killed in a plane crash, knew he was the son of the former President of the United

251. *See id.* at 151-52.

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

253. *Id.* at 309.

States, and showed himself to be very much attuned and aware of what was going on.²⁵⁴ I would not actually execute Atkins because first of all the situation didn't clearly warrant it. Secondly, the proof is very troubling as to whether it was in fact he or his co-felon who committed the killing and I would not be convinced to a moral certainty that he deserved to die.

As to life without parole, before embracing it as an adequate alternative, we have look at the *quality* of life without parole. And I hope we get a moment or two in the discussion to talk a little about death row, especially Florida's death row which David Von Drehle²⁵⁵ knows better than I. But, I spent a day there and witnessed the execution of Bennie Demps, which Bill Erlbaum specifically pointed out as a prison killing that did not deserve the death penalty.²⁵⁶ Demps was ostensibly executed for the prison killing, which in and of itself ought not to have qualified as capital punishment. But Bill Erlbaum omitted to mention Bennie Demps' first death sentence, and the murders for which he was *really* executed, morally executed, although not strictly legally.²⁵⁷ The Puhlicks, husband and wife, were a hard-working couple. She cleaned houses; he was a carpenter. They spent their working lives putting their kids through school. She was known as the "flower lady" because she loved to grow things, and they dreamed of retiring down South, perhaps to an orange grove. A cousin, a Florida real estate agent called them up excitedly; a handyman fix-up in an orange grove had just come on the market. So they went to see their dream house and drove into the grove where Bennie Demps was struggling to open a safe he had just robbed from a house a few miles away. When the Puhlicks drove up, Demps robbed them at gunpoint. Mrs. Puhlick nervously dropped her lipstick, and when she instinctively bent down to pick it up, Demps shot her in the stomach. Then he made her husband climb into the trunk of their own car, then Demps made the bleeding Mrs. Puhlick climb in next, and finally the real estate agent. The robber shut the trunk of the car, and a few minutes

254. Joint Appendix at 477-85, *Atkins v. Virginia*, 536 U.S. 304 (2002) (No. 98-8229 (6)), available at 2001 WL 34093997.

255. See VON DREHLE, *supra* note 42.

256. *Demps v. State*, 761 So. 2d 302 (Fla. 2000).

257. See *Demps v. State*, 272 So. 2d 803 (Fla. 1973).

later, before he left, Demps machine-gunned the trunk. He machine-gunned the three of them. However, Mrs. Puhlick, the “flower lady,” took the bullets that were meant for her husband, who lay for hours with his wife beside him dying in the trunk. Mr. Puhlick lived to tell about it and identified Demps as did all the forensic evidence.²⁵⁸ Demps was sentenced to die for that especially heinous double murder, but when the United States Supreme Court decided *Furman*,²⁵⁹ all death row inmates across the country, including Bennie Demps were released into general population, where Demps killed again. That first double murder was what Bennie Demps was really executed for. That’s what gave me a sense of satisfaction as I watched him die. But, what made me feel dissatisfied was the painless way in which he peacefully went to sleep while I was picturing again his victims’ suffering in the trunk of the car.

Returning, however, to some recommendations from The Constitution Project, which also tried to confine itself to the “worst of the worst,” or as it said to reserve it “for the most culpable offenders.”²⁶⁰ They, too, would exclude the mentally retarded and those under the age of eighteen. And perhaps their single most important recommendation that we must adopt if we really seek capital justice for only the “worst of the worst:” eliminate the felony murder aggravator.²⁶¹ But their recommendations only went halfway. They said eliminate the felony murder aggravator for those who did not kill or intend to kill, citing two Supreme Court cases, *Enmund*²⁶² and *Tison*.²⁶³ The fact is that the felony murder aggravator does not belong in any proper death penalty statute. Any time you need to get to the death penalty because the person deserves it—such as rape, which should independently qualify as torture—with a well-drawn statute, you can get there. But, the majority of people on death row are robber-murderers, who did not commit the kind of killings that qualify them as the “worst of the worst.” The felony murder aggravator should be dropped entirely. We

258. Telephone Interview with Victim’s Family (Apr. 11, 1999).

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

260. The Constitution Project, *supra* note 39, at xvi.

261. *Id.*

262. *Enmund v. Florida*, 458 U.S. 782 (1982).

263. *Tison v. Arizona*, 481 U.S. 137 (1987).

should, however, continue to use the “pecuniary motive” aggravator. But that, too, is also often wrongly applied and too broadly applied to robbers. Most robbers who kill do not kill from a pecuniary motive; they all *rob* from a pecuniary motive, but they don’t *kill* from a pecuniary motive. Attitude is what counts and motive is what counts here.

So the robber who finds his victim going for the gun and kills his victim in the struggle over the gun during the robbery is a murderer, and deserves to spend the rest of his life in prison. But, he does not deserve to die. That’s the most important place, then, where we need to narrow it. Keep the pecuniary motive, which the Illinois Commission would have dropped,²⁶⁴ but narrow it.

But we also need to expand it. We need to expand it and understand that as a culture we are class-based to a great degree. Corporate executives who knowingly maintain deadly work places, and thereby callously kill their own poor employees, or knowingly pollute streams giving people cancer, deserve in my view to die for it because they are acting with heinous, atrocious and depraved indifference to human life. That’s another change, it seems to me, that we need to adopt, if we are going after the “worst of the worst.”

We must recognize as vitally important that the culpable mental state of intent to kill has its moral equivalent in a depraved indifference to human life—a coldness, a wantonness, a callousness. All of us are cruel to one extent or another. The point is, again as with Jeffrey Kirchmeier, that it is only when we are *extremely* cruel, the “worst of the worst,” that we can deserve to die. So it is, ultimately, a matter of degree. At some point, as Anaximenes told us in the sixth century, B.C., “differences in degree become differences in kind.”²⁶⁵

We discovered this, not specifically in the death penalty context, but in exploring the nature of right and wrong and what is real. So we have known for 2500 years how eventually a difference of degree becomes a difference in kind. It is, as Aristotle suggests, those who depart most radically from the

264. Illinois Report, *supra* note 38, at 65-80.

265. See 1 GUTHRIE, *supra* note 53, at 139-40.

mean, the most immoderately callous or cruel, who are the worst.²⁶⁶

Those who are the coldest, who just simply don't give a damn, like one guy I spent hours with inside Lorton prison. I asked him why he shot sixteen people on a street corner with a machine gun when he was only after one victim, who was surrounded by strangers. I asked him whether he ever thought about the people he shot and killed. And he said, "yeah, a little bit." I asked, "Did you ever realize that they have people who loved them, that they have sisters, mothers, children." He shrugged his shoulders. "S.O.L."

What does that mean, "shit out of luck?" I looked at him and he saw my brow narrow, and he said, "They shouldn't have gotten in the way of my bullet."²⁶⁷ I heard that more than once inside. It's that attitude—that coldness, callousness, wantonness, depravity. Or, it's the sadism of the serial rapist killer.

Now, death *is* different. We plainly seek it too often. It is definitely different as a matter of punishment. Is it different as a matter of crime? Tough question. The easy answer, and the answer so far from the United States Supreme Court, with one possible exception—the rape of a child left open in *Coker v. Georgia*²⁶⁸—the answer thus far from the Supreme Court is yes, "death is different."²⁶⁹ The death penalty must be reserved, if at all, only for those who kill.

Yet, it seems to me that we have three contenders that challenge us. My first choice for who should die in this context is Robert Courtney, the pharmacist in the Midwest, worth \$10 million, who diluted chemotherapy to 3% strength which he distributed to cancer victims desperate for a cure.²⁷⁰ This was a case of a pharmacist worth millions of dollars diluting cancer patients' chemo for money. Can you imagine anything more depraved? It cannot be proven yet that he killed anybody. Because of his callous indifference to human life, he deserves to die. Another candidate is Richard Reid, "the shoe bomber,"

266. See ARISTOTLE, *supra* note 240.

267. Interview with Anonymous Inmate, Lorton Prison, Lorton Va. (Jan. 31, 1996).

268. 429 U.S. 815 (1976).

269. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

270. *United States v. Courtney*, 240 F. Supp. 2d 1038 (W.D. Mo. 2002).

who, but for the last second intercession by alert passengers and crew, would have blown a commercial jet full of people out of the sky.²⁷¹ He deserves to die, although he did not kill anyone. And a third, is a guy named Betheley, in Louisiana, who raped three children, nine, seven and five—one of them was his own—while he was HIV positive and knew it.²⁷² Whether or not the children live, he deserves to die. Again, it's ultimately a function of attitude.

David Von Drehle says, if you must have it, confine the death penalty to those about whom you can make factual assertions: mass-murderers, serial-murderers, law-enforcement victims.²⁷³

I know this is unpopular to assert with death penalty supporters, but the police-officer aggravator is not morally justified. If you kill a cop *because* he's a cop, then yes. But, if you kill a cop in the heat of a gun battle that you did not initiate, running away from a robbery that you did initiate, it's terrible that you did it. You're a murderer; you deserve a life in prison. But you are not the "worst of the worst." You do not deserve to die.

"Under a life-sentence" is another aggravator, Von Drehle suggests.²⁷⁴ The two of us may switch roles here. The "lifer" aggravator is predicated on the completely mistaken fallacy that "lifers" have nothing else to lose. Twelve years inside Lorton Prison has shown me, beyond any doubt, that "lifers" often have the most to lose. They are the most deterrable group precisely because they are going to be in prison for the rest of their life. They care about the quality of their lives. Their privileges are vital. The great threat to "lifers" is transfer.

Inside Lorton prison, while I was down there, I met a "lifer" who had, after many years inside, obtained one of the best jobs in the prison, delivering trays to those on lock-down. Unbeknownst to him one day, another prisoner who worked in the kitchen laced a peanut butter sandwich with two lines of cocaine to be passed along by the unwitting "lifer" to the prisoner on lock-down. But somebody else who worked in the kitchen

271. See *United States v. Reid*, 214 F. Supp. 2d 84 (D. Mass 2002).

272. *State v. Wilson*, 96-1396 (La. 12/13/96).

273. See *supra* p. 169.

274. *Id.*

snatched. The “lifer” was busted while delivering a cocaine-laced peanut-butter sandwich. Now he himself was locked-down for several months, lost all his privileges, lost his job, and all that he had worked to acquire for years and years. Furthermore, he was due to be transferred to a tougher prison far from his family.

Burning a guy like that, turning him into an unwilling conduit of contraband, is a killing offense inside. Soon afterwards, not surprisingly, the guy who sent the sandwich was himself murdered; the “lifer,” locked down, had ordered it. Under David Von Drehle’s minimalist death penalty regime this murder would qualify as the worst. Morally, however, it does not. The killing is unquestionably mitigated, inside they would say justified, yet it was ordered by a lifer who, nevertheless, does not deserve to die for it.

Mass murder challenges us to say how one human life is infinitely valuable and yet taking two lives is worse than taking one. Again, we need a language that is not our ordinary language. Again, mathematics supplies it to us. During the 19th century, Cantor gave us levels of infinity, a language by which we can express that something is infinite, and another quantity is also infinite. Yet, the greater is infinitely greater than the lesser infinity.²⁷⁵ Mathematics supplies the metaphor of how an individual victim’s life can be of infinite value and yet killing two is worse than killing one.

Life without parole; we need to know again how it feels, day to day. What is the quality of life like? We all have been told over and over again by some abolitionists that “life is worse than death” and most especially that life on death row is a living hell. I know that was my image of death row before I saw it, bolstered by movie portrayals, and I suspect a living hell is yours, too.

Recall, however, David Von Drehle’s description of the conditions on death row, this “living hell.”

Some men are devoted to soap operas. Whole tiers get on the bars every night and race one another for the right answers during *Jeopardy!* Some watch the cop shows and cheer for the bad guys.

275. See generally JOSEPH WARREN DAUBEN, *GEORG CANTOR: HIS MATHEMATICS AND PHILOSOPHY OF THE INFINITE* (Princeton Univ. Press 1990) (1979).

At noon, and again at six in the evening, most prisoners watch the news²⁷⁶

When Ted Bundy, who killed maybe fifty young women, was on Florida's death row

[i]t was a custom in those days, according to several prisoners, for inmates to put five bucks into a kitty before weekend visits. After they put in their money, they drew lots. The money went to the visiting room guards, who would look the other way, as the winning inmate joined his girlfriend in the bathroom. Carole Boone told friends that this was how she became pregnant by Ted Bundy. She bore him a daughter.²⁷⁷

I spent a day on Florida's death row. What I saw absolutely appalled me. Those who deserved the most punishment, pain, suffering, got the least. The death row convicts, and they alone, were allowed to smoke. They had televisions in their cells; they were allowed to exercise in yards; they played volleyball; they played basketball; they played softball with mitts provided, while the rest of the inmates in Florida State Penitentiary exercised in cages. Assure us that life without parole or life in prison, as an alternative to the death penalty, is truly going to be a life deserved, a life of suffering, before we can even hope to discuss whether the "worst of the worst" have even begun to approach their just deserts.

Finally, my quarrel with Von Drehle goes deeper, for in the *Lowest of the Dead*, that powerful and unsettling protest, he denies what we retributivist advocates essentially know to be true. Von Drehle writes that:

the modern death penalty . . . was built on sand; its theoretical foundation was the notion that degrees of evil and depravity and menace can be reliably distinguished and fixed into print by legislative draftsmen and consistently applied by judges of a thousand worldviews and temperaments.

In reality, the nature of the criminal soul is the terrain of a Dostoevsky, a Dante, a Camus. It defies the grasp of legal definition as a blob of mercury defies tweezers. Modern death penalty laws try to get their arms around a cloud—a dark cloud, but nonetheless evanescent—and as a result, the laws are com-

276. VON DREHLE, *supra* note 42, at 126.

277. *Id.* at 377.

plicated and ornate but ultimately hollow; hollow in the sense that their language is utterly open to new and shifting interpretation.²⁷⁸

This is a compelling denunciation and denial of what we, retributivist advocates, hold dear: That the “worst of the worst” are real and can be known and that we can, and must, identify and execute them as soon as possible.

Norman L. Greene

We will finish by 9:00 P.M. Guaranteed. David, I would like you to respond to Robert Blecker’s comment about the quality of life on death row.

David Von Drehle

Professor Blecker is absolutely half-right about this. Death row is, it seems pretty bad to me. It’s solitary confinement, maximum security, this is in Florida and I think Florida is fairly typical, which means that in cells that average 6 x 9, or about the size of your bathroom, probably, inmates spend an average of twenty-three hours a day and most of them are there for upwards of ten and on to twenty years. But, they do have television sets. They do have in normal situations access to reading material and, I describe all this in my book, there are carts that come through twice a week where, if their families have sent them money, they can buy candy or sandwiches or ice cream or this sort of thing. And, in fact, as I agree with him, a better life and I do say this in my book, than the non-lifers, what they call the general population. But, there’s a reason for that, and the reason is that to get to the general population of Florida State Prison, a person has to have washed out of at least two other prisons. Nobody, except death row inmates, start out there. It is for people who have gone to another prison, and have gotten into fights, or have proved to be disciplinary problems of one type or another and they get promoted to a tougher prison and they screw-up again, and then they find their way to Florida State Prison. They are considered incorrigible. Death row inmates, whether rightly or wrongly, are considered to be custodial in a way, awaiting their real punishment,

278. *Id.* at 237.

which is supposed to be their execution. Now, that hasn't turned out to be the case, I would agree there is probably some re-thinking that could be done about what their actual punishment is going to turn out to be and whether they're thinking about it rightly. But, there is a reason other than sympathy for them, that causes them to have better conditions than the general population there. I mean, most death row guards and wardens, as you know, Robert, love to work with death row populations because they actually have incentive to behave. It reflects well on them in their appeal and in their clemency hearings.

Norman L. Greene

Professor Fagan, do you want to say something?

Jeffrey Fagan

Well, I wanted to talk a little bit about Philadelphia and prosecutors.

Norman L. Greene

If you can please do it quickly, because we are trying to wrap up the program.

Jeffrey Fagan

Let me speak a little about Philadelphia. Philadelphia is a city where the Prosecutors' office seeks the death penalty more often than in Harris County (Houston), Texas, more often than Oklahoma City, and more often than almost any other county in the United States, according to our study.²⁷⁹ Now, Philadelphia is a very interesting place where we can make a natural experiment. Philadelphia tries their death penalty cases in two systems.²⁸⁰ In one system the cases are open to the Philadelphia Defenders, the Capitol Defenders Unit (CDU), which is a good,

279. See generally Columbia Study II, *supra* note 41, at 247; see also David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998); Jonathan DeMay, *A District Attorney's Decision Whether to Seek the Death Penalty: Toward an Improved Process*, 26 FORDHAM URB. L.J. 767 (1999).

280. See, e.g., Emilie Lounsberry, *Defense Issues in Capital Cases Hit Pennsylvania, Not New Jersey*, PHILADELPHIA INQUIRER, Oct. 6, 2003, at A1.

experienced unit that specializes in death penalty cases.²⁸¹ The rest of the cases, about 80%, go to court appointed counsel.²⁸² The error rates for the court appointed counsel are roughly four times the error rates we see in cases tried by the CDU.²⁸³ So, in other words, here's a system where the deck is structurally stacked. But this dilemma also presents an opportunity for a natural experiment, which would let us understand the effects of the quality of defense counsel on reversal rates, as well as the strains on the quality of representation when the prosecution overloads a system by indiscriminately seeking death sentences.

Indeed, the lessons from Philadelphia demonstrate the findings in the Columbia Study. There have been seventeen reversals since 1995.²⁸⁴ Nineteen of the last nineteen, have been reversed.²⁸⁵ It is hard to imagine these reversals are unwarranted when they are decisions of judges who have been appointed primarily by conservative governors or conservative presidents, and when these judges face the prospect of severe electoral recriminations if portrayed as lenient on murders. Consider, for example, the case of William Nieves²⁸⁶. Here, the State withheld evidence that the perpetrator was of a different race than that of the defendant.²⁸⁷ This "error" was committed by Mr. Eisenberg's office. Fredric Jermyn's trial counsel had less than two years experience, and failed to call a psychiatrist despite evidence of physical torture.²⁸⁸ Ronald Collins' trial counsel failed to introduce evidence of a head injury, which was subsequently documented by hospital records as brain damage.²⁸⁹ William Basemore's is a really interesting case because

281. *Id.* (The homicide unit in the Philadelphia Capital Defender Association has never had a defendant sentenced to death since it started handling city murder cases in 1993).

282. See Robert Dunham, *Death Row Pennsylvania 2002*, Refuse & Resist, at <http://www.refuseandresist.org/mumia/art.php?aid=580> (last visited Apr. 14, 2004).

283. Lounsberry, *supra* note 280.

284. Dunham, *supra* note 282.

285. *Id.*

286. See *Commonwealth v. Nieves*, 746 A.2d 1102 (Pa. 2000).

287. See Editorial, *Call Moratorium on Death Penalty*, SUNDAY NEWS LANCASTER PA., Mar. 9, 2003, at P2.

288. See *Jermyn v. Horn*, 266 F.3d 257 (3d Cir. 2001).

289. The Philadelphia Court of Common Pleas overturned the death sentence of Ronald Collins, ruling that trial counsel improperly failed to present a variety of

his death sentence was reversed subject to a new sentencing hearing because they found prejudice in the jury selection system.²⁹⁰ In fact, the Philadelphia District Attorney has a jury selection videotape which teaches its prosecuting deputies how to exclude jurors on the basis of race.²⁹¹ Now, Philadelphia is a tough City, but you can certainly understand the production of a very high rate of error under those circumstances.

Norman L. Greene

Jeffrey, please ask your one question. I will give you something to think about in the meantime, Robert. What do you mean by certain people might be thought deserving of a painful and quick death and precisely what might that sort of death be? Please think about that for a while.

Jeffrey L. Kirchmeier

I'll try to be brief. The problem when we talk about moral outrage as being the barometer in deciding who is executed is that it ends up looking a lot like the obscenity test: "I know it when I see it."²⁹² And that is a problem because the Supreme Court has stated that the Constitution will not tolerate arbitrariness in decisions of who lives and who dies where we can just say "well, yeah, that's one that I would kill."²⁹³

Finally, if we look back over history, we see that the death penalty has gradually been narrowed again and again. And if we accept Professor Blecker's current proposal, that it should be narrowed again, then that means that over the last twenty years the executions of a substantial number of people have

mitigating evidence—family background, brain damage, and mental health evidence—for Collins. See ABA DEATH PENALTY MORATORIUM IMPLEMENTATION PROJECT, BUILDING MOMENTUM: THE AMERICAN BAR ASSOCIATION CALL FOR A MORATORIUM ON EXECUTIONS TAKES HOLD: A SUMMARY OF MORATORIUM RESOLUTION IMPACT FROM AUGUST 2001 THROUGH JUNE 2003 30 (2003), available at <http://www.abanet.org/moratorium/4thReport/4thAnnualReport.doc>.

290. See *Commonwealth v. Basemore*, 744 A.2d 717 (Pa. 2000).

291. AMERICAN RADIOWORKS, *Juror Bias*, at http://www.americanradioworks.org/features/deadlydecisions/bias_print.html (Aug. 2002) (discussing a videotape of former homicide prosecutor Jack McMahon, prepared by the Philadelphia District Attorney's office in 1987 for instructing my prosecutors on the art of jury selection).

292. See *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

293. See generally *Gregg v. Georgia*, 428 U.S. 153, 189 (1976); *Godfrey v. Georgia*, 446 U.S. 420, 427-28 (1980).

been morally wrong. So who is to say that twenty years from now someone is not going to look at what we have done and propose an even narrower death penalty. Then it will have been morally wrong to have executed those we will execute under this new narrower system. And so on. The only way for us to eliminate the problems with the death penalty is to just abolish capital punishment.

Norman L. Greene

I think that we are going to conclude the evening. I would like to say a few things before we do so. Number one, Martin Leahy, this is your night. We owe you a lot for this tonight. Second, whatever you see here was all in the preparation. Third, I thank you all for coming, and I hope we have a wonderful publication.