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POLITICS AND THE DEATH PENALTY: CAN RATIONAL DISCOURSE AND DUE PROCESS SURVIVE THE PERCEIVED POLITICAL PRESSURE?†

NORMAN REDLICH:

Good morning. I am Norman Redlich, former dean of the New York University Law School. The title of this program is "Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?"

I want to thank Ron Tabak, the program chair, for putting this program together. In the interest of time, I will be introducing myself. You now know my name. I am the former Dean of NYU Law School, and I am currently practicing law with a private firm.

I guess my claim to fame in the death penalty area is that I may well have been the first lawyer in the country to litigate against the death penalty as a form of punishment. In 1958, I organized the New York Committee to Abolish Capital Punishment, which undertook the task of stopping executions in New York State — which it successfully accomplished. Before that, New York State had executed quite a few people. Very few people know that twelve of the last thirteen people to be executed in New York State were either Black or Hispanic.¹ The last execution occurred in 1963,² and two years later New York State abolished the death penalty.³

More recently, a few of us organized the New York State Justice-PAC, which are a political action committee supported by contributions which promotes anti-death penalty candidates for the New York State legislature. We look for candidates in districts where

† This transcript is taken from a program sponsored by the American Bar Association Section of Individual Rights and Responsibilities.

1. For information regarding the last thirteen executions in New York, see LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEPARTMENT OF JUSTICE, CAPITAL PUNISHMENT, for the years 1955 through 1964.

2. In 1963, Eddie Lee Mays was the last person to be executed in the State of New York. James R. Acker, *New York's Proposed Death Penalty Legislation: Constitutional and Policy Perspectives*, 54 ALB. L. REV. 515, 526 (1990). In 1963, New York became the last state to abandon mandatory capital punishment for first degree murder. *Id.* at 522.

3. On June 1, 1965, legislation was implemented in New York that drastically narrowed the types of crimes that were capital offenses, thereby accomplishing a virtual abolition of the death penalty. *Id.* at 525. See generally *id.* at 522-30 (describing the various legislation contributing to New York's abolition of the death penalty).

the death penalty is an issue. One of the prime examples of our success both in terms of the death penalty and in terms of the people of Rochester and New York State is the fact that present on this program is Assemblywoman Susan John, who was in part Justice-PAC supported. She had a pro-death penalty opponent, and she'll talk to you about that in due course.

At this point, I would just like to state the premise of this program. This is not a debate on capital punishment. It may end up as a debate on capital punishment, but it is not intended to be a debate on capital punishment. We are trying to deal with a somewhat different issue — the perception that there is overwhelming support in this country for the death penalty. Although that perception may be accurate, it is in dispute. Nevertheless, the perception exists.

Our Justice-PAC in New York has challenged that perception. I never thought I would live to see the day when it was headlined in an Albany newspaper that "Support for Death Penalty Fatal For Assemblymen."⁴ It was fatal to two candidates that were in support of capital punishment because they lost, notwithstanding the fact that their opponents were opposed to the death penalty.

But that is the perception, and what we are trying to deal with are the consequences of that perception. It has an effect on prosecutors, on courts, on clemency proceedings, on lawyers, on political campaigns. We all know that President Clinton, then candidate Clinton, returned to Arkansas for an execution. We know that Governor Richards of Texas is now Governor of the state that has the dubious distinction of being the execution capital of the United States.⁵ It is part of the political process. It has an effect on the media, and I think we have to be aware of that and acknowledge the consequences of that perception. The death penalty has become more politicized than ever, and there is no question that this affects the entire criminal justice system.

Our first speaker is James Coleman. James Coleman is a professor of criminal law at Duke University School of Law. He teaches a seminar on the death penalty. He is a graduate of Harvard College and Columbia Law School and was Assistant General Counsel for the Legal Services Corporation. He is active in issues related to civil rights, the death penalty, and human rights. He is a member

4. See Robert Borsellino, *Support for Death Penalty Fatal for Assemblymen: 2 Democrats Lose Primaries*, TIMES UNION, Sept. 12, 1990, at 1.

5. See Jason Berry, *Governors Backing Off Pardons*, DALLAS MORNING NEWS, Aug. 15, 1993 (Texas leads the nation in executions).

of the council of the Section of Individual Rights and Responsibilities, which, of course, is the section which sponsors this program. And he chairs the Thurgood Marshall Awards Committee of that section which was awarded at the very inspiring dinner the night before last. Many of us were there to hear the presentation of the Thurgood Marshall Award to Judge Frank Johnson, whose career is legendary. Professor Coleman has provided post-conviction representation for two clients under the sentence of death in Florida. We welcome Professor Coleman.

PROFESSOR JAMES COLEMAN:

Ron asked me to provide some overview on what the Supreme Court has done in the area of capital punishment, and he asked me to do that in about five minutes. I'll try to do that. In looking at the program, I guess the question that I would stress is whether the states can implement the death penalty fairly, because that basically is the question that the Supreme Court has been dealing with for quite some time.

In 1972, the Court in *Furman v. Georgia*⁶ decided that states could not implement the death penalty fairly. Four years later, the Court decided that, based on some changes that states had made in how their death penalty was imposed, the states had corrected the problems that led the Court in the *Furman* case to declare the death penalty unconstitutional.⁷ Thus, since 1976, we have basically had the death penalty in thirty-six states.⁸

The problem that the Court identified with the manner in which the death penalty was being imposed in 1972 had to do with its arbitrariness: that is, that the jury that imposed the death penalty had unguided discretion to decide to impose the death penalty whenever it was available. The jury had the total discretion to determine whether or not to impose the death penalty. Therefore, in situations where the defendant was eligible for the death penalty, there was no meaningful way to distinguish between cases in which

6. 408 U.S. 238 (1972).

7. See *Gregg v. Georgia*, 428 U.S. 153 (1976).

8. The following 38 jurisdictions (including 36 states) currently have death penalty statutes: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming, United States Government, and United States Military. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., *DEATH ROW U.S.A.* (Summer 1993).

the death penalty was imposed from cases in which it was not imposed. That led five of the justices on the Supreme Court to conclude that the death penalty was unconstitutional.

By 1976, the states, in response to the *Furman* decision, implemented new death penalty statutes. Some states enacted mandatory death penalty statutes which took away discretion altogether. In other states, "guided discretion" statutes were instituted, under which trials were divided into two parts: the first part for the jury to determine whether the defendant was guilty of the capital offense, and the second part to determine whether the death penalty should be imposed.⁹ In the second part of the trial, these states established some guidelines, primarily to determine who among the people convicted of a capital offense is eligible for the death penalty. Once that determination is made, the juries are then supposed to decide whether to impose the death penalty by considering aggravating factors (factors that cut in favor of the death penalty)¹⁰ and mitigating factors (which cut against the death

9. Today, every state has a guided discretion statute, as a mandatory death penalty no longer exists. This means that the jury is never mandated to impose the death penalty, but has the discretion to consider aggravating and mitigating circumstances. Cf. *Johnson v. Texas*, 113 S.Ct. 2658 (1993) (holding that states are free to shape consideration of mitigating evidence in death penalty cases).

However, in Florida, Alabama, and Indiana, judicial override statutes permit judges to sentence a defendant to death notwithstanding the jury's decision against death. Ronald J. Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 14 N.Y.U. REV. L. & SOC. CHANGE 797, 820-22 (1986). In *Spaziano v. Florida*, 468 U.S. at 447 (1984), the Supreme Court held that Florida's practice of judicial override is constitutional. *Id.* at 821.

10. See, e.g., Model Penal Code § 210.6 (Sentence of Death for Murder; Further Proceedings to Determine Sentence, Aggravating Circumstances):

- a. The murder was committed by a convict under sentence of imprisonment.
- b. The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.
- c. At the time the murder was committed the defendant also committed another murder.
- d. The defendant knowingly created a great risk of death to many persons.
- e. The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.
- f. The murder was committed for pecuniary gain.
- g. The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.
- h. The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

penalty).¹¹ But in terms of how the jury actually goes about weighing the aggravating and the mitigating factors, the statutes again provide no guidance.¹²

In my view, the effect of this is that we still have unguided discretion. While we now have procedures under which the defendants are able to argue for a life sentence after they are convicted, the juries are still left with the total discretion to impose the death penalty. That, in fact, is what the Supreme Court has approved.

I also think that the Supreme Court itself has concluded that the death penalty can't be implemented "fairly" in the sense that the Court meant "fairly" in 1972 when it found that the death penalty was arbitrary. I think that the best evidence of that is the case called *McCleskey*¹³, in which the Court was faced with the question of whether the race of the victim was the principal factor in determining who got the death penalty. There was a statistical study which indicated that the race of the victim was, in fact, a principal factor that determined who got the death penalty,¹⁴ and the Supreme Court accepted that conclusion for the purposes of making its decision. In other words, the Court said, it would accept the fact that it appeared that race was a factor in the imposition of the death penalty.¹⁵ The Court held the question then was to what extent would it tolerate the risk that race was a factor in the imposi-

11. *See id.*:

B. Mitigating Circumstances

- a. The defendant has no significant history of prior criminal activity.
- b. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- c. The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
- d. The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.
- e. The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.
- f. The defendant acted under duress or under the domination of another person.
- g. At the time of the murder, the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.
- h. The youth of the defendant at the time of the crime.

12. *See Graham v. Collins*, 113 S.Ct 892 (1993) (Stevens, J. dissenting).

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

14. The Baldus study submitted to the court in *McCleskey* demonstrated that defendants who killed white victims were 4.3 times more likely to receive the death penalty as defendants who killed black victims. *Id.* at 287.

15. *See id.* at 292 n.7 ("As did the Court of Appeals, we assume the study is valid statistically without reviewing the factual findings of the District Court.").

tion of the death penalty.¹⁶ The Court held that the defendant in the case had failed to establish that this risk was intolerable under the Constitution.¹⁷

In 1972, in *Furman*, faced with a much less elaborate study, some of the Justices thought that if there was any rational basis to determine why the death penalty was imposed, race was a principal factor. That led to their vote in 1972. In 1987, in *McCleskey*, I think the Court in effect had abandoned that approach. I think they abandoned it because the Court concluded that the death penalty could not be administered fairly: you could not establish a system under which you could protect a defendant from the arbitrary imposition of the death penalty. It is impossible to prevent a jury from taking into consideration race or any other inappropriate factors in the imposition of the death penalty; and unless you were willing to declare the death penalty unconstitutional, in effect you had to accept the risk that some arbitrary factor would determine its imposition.

The Court, in addition to reaching that conclusion, took steps to prevent defendants from being able to litigate challenges to the death penalty, challenges against the system. It started in 1983 by permitting the federal Court of Appeals to summarily review constitutional challenges to the death penalty.¹⁸ In *Barefoot v. Estelle*, the Court held that in cases where the defendant had challenged his conviction and sentence but had lost his state court appeals, the federal courts don't need to go through the full procedures that they ordinarily would go through to review a conviction and death sentence; they can do the review summarily.¹⁹

That opened the doors for courts, in effect, to duck the issue by simply passing it along. I think of some of the cases that we have seen where courts dismiss constitutional issues that they have concluded were not frivolous.²⁰ Instead, what the courts have done, led by the Supreme Court, is erect procedural devices that have the

16. *See id.* at 281 ("This case [McCleskey] presents the question whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that petitioner McCleskey's capital sentence is unconstitutional under the Eighth or Fourteenth Amendment.").

17. *Id.* at 297 ("[W]e hold that the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose.").

18. *See Tabak, supra* note 9, at 834-38 (discussing *Barefoot v. Estelle*, 463 U.S. 880 (1983) and its repercussions).

19. *Id.*

20. If the courts had concluded that the issues were frivolous, they simply could have gotten rid of the cases on that ground.

effect of preventing the defendant from litigating his claims on the merits.

The Supreme Court, for example, decided the case of *Teague v. Lane*,²¹ in which it barred the defendant from litigating a “new” claim in which the defendant argued for the recognition of a constitutional claim that had not been recognized before. The effect of this is that the Court will not permit litigation of a “new” claim in a habeas action. Thus, a defendant is left to litigate “novel” claims only at trial and on direct appeal.

The other thing the Court has done is to use procedural default and something called “abuse of the writ” to avoid having to reach the merits of a constitutional claim.²² Procedural default involves procedural devices that, in effect, say that if the defendant initially fails to raise a claim in the state court, and the state court later decides not to hear the merits of the claim for that reason, then the federal court will not hear the claim on the merits *unless* the defendant can meet a very high standard that in most cases cannot be met.²³ The same holds true for the “abuse of the writ” doctrine which provides that when a defendant has litigated one habeas petition, he can’t raise claims in a second petition unless he can meet this very high standard.²⁴

One thing the Court just recently did was to change the standard of the burden of proof in a habeas case where a defendant has

21. In *Teague v. Lane*, 489 U.S. 288 (1989), petitioner, through a writ of habeas corpus, sought to apply the Sixth Amendment’s fair cross-section requirement to the petit jury. The Court never reached that question because it formulated a narrow test for retroactivity for cases on collateral review. *Id.* at 292. In *Teague*, the Court held that, unless one of two narrow exceptions applies, new constitutional rules would not apply retroactively on collateral review. *Id.* at 310-11. A new rule would be applied retroactively only if: a) it makes the conduct non-criminal, or b) it is implicit in the concept of ordered liberty. *Id.* at 311. Under the approach adopted by the Court, there could be no retroactive application of the fair cross-section requirement to the petit jury. *Id.* at 316. See also *Butler v. McKellar*, 494 U.S. 407 (1990) (rule not applicable to review of defendant’s conviction because it did not fall into one of the two narrow exceptions). For a discussion of retroactivity, see Ronald J. Tabak & J. Mark Lane, *Judicial Activism and Legislative “Reform” of Federal Habeas Corpus: A Critical Analysis of Recent Developments and Current Proposals*, 55 ALB. L. REV. 1, 44-46 (1991).

22. See Tabak & Lane, *supra* note 21, at 50-52, 84-88 (discussing abuse of the writ in capital cases).

23. See *Sawyer v. Whitley*, 112 S. Ct. 2514, 2518 (1992) (“Unless a habeas petitioner shows cause and prejudice, a court may not reach the merits of: . . . new claims not previously raised which constitute . . . procedurally defaulted claims in which the petitioner failed to follow applicable state procedural rules in raising the claims.”).

24. See *McCleskey v. Zant*, 499 U.S. 467 (1991) (denying relief because petitioner failed to show cause for his failure to raise sixth amendment claim in first federal habeas petition).

succeeded in demonstrating that there has been a constitutional error.²⁵ The Court now requires that a defendant show that the error was prejudicial.²⁶ In the past, the burden had been on the prosecutor: once the defendant established a constitutional violation, then the burden was on the prosecutor to show that it was harmless. The Court's new standard provides a way of avoiding having to reverse a conviction even though there was a constitutional error. The Court now, in effect, has said that even if the defendant jumps through all the procedural hoops and manages to convince the judge that there was a constitutional violation, the defendant still has to demonstrate that that constitutional violation caused him harm. Thus, in the years since the Court reinstated the death penalty, it has become increasingly more difficult for defendants to litigate the constitutionality of their convictions and sentences.

Let me close by saying that I think that anybody who has handled a death penalty case recognizes the role of politics in these cases, and in some cases very directly. One of the cases that I litigated in Florida started in 1986,²⁷ when Governor Bob Graham was running for the U.S. Senate. He signed four death warrants between February and November, when his election was held. This same client was executed in 1989 under Bob Martinez, who was Governor at that time.²⁸ In 1990, he used my client as a prominent part of his campaign for re-election. In a state like Florida, the death penalty is one of the principal factors in politics.

DEAN REDLICH:

It's interesting that in New York State, our present governor and our last governor both were elected and re-elected (in Cuomo's case, several times) and have been strong opponents of the death penalty. Further, they were opposed by people who were strong proponents of the death penalty. Nonetheless, they have managed to survive in New York State — and not by small majorities. That

25. See *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993).

26. See *id.* at 1722 (prejudicial standard applies in determining whether habeas relief must be granted because of constitutional error of the trial type).

27. The case that professor Coleman referred to was his participation in the defense of Ted Bundy in Florida. Court of Appeals decisions on Bundy's petition for a writ of habeas corpus include *Bundy v. Wainwright*, 808 F.2d 1410 (11th Cir. 1987), and *Bundy v. Dugger*, 850 F.2d 1402 (11th Cir. 1988).

28. Florida Governor Bob Martinez ran commercials in his re-election campaign in which he bragged, "I now have signed 90 death warrants in the state of Florida," and which featured "the smirking face of serial killer Ted Bundy." Richard Cohen, *Playing Politics with the Death Penalty*, WASH. POST, Mar. 26-Apr. 1, 1990.

is an example of the fact that oftentimes political figures tend to exaggerate the impact of this issue — although I do not doubt that, as the rest of the world says, New York may be different.

Shabaka was born as Joseph Green Brown in Charleston, South Carolina. He spent fourteen years on death row in the Florida state penitentiary, where he came within fifteen hours of being executed after being convicted of rape, murder and robbery — charges that were later dropped. He was released in 1987, after serving fifteen years in prison for crimes he did not commit. In the subsequent proceedings that led to the ultimate overturning of his conviction, instances of prosecutorial misconduct were found to have been blatant.

Shabaka's ordeal has been documented in numerous newspaper stories.²⁹ He currently resides in Temple Hill, Maryland. We are pleased to welcome Shabaka to this panel.

SHABAKA SUNDIATA WAGLINI:

I want to thank you. Before I begin, I see Judge Kravitch is among us. Judge Kravitch, can you stand? Judge Kravitch was one of the judges who sat on the federal Court of Appeals for the Eleventh Circuit in my case,³⁰ and I was blessed this past Saturday night to finally see and meet this wonderful lady. I want to say that I love you, my wife loves you, my mother loves you, and my whole family loves you.

As Mr. Coleman already mentioned, in the State of Florida no one can deny politics influences discussion about the death penalty. Florida has a bifurcated system. In one system, you are found guilty, and in the other the jury recommends the sentence. Florida is relatively unique in that if the jury brings back a recommendation for mercy, the judge has it within his power to override the recommendation and still give out the death penalty.³¹

From my days on death row, I cannot remember during those years or even today any politician that was ever elected to state office that opposed capital punishment. I believe that this is what we are here to talk about today. Capital punishment is not a moral issue; it is not a religious issue. Capital punishment is a political issue. That's how it was then, and that's how it always will be. And

29. See, e.g., Paul Grondhal, *Executioner's Other Song: Innocent on Death Row*, TIMES UNION, Apr. 20, 1992, at C1; Lawrence L. Knutson, *Freed Death Row Inmate Urges More Protection For Condemned*, PHILA. INQ., July 25, 1993, at A03.

30. See *Brown v. Wainwright*, 785 F.2d 1457 (11th Cir. 1986).

31. See Tabak, *supra* note 9, at 820-22 (discussing judicial override).

as soon as we recognize that, I think we can then go about the business of getting rid of it.

I spent fourteen and a half years of my life on death row and, yes, I came within fifteen hours of being executed for a crime I did not commit. Time does not permit me to go into certain aspects of my case; I am not here to talk about that. Allow me to say that politics and capital punishment are one and the same.

We have heard a lot about victims and politicians crying about victims. There are many victims when you talk about this issue. I know about victimization. I know and have seen victimization. The State of Florida killed sixteen men while I was there, and I came close to being number seventeen.³²

It is difficult to picture in one's mind living in a state where the whole issue of capital punishment is one of politics. A governor signs a death warrant and the prison guards immediately have a bet on whether or not you will get a stay of execution. You can not picture a governor like Bob Graham, at that time (he is now a United States Senator). When he signed my death warrant in September of 1983, he left the State of Florida to go on a trip to China. If I had not been granted a stay by the United States District Court, the governor would not have been around to hear a clemency appeal.

Speaking of clemency, Florida does have a clemency procedure, but that does not remove the political dimension. I can only speak of my individual case, and I clearly remember that during my clemency proceeding the Assistant Attorney General for the State of Florida interrupted my clemency proceeding to inform Governor Graham and his cabinet that he himself had serious doubts about my guilt. Three weeks later, Governor Graham came in the room to sign my death warrant for me to be put to death. It did not matter what his Assistant Attorney General thought. We can't allow such penalties to be on the books anywhere in this country, where there is so much unfairness.

The unfairness begins at the trial level. In my particular case, my trial lawyer was three years out of law school.³³ The trial lawyer, after my conviction, stayed on my case until midway through the

32. There are currently about 325 people on Florida's death row. NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., *DEATH ROW, U.S.A.* (Summer 1993).

33. See Tabak & Lane, *supra* note 21, at 830-35 for a discussion about who represents people on death row. See also Ira P. Robbins, American Bar Association, Criminal Justice Section, Task Force on Death Penalty Habeas Corpus, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AMER. UNIV. L. REV. 1, 62-71 (1990); Sherrill, *Death Row on Trial*, N.Y. TIMES, Nov. 13 1983, § 6, at 80, 100.

appeal in state court. In the State of Florida, the lawyer who handles the trial must also handle the automatic appeal. But once this lawyer leaves your case after this appeal, Florida is not bound by statute to give you another lawyer.³⁴ You must find another lawyer the best way you can.³⁵ And that's what happened in my case.

The delay of my case while I was on death row was not brought upon by anything of my own doing. I didn't have a lawyer. I was not guaranteed a lawyer. Even at my trial, I was not guaranteed a *lawyer*, because if I had been, I would not have received a "lawyer" three years out of law school; there would have been resources there. Even today, in 1993, there is still a deficiency in counsel at the trial level. The resources are still not there.³⁶

As for those who advocate for the death penalty and the overthrow of habeas, I would challenge each and every one of those individuals to provide a defendant with the same quality of representation as the State. The State has a whole apparatus behind the quality of the investigation — the whole county and city police forces — and the defense has nothing. So, I say, begin at the state level. But we must stop allowing judges, prosecutors, and even governors to be elected into office where every decision is based upon politics, as to whether or not they grant clemency, and whether or not they override a jury recommendation of mercy. We must stop this. We must be persistent so that politics will be removed from the judicial system.

DEAN REDLICH:

Thank you for that moving talk. Judge Kravitch, I would like to welcome you on behalf of the entire panel as well. Our third speaker is a late entry, but a very welcome one, the Attorney General of Pennsylvania, Ernest Preate, Jr., who is an elected official. He was recently re-elected as Pennsylvania State Attorney General. He has a prior career as district attorney in Scranton, Pennsylvania. He personally tried nineteen murder cases, and in five cases out of seven, the jurors returned death penalty verdicts. He has argued many homicide cases on appeal — the most recent case,

34. Florida does have a capital legislation resource center, but it does not represent very many people itself. Tabak *supra* note 9, at 830-31.

35. See *Murray v. Giarratano*, 429 U.S. 1 (1989) (no constitutional right to a post-conviction attorney in death penalty cases); see also Ronald J. Tabak & J. Mark Lane, *The Execution of Injustice: A Cost and Lack-Of-Benefit Analysis of the Death Penalty*, 23 LOY. L.A. L. REV. 59, 83-85 (1989).

36. See Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA. L. REV. 433 (1993).

decided by the Supreme Court in 1990, was the *Blystone* case.³⁷ In *Blystone*, the Supreme Court upheld the Pennsylvania death penalty statute against a facial challenge which asserted that Pennsylvania's procedures mandated the death penalty upon a finding of guilt for first degree murder.³⁸

Attorney General Preate has written a manual for use by prosecutors, judges, defense lawyers — but primarily for the prosecutors — on the trial of death penalty cases. He has lectured on the subject, and he has been very much involved in the legislative efforts that are going on in Congress with regard to the federal crime bill and the changes that have been proposed with regard to federal habeas corpus. We welcome Attorney General Preate to our panel.

ATTORNEY GENERAL ERNEST PREATE, JR.:

Thank you very much, Dean. I appreciate the chance to be here, and the opportunity to provide some insight into the prosecution's side on this very, very important issue. I think the issue here today is not whether we should have the death penalty, in all due respect to some folks who believe we should not, but whether our system can provide for fairness and effective assistance of counsel in death penalty litigation. In short, can a prosecutor seek to have a system that ensures fairness, with effective assistance of counsel for the defendant? I believe that in too many of our capital cases there is ineffective assistance of counsel on both sides. Such trials are not fair, not fair to defendants like Shabaka and not fair to people who

37. 494 U.S. 299 (1990).

38. In *Blystone v. Pennsylvania*, 494 U.S. 299 (1990), the defendant, Blystone, robbed and killed a hitchhiker named Smithburger. Blystone was charged with and convicted of first-degree murder, robbery, criminal conspiracy to commit homicide, and criminal conspiracy to commit robbery.

After convicting Blystone, the jury found as an aggravating circumstance that he "committed the killing while in the perpetration of a felony." Because the jury did not find any mitigating circumstances, it sentenced him to death pursuant to a Pennsylvania statute, 42 PA. CONS. STAT. § 9711(c)(1)(iv), which provided that "[t]he verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstances or if the jury finds one or more aggravating circumstances which outweigh any mitigating circumstances." *Id.*

The Supreme Court held that the Pennsylvania statute did not violate the Eighth Amendment, since it allowed the capital sentencing jury to consider and give effect to all relevant mitigating evidence. The Court also found that the statute was not impermissibly mandatory, because it did not impose the death penalty unless the aggravating circumstances outweighed the mitigating circumstances, or unless no mitigating circumstances were present. *Blystone*, 494 U.S. at 304-05.

the prosecutor represents — surviving members of the victim's family.

I believe that there is no finer example of what our profession is all about than two experienced and knowledgeable trial attorneys arguing before a fact finder. For that reason, I support capital resource centers for the defense and for the prosecution. For that same reason, I support the establishment of counsel standards for trial and appellate counsel, with a list of competent and qualified counsel established by the highest courts of the state. I also support state and federal funding for death penalty litigation centers and for counsel at both the trial and appellate levels. And in order to assure that there is prompt and effective federal oversight of state proceedings, I support federal habeas reform.

What have I done about it? Well, for the last five months, as Chairman of the National Association of Attorneys General Criminal Law Committee, representing my brother and sister attorneys general, I've worked with Senator Joe Biden (Chairman of the United States Senate Judiciary Committee) and his staff, with Janet Reno and with her staff, and with the leadership of the National District Attorneys Association. We have been working to come up with proposals that would reform habeas corpus, proposals that would permit individuals who are seeking redress in the federal system because of state court errors to obtain that redress, and proposals that would mandate effective counsel at both the trial and appellate court levels. It would no longer be satisfactory to have lawyers three years out of law school trying death penalty cases. In such cases, there would be funding for the litigation centers, the trial, the appeal, as well as for the investigative help both the prosecution and defense need in these most important cases.³⁹

You may think it's easy for someone on the prosecution side to do that, but when I proposed to work with Senator Biden, it was not an easy thing. Lots of people said, "You can't work with Joe Biden. He is not going to be in favor of working with prosecutors." I did not find that to be the case. I found Senator Biden to be open, earnest, diligent, and knowledgeable, and a competent United States Senator in this area. He may be competent in lots of other areas, but he was particularly competent in this area and knowledgeable, as was his staff.

We proposed a draft for the new crime bill that evolved in early June, and we circulated it around the nation amongst the prosecu-

39. See Habeas Corpus Reform Act of 1993, 138 CONG. REC. S10925 (daily ed. Aug. 6, 1993).

tors. The prosecutors did not like that draft, and took a lot of shots at me for working with Senator Biden to try to develop some meaningful habeas corpus reform, particularly the establishment of counsel standards. We went back to work again in June or July and produced a draft dated August 4, 1993, which is now in the process of being circulated around the nation, and I think this one is going to have a much more positive reception.⁴⁰

The bill containing the proposal for the draft on habeas was introduced by the Senator on Friday [August 6, 1993]. I have a rough copy of it here. I know some of you might be interested in taking a look at it, and I'll share it with you later on. Senator Dole and Senator Hatch, with whom I've also had extensive conversations as late as last week on federal habeas reform and the crime bill itself, have introduced a provision on habeas corpus reform that passed the Senate in 1991,⁴¹ as part of this year's Republican crime bill.

There is, in my sense, a growing awareness in Congress and in the Senate of the need to achieve some kind of habeas corpus reform and to have it settled outside of the emotion of the death penalty debate. I think this is such a critical area of the law. Habeas corpus has not been touched in one hundred years, and we were all very, very conscious of that as we attempted to draft the provisions.

You folks out there, when you see it, might have a better idea than we had. God knows, we've had some ideas put up the flagpole and have immediately been shot down. We're looking forward to a rational discourse. That's one of the reasons I am here today. This Section has a duty to encourage rational discourse on important principles of law outside of the supercharged emotional and political challenges that are raised in the debate on capital punishment and the death penalty.

I think it is time to step back and to look at habeas corpus reform, to look at the effective assistance of counsel, because it's the foundation of our entire system. Capital cases are on the cutting edge of the development of constitutional law in the criminal area,

40. The different crime bills which passed the Senate and the House in 1993 did not contain any provisions concerning habeas corpus. Despite Attorney General Preate's support, Senator Bidens's habeas corpus proposals in 1993 were attacked by many prosecutors, as well as by many advocates for death row inmates. It is likely that different legislation concerning habeas corpus will be introduced in 1994.

41. See § 1241, 102d Cong., 1st Sess., 137 CONG. REC. S9982, S9999-10001 (daily ed. July 15, 1991) (text of habeas corpus provisions which passed the Senate in 1991); see also 137 CONG. REC. S9832 (daily ed. July 11, 1991) (final passage of omnibus crime bill containing those habeas corpus provisions).

and these kinds of cases ought to be tried by our best lawyers, then appealed by the best lawyers, on both sides, and then argued before juries and before courts by people of experience, knowledge and competence.

So, we are working on this issue. Can a prosecutor do it and work with the liberal Democrats? This prosecutor, I think, has done it.

DEAN REDLICH:

Thank you, Attorney General Preate. I am sure there will be a great many questions that will be asked of you. I am pleased that you joined us. Our next speaker is Bryan Stevenson, who is the Executive Director of the Alabama Capital Representation Resource Center in Montgomery, Alabama. He graduated from Harvard Law School, and holds a graduate degree in public policy from the Harvard School of Government. He recently secured the release of Walter McMillian from Alabama's death row. He, like our previous speaker, has produced manuals on capital litigation. He was a staff attorney for the Southern Center for Human Rights in Atlanta, Georgia. He, too, has lectured extensively on death penalty litigation and race and poverty issues and the federal justice system. He was awarded the ABA Wisdom Medal for public service litigation and he has also been awarded the ACLU National Medal of Liberty. Bryan Stevenson, welcome.

BRYAN STEVENSON:

Thank you. It's a real honor for me to be here with you and with the ABA, particularly this Section, which has worked so hard on issues like capital punishment. I want to congratulate the ABA and this Section for holding a panel on politics and the death penalty. I believe that political influences in the administration of capital punishment are at the heart of what is so frustrating to many who deal with these issues day by day, both judges, lawyers, and even some prosecutors.

A few years ago, I found myself sitting in the chambers of a state court judge right before we were about to have a hearing. The hearing was for a ruling on the state post-conviction petition we had filed in a capital case where we presented a great deal of evidence concerning the unconstitutionality of this black defendant's

capital murder conviction and death sentence.⁴² And it was interesting to be sitting in the judge's chambers before the hearing began.

He began talking to one of his investigators, just generally about the political environment, and I was sitting with my co-counsel and my client, and I was listening very, very closely to some of the things that the judge was saying. He was complaining about the recent gubernatorial campaign that had taken place in Alabama. We had a gubernatorial candidate in Alabama who, in running for governor, made a pledge that he was going to "fry them 'till their eyes pop out."⁴³ You could get a bumper sticker in support of this candidate and you'd get billboards and have this phrase, "Fry them, 'till their eyes pop out." He was a former Attorney General. And this judge, sitting before this hearing, started complaining to one of the law enforcement people sitting in the room. "You know, it really makes me mad," the judge said to the law enforcement officer, "that this guy runs around saying 'Fry them 'till their eyes pop out' I couldn't go down to Holman Prison and actually pull the switch and fry somebody and watch them die like he claims he wants to do." And the judge looked at the police officer and said, "Jimmy, could you go down there and pull the switch and fry somebody 'till their eyes pop out?" And the police officer said, "No, sir, judge, I could not do that." And sitting there before we were about to get the ruling in the state postconviction hearing, it was very encouraging to me that this judge seemed to be sensitive to this political dynamic, this concern about rhetoric that takes so much precedence over justice and fairness.

And then the court reporter walked in, and it was almost as if someone had said, "Act One will begin now". The judge stood up and put his robe on and he sat back down, and then he started filling the record with all these stern pronouncements about how our client was to die and how he was to be executed and how in X many days he wanted to see this case move through the process, and how he was frustrated that it had taken so long to get this man into the electric chair. And he rejected all of our claims, and he rejected all of our arguments, even though the evidence, in our view, was quite overwhelming. This defendant was someone who

42. *State v. Jefferson*, No. CC-81-77 (Chambers County, Ala.), *aff'd* 473 So. 2d 1100 (Ala. Crim. App. 1984) (imposition of death penalty upheld).

43. This gubernatorial candidate was former Attorney General Charles Graddick. See Bill Peterson, *Alabama Political Tide Takes Turn to the Left; Top Contender for Governor Runs as a Liberal*, WASH. POST, May 31, 1986, at A4.

not only deserved a new trial, but who deserved actual judicial relief.

In this case, we had an issue of racial discrimination in jury selection because the prosecutor had organized the jury pool into four groups. He put some of the jurors on a list marked "strong," he put some of the jurors on a list marked "medium," he put some of the jurors on a list marked "weak," and he put all of the black jurors on a list marked "black." The prosecutor in this particular case exercised twenty-four peremptory challenges against twenty-four of the twenty-six black people qualified for jury service. After achieving an all-white jury, he stood up and made an argument to the jury in this burglary/murder case that "We have got to send a message to 'them.'⁴⁴ We thought that the evidence was overwhelming in support of our claim of racial bias.⁴⁵ But it really is this political dynamic that we are discussing today that made it not only possible, but comfortable, for this judge — after professing such concern and disagreement with the prevailing politics of the time — to rule against the way the law would have him rule, and to rule that way with gusto, and with the same kind of rhetoric to fuel this process.

Like Florida, Alabama has a statute that permits judicial override,⁴⁶ and in some ways it's one of the clearest measures of the political influence in the administration of capital punishment. Unlike Florida, Alabama does not have standards which regulate when a judge can or cannot override a jury verdict of life. As Shabaka explained, what happens is the jury can return the verdict of life imprisonment, but the judge has the authority to override that verdict and impose the death penalty.

Approximately one hundred and twenty people are on death row in the State of Alabama.⁴⁷ Nearly twenty-five percent of those

44. See *State v. Jefferson*, No. CC-81-77 (Chambers County, Ala. 1984). The exact quotation from the trial transcript is:

I submit to you ladies and gentlemen of the jury, as soon as we start burning a few of them, and sentence them to death, for the kind of crimes that they are committing, they are going to think twice before they start cutting somebody's head off and before they start shooting, and before they start raping, and there's only one way to do that, and that's to show them that we mean business. Show them that we mean business.

Id. at 164.

45. See *Batson v. Kentucky*, 476 U.S. 79 (1986) (Equal Protection Clause forbids prosecutor from challenging potential jurors solely on account of race).

46. ALA. CODE § 13A-5-47 (1982).

47. As of the summer of 1993, the NAACP Legal Defense and Educational Fund, Inc. documented 117 people on death row in the State of Alabama. NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., DEATH ROW, U.S.A. (Summer 1993).

people received life verdicts from juries.⁴⁸ When you do a statistical study, a mini-multiple regression analysis of how the death penalty is applied and how override is applied, there is a statistically significant correlation between judicial override and election years in most of the counties where these overrides take place. And it is one of the clearest examples of the precise dynamic of politics in the administration of the death penalty.

We also see this political dynamic at work in the legislature. We, in Alabama, just had new statutes added to our capital code which provide for the death penalty any time there is a victim under the age of fourteen.⁴⁹ So for the first time we are now seeing a new spate of cases involving domestic child killings or abuse killings — tragic cases that are now being prosecuted as capital murder cases. We are also seeing cases involving younger and younger defendants.

This dynamic not only imposes real serious obstacles for people in getting fairness, but it also has an irrational effect on the way we think about crime. For example, sixty-three percent of the homicides committed in Alabama are of African Americans.⁵⁰ Poor people are considerably more likely to be victims of homicides in that state.⁵¹ And it's because poor and minority people are in such great risk of violent crime and victimization that the need for rational discourse not only about the death penalty, but about dealing with the problems of crime is so critical.

I think about this all the time, and I think about the 2800 people on death row. There about 2800 people on death row in this country,⁵² and I dare say you could kill everybody that is on Alabama's death row today, and kill all 2800 people on all of America's death

48. See Ruth E. Friedman & Bryan A. Stevenson, *Solving Alabama's Capital Defense Problems: It's a Dollars and Sense Thing*, 44 ALA. L. REV. 1 n.67 (1992) (citing Tracking Project, Alabama Capital Representation Resource Center, Montgomery, Alabama (1992)) ("Nearly a quarter of the defendants sent to Alabama's death row arrived there after a jury had recommended the life-without-parole option.").

49. See ALA. CODE § 13A-5-40 (1975 & Supp. 1993).

50. STATE OF ALABAMA CRIMINAL JUSTICE INFORMATION CENTER, 1992 CRIME IN ALABAMA 29 (1992).

51. This figure is derived from the number of homicide victims where economic data is available.

52. See Dick Lehr, *Death Penalty Foes Seek a New Debate, See Stronger Case*, BOSTON GLOBE, Jan. 10, 1993, at 1 ("Traditionally, supporters of the death penalty have argued that executions are a deterrent. But the statistics tend not to support that assertion. In Texas, the nation's leader in executions with 54 since 1977, the murder rate for the past decade has hovered between 12 and 14 murders annually per 100,000 residents, according to U.S. Department Justice figures. In Florida, which has executed 29 prisoners, the murder rate has held at about 11 per 100,000 residents.").

rows, and none of us would be any safer walking the streets of Chicago, Detroit, Los Angeles or Miami. And there's not really much disagreement about that.⁵³ Yet, we persist in using the death penalty as a symbol of strength, of power, and resolve, in dealing with violent crime. And it's particularly frustrating when I think about the hopelessness that such an irrational discourse has, not only on people who are engaged in struggles within the criminal justice system, but on people who are living in the community.

I can't help but think about it during the times when I go into low-income areas to meet the siblings of my clients. Not long ago I was in the Montgomery, Alabama housing projects and I saw two kids sitting on the doorsteps. One of them was eight and one was about nine. They were talking very excitedly about something. I figured they were talking about Michael Jordan and basketball, or baseball, or some sports hero. So I walked closer to hear what they were talking about, and I was very surprised to hear that they weren't talking about sports or what was on television or in the movies. They were talking about guns. The eight year-old was saying to the nine year-old, "Man, you got to get yourself a 9 mm that can shoot this many rounds. You should see the gun that Johnny has." The nine year-old said to the eight year old, "No, man, that ain't any good. You got to get the kind that can shoot this many rounds in this many seconds." And they were preoccupied with these weapons of violence as a measure of esteem, a measure of success.

I think about it when I talk to clients' siblings — these kids who are fourteen years old and don't believe they are going to live past the age of eighteen. Once you start talking to them about some of the things that they are doing, and they say, "I don't believe I'm going to live past eighteen. It doesn't matter what I do." Obviously, when you think that way, you have a very different orientation to law and to society. And that kind of hopelessness, in so many ways, is driven by the irrationality surrounding us, especially in criminal justice, especially in our discussions about fairness, and, yes, in our discussions about the death penalty.

I think about it when I think about the one or two times we've had to be in situations where we were unable to get stays of execution. A couple of years ago, I found myself driving from my office in Alabama to Holman Prison, to be with a man whose case we had

53. *See id.* ("A bare majority of Americans, 51 percent, now think the death penalty has a deterrent effect, according to the 1991 Gallup poll, a decline from 61 percent of those questioned in 1986.").

taken on just three weeks before his scheduled execution. I drove down there after we had failed to receive a stay from the U.S. Supreme Court. I got involved in this case because this man got an execution date even though his lawyers had basically abandoned him and he said, "Just represent me for these last few weeks. I am not asking you to do something that you can't do. You're probably not going to be able to get a stay. But I have to have some hope to get through these last twenty-one days. I can't make it even until the day of execution unless somebody gives me some hope and stands with me and tries to do something." We got involved and unfortunately didn't get a stay. And I went down, and throughout the night of his execution this dynamic of hopelessness related to irrationality was very present in my mind. I went down there and spent the last thirty minutes with this man, and we were standing there and we were trying to deal with all the horrible things that were going on and he started asking questions, and he said: "You know it's been a very strange day." I said, "What do you mean?" He said, "When I woke up this morning, the guards, they said 'What can we get you for breakfast?' and then they said 'What can we get you for lunch?' and then they said 'What can we get you for dinner?' and they said 'Do you need to use the phone?'" and, he said, "Every fifteen minutes somebody came and said 'What can we do to help you? Can we get you some cigarettes? Can we get you some coffee? Do you need to call somebody? Do you need some stamps?'" And he said something that still resonates in my mind. He said, "You know, it's interesting. More people have asked me what they can do to help me in the last fourteen hours of my life than they ever did in the first nineteen years of my life."

When I think about this state of irrationality and hopelessness, I can't help but ask the question: Yes, where were you when he was three, being physically abused; or when he was six, and being sexually assaulted by his step-father; or when he was nine and starting to experiment with heroin; or when he was fourteen and strung out and homeless with no place to go? And yet, we persist in talking about crime in terms of habeas corpus and the death penalty.

I'm encouraged to hear some of the things Mr. Preate said this morning. I, too, am committed and hopeful that we can get to a system of justice that does provide people accused of capital crimes with the best lawyers, with the kind of rigor and the kind of treatment that gives us hope that there won't be more Shabakas and

Walter McMillians.⁵⁴ But I am frankly skeptical that we can achieve this when we talk about a crime bill that uses restricting habeas corpus and expanding the federal death penalty as its centerpiece. And it's really in that context that we are in desperate need of leadership.

I think that there is a tendency to depreciate the centrality of the criminal justice system and even the enforcement of the death penalty in the hopes and aspirations of people who live on the margins. I think about this in connection with African-Americans. It is very clear to me that in the last twenty to twenty-five years the most vivid and the most painful manifestations of the frustrations of many poor people and African-Americans have come surrounding events and incidents relating to the criminal justice system: the Rodney King disturbances, the disturbances in Florida, the disturbances in other communities when people have the perception that justice cannot be had and that rationality cannot dominate over bias and bigotry. It's central because any democratic society that defines itself by its commitment to laws as a means of achieving justice must do better than we presently see in the administration of the death penalty.

I represent a black man named Walter McMillian who was released from prison after being on death row for nearly six years for a crime he did not commit. The political influences were all around this case. This man was someone who received a life verdict from the jury. But the judge, a man named Robert E. Lee Key, overrode the jury's verdict and imposed the death penalty. This was a man who was put on death row in Alabama a year before he ever went to trial, and while he was awaiting trial, the law enforcement people in his community conspired with the Department of Corrections and placed him on death row. This was a man who had numerous witnesses, who could prove where he was at the time of crime, and all these folks were rejected because of this desire to get someone sentenced to death for a particular crime.

As we move forward, we must not only recognize that the political influences that work their ways into particular cases are leading to the kind of injustices that Shabaka has described, but that these injustices have implications for all of us. The reason that they have implications for us all is that we are, in fact, the managers of

54. See *Alabama Releases Man Held on Death Row for Six Years*, N.Y. TIMES, Mar. 3, 1993, at 1; *On the Fast Track from the Courtroom to Death Row*, N.Y. TIMES, Mar. 7, 1993, § 4, at 2; *The Murder Case that Unraveled*, ABA JOURNAL, June 1993, at 30; *Five Years on Death Row*, WASH. POST, Mar. 15, 1993, at 27.

our systems of justice. Lawyers, people who are committed to administering justice as judges, prosecutors, and defense attorneys are all the custodians of justice in this society.

It is simply not enough to acknowledge these political factors that are affecting us, forcing us to do this and that. Instead, we must recognize that ultimately we have the authority to act responsibly, to act judiciously, and to act fairly within this system. It is really in that spirit that I hope we can continue this discussion that we started today in framing a vision of justice that's better, a vision of justice that gets us past where we are and a little closer to where we need to be.

It's been a wonderful two days for me to be here and talk with so many who seem to share that vision of justice, and I really hope that this Section and organization can continue to provide leadership. After such a long period of time where hopelessness and politics have reigned, this kind of strong leadership is badly needed.

DEAN REDLICH:

Thank you, Bryan.

Nat Hentoff is a columnist for the Village Voice and the Washington Post, and a staff writer for the New Yorker. He is one of the foremost authorities in the areas of First Amendment defense, journalistic responsibility, and freedom of expression generally. He has published biographies, novels, children's literature, and books on jazz. He is a graduate of Northeastern University, and a Fulbright Fellow. He was awarded the ABA Silver Gavel Award in 1980 for his coverage of the law and criminal justice issues. Nat, I am sure when the day comes when the ABA creates its Golden Gavel Award, you'll be right up there as one of its first recipients. Nat Hentoff.

NAT HENTOFF:

With regard to one thing the Attorney General said, I wish it were possible to become engaged in a rational discourse with the Chief Justice. The question today concerns not only lawyers, judges and legislatures, but also the press. Thomas Jefferson said that this peculiar institution, the constitutional democracy, depends on its citizens being sufficiently informed so that they can govern themselves. Yet, he grew to hate the press. In his last years, he read only one paper, and he read it for its advertisements. But he knew how crucial accurate information and analysis are.

In terms of due process (including habeas corpus), and the death penalty, the print press, with some exceptions, is delinquent. With even fewer exceptions, reportage by television news in this and other areas might have made Jefferson weep. From television's coverage of pivotal Supreme Court decisions of any kind, for instance, it would be nearly impossible for anyone to understand even minimally what happens during each judicial term. The citizenry is left largely ignorant of pervasive violations of due process throughout the judicial system.

Locally, they see what the reporters call "the perp walk". The alleged perpetrator, having been arrested, is escorted with his coat over his face to his just deserts. He is already guilty.

You have to go through extensive files of newspapers in any city to find a clear definition of due process or the reason the writ of habeas corpus is in the Constitution. Floyd Abrams once said that the only part of the Bill of Rights that the press is passionately committed to, and sometimes the only part it really knows, are the words "of the press" in the First Amendment.

It's true that a few papers, notably the *New York Times* and the *Washington Post* gave more than cursory coverage to the Leonel Herrera "actual innocence" case.⁵⁵ But there were key facts, very dramatic facts, that really were like Orsen Welles's "A Touch of Evil" in Sandy D'Alemberte's brief in that case that never made it into the press. Except for relatively few reporters, like David Elliot of the *Austin American Statesman* who has been writing about the case of Gary Graham, most reporters and editors are not much moved to action by the words due process or habeas corpus.

On July 23, 1993, Don Edwards' Subcommittee on Civil and Constitutional Rights (I wish he rather than Joe Biden were involved in the habeas corpus write-up) held a hearing on procedural protections for criminal defendants. Four of the witnesses had nearly been executed, but because they finally had decent counsel they were able to prove their innocence. Pretty dramatic stuff. I saw nothing about the hearing on television and may have missed some of the print press, but I didn't see anything there either.

The same thing happened to Senator Metzenbaum's April 1st hearing on innocence and the death penalty. Senator Metzenbaum's decision to retire is a great loss for anyone who hopes to curb, to some extent, the Rehnquist Court's obsession

55. See, e.g., John Tucker, *The Rehnquist Rush to Execute; Should States Get the Final Say?*, WASH. POST, Apr. 26, 1992, at C1; Nat Hentoff, *When Guilt or Innocence Doesn't Matter*, WASH. POST, Feb. 13, 1993, at A31.

with dismembering habeas corpus. Among those testifying were people who had been convicted and sentenced to death but were freed just in time. I saw no press on that hearing and I asked Senator Metzenbaum's press secretary what she had seen. "Nothing," she said.

The press has done very little to clarify, or to expose, really, some of the propaganda by the advocates of the death penalty. By the way, I do not think you can talk about habeas corpus reform without the passion of the death penalty. It's impossible, as I think you've heard this morning. A term used very often by Chief Justice Rehnquist is the so-called "urgent need for finality." That is a real Orwellian term. It also was used, I was dismayed to see, by Justice Ginsburg in her confirmation hearing. But, as Judge William Norris of the Ninth Circuit Court of Appeals puts it, "A human life is at stake. I fail to understand the rush to judgment."⁵⁶

There is a grim warning, particularly to politicians at election time, that if they become "soft" on capital punishment, the "fiend" will get out in a few years and stalk your neighborhood. However, (and this was reported in the Wall Street Journal but it's not in many other places), the Death Penalty Information Center points out that the perception that a murderer convicted of a capital crime will be back on the streets in seven years or less if not given the death penalty is totally inaccurate.⁵⁷ Thirty-three states plus the District of Columbia and the federal government impose life sentences without parole.⁵⁸ All other states require those sentenced to life for capital murder to serve at least twenty years.⁵⁹ But a key reason the majority of the public does not want to let go of the death penalty is the belief that a life sentence for capital murder really means release after several years. How come that disinformation is still prevalent? Because the press doesn't correct it.

Most Americans are also ignorant because they are not otherwise informed of a point made by Justice Thurgood Marshall at the

56. See *Brewer v. Lewis*, 989 F.2d 1021, 1032 (9th Cir. 1993) (Norris, J., dissenting).

57. RICHARD C. DIETER, DEATH PENALTY INFORMATION CENTER, SENTENCING FOR LIFE: AMERICANS EMBRACE ALTERNATIVES TO THE DEATH PENALTY (Apr. 1993) ("Forty-five states and the federal government now employ sentences in which parole is impossible for at least 25 years for their more serious murder cases. In two-thirds of the states those who are not given the death penalty face life imprisonment with *no possibility of parole ever*. Yet only 4% of Americans believe that those convicted of first degree murder would spend the rest of their lives in prison . . .").

58. *Id.*

59. *Id.*

Second Circuit Judicial Conference in September, 1988. Marshall cited a case in which the defendant's lawyer "did not inform the jury the petitioner had no criminal record, had been steadily employed, had an honorable military record, had been a regular churchgoer, and had cooperated with the police."⁶⁰ During the sentencing phase, Justice Marshall continued, this very casual advocate did not give the jury a single reason why they should spare the petitioner his life.⁶¹ Now take this. The Federal Appeals Court ruled that the lawyer's performance was not constitutionally deficient.⁶² Did the press take note? This does not astonish anyone in this room or anyone who reads the *American Lawyer* or the *National Law Journal*, but the great majority of voters do not read such publications, they do not see Bryan Stevenson, Steve Bright, or Sandy D'Alemberte all that often, if at all, on television. So, most of the citizenry are largely unaware of how useless the term "due process" is for many capital defendants.

Another example of information that doesn't get out concerns Congressman John Lewis of Georgia, a legend in the civil rights movement. During the 1960's, he was almost summarily executed, not by the State — although the State was sort of involved by not doing anything — but by mobs of racists. He was a strong supporter of Bill Clinton during the primaries and later. His support was effective because of the respect in which he is held. Then, in 1993, John Lewis wrote a public letter to the President with regard to "your administration's position on the death penalty." I doubt anything quite like it has been publicly addressed to any President in the past by a member of Congress who was a key supporter. Congressman Lewis' letter said that "[w]hile the rest of the world is moving away from death as a form of punishment, capital punishment is becoming more entrenched in some parts of our country."⁶³ Congressman Lewis cited a 1990 study by the General Accounting Office that found a pattern of evidence indicating racial disparities in the imposition of death sentences in state courts throughout the country.⁶⁴ He also urged the President to firmly

60. See *Messer v. Kemp*, 760 F.2d 1080 (11th Cir. 1985), *cert. denied*, 474 U.S. 1088, 1090 (1986). Messer was subsequently executed.

61. *Id.*

62. *Id.*

63. See Nat Hentoff, *Capital Punishment — A Matter of Fundamental Fairness*, WASH. POST, May 8, 1993, at A21.

64. See U.S. GENERAL ACCOUNTING OFFICE, *DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES* (1990), *reprinted in* 136 CONG. REC. S6889-90 (daily ed. May 24, 1990).

reject attacks by Congress and the Chief Justice on habeas corpus. "The right of Americans," he said, "to a full review of federal constitutional claims in the federal courts should not be compromised."⁶⁵

That's news, it seems to me. A black Congressman of enormous integrity confronting a President who has been an executioner as Governor with a plea that he show some courage. So far as I know, no paper or television news operation — maybe in Atlanta, but nowhere else — picked up on that letter, except for one columnist.

Having indicted the press, I should now focus on emphasizing to editors and assignment editors what can be done to improve the situation. It seems to me what is needed is education of the press. I suggest, and there may well be better variations of this idea, that in each city there be informal meetings between members of the ABA and editorial staffs of both newspapers and television stations. A confrontational approach would not be advisable. We journalists have thinner skins than cops accused of police brutality. But journalists are by nature curious, particularly about ways to get more stories and make those stories sound authoritative. It also might be useful to include in these discussions local district attorneys and judges, as well as public defenders, and, where possible, defendants analyzing the quality of their defenses.

Of course, I would like to see Bryan Stevenson make a tour of the cities at those meetings. Among other benefits for the journalists, getting to know some of these people in an informal way might well add to their sources for future stories. And perhaps most enlightening to the reporters and the editors would be hearing some district attorneys explain what they mean by "due process." It gives new life to George Orwell's term: "newspeak".

DEAN REDLICH:

You may be interested to know that shortly after I became Dean at NYU Law School, I had the idea of having a seminar to educate the print and electronic media about basic aspects of the legal system, including the criminal justice system and legal ethics. We did get some financial support for this program from the New York Times Foundation, but the problem was that it was almost impossible to get an audience of news people. The media simply did not want to give time off on a paid basis for reporters of the print and

65. See Hentoff, *supra* note 63.

electronic media to attend a seminar of this kind. I was greatly disappointed. It seems that the media's curiosity does not extend to learning something about what they are supposed to write.

As I mentioned in our introduction, Assemblywoman Susan John first came to my attention when I heard about this candidate from upstate New York who was opposed to the death penalty and needed help. Susan John currently represents the 131st Assembly District in the Assembly. She is a member of the Judiciary, Education, Codes, Corrections, Governmental Operations and Energy standing committees. She chairs the Subcommittee on Public School Violence and Constitutional Amendments.

Assemblywoman John is author of the New York State's Stalking Law, which became effective in 1992, and the 1993 Healthcare Facilities Access Bill. She is a graduate of George Washington University and Syracuse University Law School. She worked for Congressman, now Senator, Paul Simon and for former Senator Adlai Stevenson. She was in private practice in Syracuse before being elected to office. She has been active in many local bar and non-profit organizations, co-chairs the Monroe County Bar's Legislative Committee, and has been an attorney for the Volunteer Legal Services Project. Susan John embodies the best of what our profession aspires to be, and we're pleased to welcome Susan John.

SUSAN JOHN

Thank you and good morning. I'm really delighted to be part of this panel. I want to tell you a little bit about my story and also comment a little bit on what some of the other speakers have said.

As an overview, I think that the one bit of good news from a politician's perspective, is that the death penalty is not an issue that the electorate votes on. It really isn't. People do not go out and vote for someone because they are in favor of the death penalty. I do think some people may have voted for me because I was opposed to it, and it's something that they felt deeply down in their souls.

I think that that message is important, because I hope that some of the people sitting in this room who are opposed to the death penalty may decide to take that into action by running for office someday. People do not vote against you because you are opposed to the death penalty, and they don't vote for you because you are in favor of it. My opponent proved that.

In January, 1990, I was a liberal Democrat working as a commercial corporate lawyer in a fine private firm in Rochester, New

York, and I was in the process of encouraging people to run in a Democratic primary against a conservative Democrat who represented my district in the state legislature for fourteen years. Through a convoluted set of developments, I found myself announcing my candidacy in March 1990.

I remember April 19th of that year perhaps more clearly than a number of other days because that's the day that my opponent, a gentleman by the name of Gary Proud, announced by press release that he was switching his position on the death penalty.⁶⁶ For fourteen years, including earlier that year in March, he had voted against the death penalty.⁶⁷ The press release said that he felt that there had been changes made to the proposed legislation that would prevent the possibility of mistakes from happening in the administration of the death penalty and that therefore he would provide the 100th vote in the New York State Assembly to override the expected veto from the Governor.⁶⁸

Well, of course, I had a number a reactions to this news. At first, I thought, well now, this is really going to become an issue in the election. Before, we had been on the same side of the issue. There was a serial murderer in Rochester that year who was going to trial just four days before our election,⁶⁹ whose case would provide the perfect backdrop for all of the typical kinds of emotional discussion that you hear about the death penalty. And yet I also couldn't help but feel that perhaps I was somebody who had taken a rather egotistical and selfish step. I had decided to run for office. I had never run for anything before. I had never held elected office. I had not mapped out a career in which I intended to run for office. And yet, because I had made the decision to challenge this long-term incumbent in my party, he was now going to give New York the death penalty. These were a very hard few hours for me, when I really let that all sink in. Fortunately, there were people like Ron Tabak and Norman Redlich and other people in the state who were committed to telling me that I could still get elected, even

66. See Dick Zander, *New Life For Capital Punishment in NY?*, N.Y. NEWSDAY, Apr. 25, 1990, at 66.

67. *Id.*

68. See Rex Smith, *Key Shift on Death Penalty Assemblyman's Vote May be Last One Needed for Override of Veto*, N.Y. NEWSDAY, Apr. 20, 1990, at 7 ("Assemb. Gary Proud (D-Rochester) said he would drop his long-standing opposition to the death penalty for murder because the bill's sponsor has agreed to add an amendment ensuring that the state's top court will review 'the quality of the evidence' in all death penalty cases.").

69. See *id.* (discussing arrest of Arthur Shawcross, paroled killer and suspect in killings in Rochester area).

though the death penalty would be an issue in the campaign. And they were right.

Here are the facts. The death penalty is not a deterrent.⁷⁰ The death penalty is discriminatory, both on an economic and a racial basis.⁷¹ The death penalty is expensive⁷² —it will be even more expensive if we adopt some of the changes that were described by the Attorney General earlier. Whenever someone is put to death, there is the possibility of mistakes. You know all of those things. Most people in the general public don't know those things. I would talk to people about why I was opposed to the death penalty when it came up in the television debate, the radio debate, and on people's doorsteps. I would go through all the reasons. I would tell them who the people were that had been executed in New York State, and what the facts are about the homicide rate in states like Texas and Florida that do have a death penalty.⁷³ Once people heard the facts, they were no longer sure that they were in favor of the death penalty.

The most important thing for an elected person, or one who hopes to become elected, is to educate the public about the facts on the death penalty, including the fact that the death penalty does not help the victims of crime. For those who try to wave the flag of the victims, this is not the appropriate issue. There *are* ways to help victims of crime. There is plenty of legislation that can be enacted to provide the open assistance of government. But the death penalty is not the way to assist the victims of crime.

Here in New York we have managed to keep the death penalty from becoming state law, but it has been a very difficult battle. When I ran in 1990, as I told you, there were almost a hundred "yes" votes in the state assembly: one hundred votes would have been enough votes to override the governor's veto. This means that if our governor does not continue to be governor at any point in

70. See M. RADELET & M. VANDIVER, *CAPITAL PUNISHMENT IN THE UNITED STATES: AN ANNOTATED BIBLIOGRAPHY* (1988) (reviewing post-1972 empirical studies on death penalty and finding no criminologist in the U.S. in the past 15 years that claimed to find data indicating that the death penalty has a deterrent effect greater than lengthy imprisonment); see also *supra* note 53.

71. See *supra* note 67 (discussing GAO Report finding racial discrimination in the imposition of the death penalty).

72. See generally Robert L. Spangenburg & Elizabeth R. Walsh, *Capital Punishment or Life Imprisonment? Some Cost Considerations*, 23 LOY. L.A. L. REV. 45 (1989) (analysis of the costs associated with the death penalty); Ronald J. Tabak & J. Mark Lane, *The Execution of Injustice: A Cost and Lack-Of-Benefit Analysis of the Death Penalty*, 23 LOY. L.A. L. REV. 59, 133-38 (1989).

73. See *supra* note 52.

the future, we have a very serious situation in the state legislature. The death penalty bill passes overwhelmingly each year in the state senate and the state assembly, and it is only because the state assembly has too few votes for the override of the governor's veto that New York doesn't have the death penalty.

So, what do we do if we don't have a governor there to veto it? And what do we do if, as some have proposed, an amendment is made to the New York State constitution to impose a death sentence through the constitution that does not require the signature of the governor? That is a question that must pass two different legislatures, and if it did, it would go on the ballot for the general public to decide whether or not New York should join the list of states that impose the death penalty.

It is too easy for people to get caught up in the death penalty as part of the broader movement in this state, and in this country, for stronger criminal penalties. We have imposed mandatory minimum sentences and we have seen just how much "safer" all of us have felt over the past twenty years. We have seen the bursting at the seams of the New York State prisons so that we have almost tripled our prison population in the last ten years. It is important, I think, that the death penalty be used as part of the discussion to persuade people why harsher penalties are not the answer.

Bryan spoke earlier, movingly, of what he witnesses when he goes out to talk to the siblings of the people that he represents. I know that in this city, young men talk about how their friends have gone away "to get strong." That means that they are upstate in prison, where they get three meals a day, have a roof over their heads, and don't have to face the possibility of getting shot on the street like many of their friends. In this city, there is tremendous hopelessness among the youth. If you are a young African-American or Hispanic male and live in New York City, you are much more likely to face death by gunshot than anything else.⁷⁴

74. See REPORT OF FEDERAL CENTER FOR DISEASE CONTROL, (ATLANTA, GA. 1990) (homicide rate among black males between the ages of 15-24 increased by 2/3 in the last five years: "In some areas of the country it is now more likely for a black male between his fifteenth and twenty-fifth birthday to die from homicide than it was for a United States soldier to be killed on a tour of duty in Vietnam."); Peter B. Edelman, *Toward a Comprehensive Antipoverty Strategy: Getting Beyond the Silver Bullet*, 81 GEO. L.J. 1697, 1699 n.8 (1993) (teenage black males in major cities more likely to die from gunshot wounds than any other cause); Mel Reynolds, *Gun Makers Must Pay the Price*, CHICAGO TRIB., Feb. 15, 1993, at N17 (FBI statistics demonstrate that gunshot deaths among African American teenagers outnumber all natural causes of death combined); *Youths and Violence*, GANNETT NEWS SERV., Aug. 10, 1993 (African

And so while we have succeeded, to some extent, by stopping the death penalty in New York State, it is important that we continue the fight. We must continue to come out against the death penalty for the reasons that we feel it is wrong: It is not a deterrent, it is discriminatory, it is incredibly expensive, and there is always the possibility of mistake.

Finally I would just like to say because of my experience that, yes, you can oppose the death penalty even in the midst of a trial of a serial murderer and win, because the public perceives it as a matter of character and principle. They may disagree with your stance but they understand that you have reasons — reasons, not politics — for taking that position.

If any of you ever find yourself to be in the good fortune of running or supporting a candidate who is running for office who is opposed to the death penalty, I would be more than happy to sit down with that candidate and talk to him or her about the reasons for being opposed to it, how to present the issue, and how to handle it in a political campaign and not to get caught up in the pressure.

Since my election, we have elected two other people from Rochester to the state legislature who are opposed to the death penalty. Although no one does anything single-handedly, I helped both of those candidates to understand more clearly and in a way they could describe to the average person why they were opposed, and what was wrong, and what we should be doing instead. I remain convinced that it is only through changing the legislative bodies that we will be able to stop the death penalty from being imposed in this country.

DEAN REDLICH:

Thank you. Organizing a political action committee to support candidates like Susan John in other states is doable, and people will give money for that purpose. We have had that experience here.

The interest of this panel is demonstrated by the fact that we have two late entries, the Attorney General of Pennsylvania and Chief Justice Exum of North Carolina, who gives us the perspective of a justice of the highest court of one of our states. We are very pleased to welcome to this panel an outstanding jurist and the Chief Justice of the Supreme Court of North Carolina.

American males are 11 times more likely to die by homicide than males of any other race, and homicide is most common cause of death for African American youth).

CHIEF JUSTICE EXUM:

Thank you, Dean Redlich. I was suddenly, without notice commandeered to come here yesterday, and in looking over the nature of the program, I realize there is one question in particular on which you might want me to comment. That question is: Can elected state judges survive if they sometimes overturn death sentences for constitutional error? And as a corollary to that question: Is political death the inevitable consequence of opposing capital punishment? I can offer, I think, some perspectives on both of those issues.

We do elect our judges in North Carolina, and we elect them on a partisan political basis. We run as Democrats or Republicans. This had not been too much of a problem in our state because, for most of our history, the Democratic party has been in control of the political machinery and almost all of our judges were Democrats. The judges who got their positions by appointments were rarely opposed (although it was always theoretically possible for them to be opposed). But to the extent that they were opposed, it was usually in a Democratic primary; there was rarely any opposition at the general election.

But North Carolina has, in the last decade or so, become a truly two-party state. Both of our Senators are Republicans, and we have had two Republican governors. Therefore, the political situation regarding our judiciary has greatly changed, to the extent that now whenever a judge, particularly an appellate judge, whether the judge be Republican or Democrat, comes up for re-election, that judge is almost inevitably opposed by a candidate from the opposite party.

I ran to fill a vacancy on our court in 1974, and I won the Democratic primary and had no Republican opposition in the general election. My views on the death penalty are unusually well documented for a judge in my state because, before becoming a judge, I was a North Carolina legislator. As a legislator, I voted for the abolition of the death penalty. That fact was and is well known in North Carolina.

In 1986, I was acting the Senior Associate Justice of the North Carolina Supreme Court when the Chief Justice retired. It had long been a tradition in our state for the Senior Associate Justice to be appointed by the governor to fill the vacancy in the Chief Justiceship. However, in this case, the governor was of the opposite political party. Instead of following tradition, he elected to name the junior justice on the court, whom he had recently appointed and

who was the only Republican on the court, to be the Chief Justice. I had already been nominated by the Democratic party as its candidate for Chief Justice. Therefore, we had a contested race in the fall of 1986 for the position of Chief Justice. My views on the death penalty became very much an issue in the campaign because my opponents emphasized my personal opposition to it. I made no secret about that during the campaign, acknowledging that, indeed, I was personally against the death penalty. I also made clear that as an associate justice, I had recognized my obligation to enforce this law, capital punishment, because the legislator had decreed that it be the law in North Carolina, and that I had voted to sustain a large number of capital sentences imposed by our trial courts.

Shortly after reaching the court as an associate justice, I had the occasion to write a concurring opinion in the first capital case in which I voted to sustain a death sentence. In that opinion, I set out my views that while I remained a person opposed to the death penalty on public policy grounds, I did not believe that the death penalty was unconstitutional *per se* under either our state or the federal constitution.⁷⁵ The North Carolina Constitution expressly provides for death as a penalty,⁷⁶ so there is not much ground for maneuvering there. The United States Supreme Court ultimately settled the issue as regards the federal constitution.⁷⁷

So, that concurring opinion was on the books. Thus, while the issue of my views on the death penalty figured very large in the campaign for Chief Justice, I was able to demonstrate that although I didn't personally believe in capital punishment as a matter of public policy, I do not think it unconstitutional and had been able to enforce the death penalty as an appellate judge.

Some of the campaign debate got really grizzly. My opponents would bring up all the times I had dissented in cases involving the imposition of the death penalty, and I had to come back and demonstrate all the times I had concurred in cases sustaining the death penalty. So, it emerged into a battle of statistics.

In any event, I was elected and became Chief Justice of our state court in 1987. I have been serving the state of North Carolina in that capacity ever since.

75. *State v. Woodson*, 215 S.E.2d 607, 619-21 (1975).

76. See N.C. CONST. Art. II, § 2 (1944) ("Death Punishment: The object of punishment, being not only to satisfy justice, but also to reform the offender and thus prevent crime, murder, arson, burglary, and rape, and these only, may be punishable with death, if the General Assembly shall so enact.").

77. *Gregg*, 428 U.S. 153 (1976).

I was up for re-election in 1990 and again had an opponent from the opposite party. The death penalty once again became an issue in that campaign, although not quite to the extent to which it had been in the earlier campaign. My re-election was somewhat easier than my first election, although the issue of the death penalty was still an obstacle.

So, I guess on the question of whether elected state judges can survive if they sometimes overturn death sentences, the answer is yes, they can, but I believe it is becoming more and more difficult.

I think the public clamor for the death penalty is becoming more shrill. I'll close those comments with an illustration. Our court recently handed down an opinion in a case in which a defendant had been sentenced to death for the murder of a police officer in the city of Charlotte, our state's largest city.⁷⁸ The crime problem in Charlotte has become one of the major issues in that city. Therefore, the city officials, leadership, and newspapers have become rightly concerned and want to do something to improve the situation and attack the problem.

The North Carolina Supreme Court in that capital case unanimously agreed there was error in the jury selection process when a defense challenge for cause of a particular juror was denied. The juror had seemed confused about the presumption of innocence and the duty of the State to prove guilt beyond a reasonable doubt. The court unanimously felt the challenge for cause should have been granted. Defendant ultimately removed this juror peremptorily and thereafter exhausted all peremptory challenges. Therefore, he was unable peremptorily to challenge a juror whom he sought to remove and who ultimately sat on the case. We concluded that the error required reversal and was not subject to harmless error analysis because it resulted in a juror sitting on the case who was unacceptable to defendant and who, absent the error, defendant would have been able to remove peremptorily.

There followed what we considered to be an unfair critique of the opinion in an op-ed article that appeared in the *Charlotte Observer*.⁷⁹ The article took the court to task for its opinion and contended that even if there was error in the denial of the challenge for cause, the error could not have been prejudicial. The court's

78. *State v. Cunningham*, 429 S.E.2d 718 (N.C. 1993).

79. See Thomas J. Ashcraft, *The Court and the Cop Killer in a Sorry Display of Legal Gamesmanship, Justice was the Loser*, CHARLOTTE OBSERVER, July 14, 1993, at 13A ("In the *Cunningham* case, the justices made an ass of the law by employing hyper-technical analysis to avoid a just result, the execution of a repeat killer.")

conclusion that the error required a new trial was, according to the article, simply ridiculous. The article failed to point out that this kind of jury selection error, under our precedents and, I think, under the precedents of most jurisdictions, is simply not subject to harmless error analysis. The article, authored by Mr. Thomas J. Ashcraft, who, I understand, is a Republican attorney, noted that all current members of the Supreme Court are Democrats, a point not usually made in lawyerly critiques of appellate court opinions.

After the article was published, there was an editorial cartoon in the *Charlotte Observer* depicting an outreached hand holding a briefcase on which were written the words "confidence in the North Carolina judicial system or criminal justice system." Hurling over the hand with the briefcase was a robed figure, labeled "Chief Justice Exum" holding a hatchet poised to chop off the hand holding the briefcase.

We understand that we are subject to criticism for our judicial opinions, and we welcome fair criticism. But, I would have thought that a great paper like the *Charlotte Observer*, and it is a great paper; I know most of the editors on the paper personally, I respect them and we've enjoyed good relationships, instead of feeding the frenzy which this kind of decision can generate, would have taken the time to more carefully analyze the opinion. The paper should have pointed out that while you might disagree with the court's judgment about whether the particular juror should have been excused for cause, once that judgment was made, the error in failing to excuse the juror for cause required a new trial because it was not subject to harmless error analysis.

I think the more this type of thing occurs in our state judiciaries, the less likely it is going to be that the state judges will be able to survive if they sometimes overturn death sentences. Three years ago I announced that I would not seek reelection after my current term expires in 1998. I plan to resign. I'm glad I will not have to run again.

DEAN REDLICH:

Thanks to the discipline of our speakers, after seven speakers we still have some time. Now I know the panelists can't wait to talk about what each person said, but I say to my fellow panelists: think about how impatient the people in the audience are. They have been listening to all seven or eight of us, and so before giving the panelists an opportunity to comment, I would ask the audience if you have any questions. I will enforce a "no speeches" rule, but if

you have any questions that you would like to address to any members of the panel or the panel as whole, I would be pleased to recognize some.

AUDIENCE: Addressing Attorney General Preate, you described the role of the courts in death penalty cases as being on the cutting edge of constitutional law and, of course, that's true, and one of the areas of concern in those developments has been what Professor Coleman has described about *Teague v. Lane* and its effect in cutting back on developing constitutional law and habeas corpus. I was wondering what you could tell us about what the new legislation proposes to do in that area.

ATTORNEY GENERAL PREATE: In the area of retroactivity, new rules go back to Justice Harlan's opinions in *Desist* and *Mackey* but do not continue to maintain the *Teague v. Lane* doctrine. It is essential to gain prosecutors' support for this legislation, and the point I am making here is that there are tradeoffs. Nat Hentoff talked about *Herrera*. On the other hand, this final version codifies and extends *Herrera*. It creates a whole new right that didn't exist before. So, talking about ways in which we can have a rational discourse on this very important issue, I think that's what we tried to do. But there are a number of places in the legislation where lawyers got together and rationally looked at, free of rhetoric, this very important complex area of the law.

AUDIENCE: Also for Attorney General Preate, regarding your proposals to put more resources into indigent defense in capital cases. People don't want to pay for public schools that their kids don't attend. They don't want to pay for subways they don't use. So, as a practical political matter, how are you going to persuade them to spend money defending poor people who they probably assume are guilty anyway?

ATTORNEY GENERAL PREATE: I think that that's a good question as to how we can pay for it. The bill is not an appropriation measure. It is an authorization measure. But again, it has the enormous force and impact of folks who are very politically astute and powerful in Congress and the Senate. The requirement here is to provide funding from the federal government of seventy-five percent of the money for counsel and for resource centers, and twenty-five percent of it is to come from the state, and this has been agreed to by prosecutors. If you get prosecutors to agree to something of this nature, it takes the shrillness of the debate out of the issue.

NAT HENTOFF: Was there any input in this draft from the defense bar?

ATTORNEY GENERAL PREATE: Nat, there was no input from the defense bar.

NAT HENTOFF: Then how do you say it's been debated?

ATTORNEY GENERAL PREATE: I didn't say there was a debate, Nat.

NAT HENTOFF: Oh, you just used the word.

ATTORNEY GENERAL PREATE: I said out of the debate, out of the debate that would come in the future on the question of authorization of an appropriation of money. The habeas corpus reform and the kinds of things we're talking about could not proceed unless the prosecutors of America — and there are several in the audience here today — unless they agreed to this provision. Otherwise, you would not move this issue forward. We have moved it forward, we have agreed in a lot of respects. Not everybody agrees with everything in the Biden bill. Not everybody agrees with everything in Senator Hatch's bill and Senator Dole's bill. There are some good points in both those bills and its going to be up to the Congress and the Senate to sort it all out, but the matter has been brought down to the point of rational discourse.

BRYAN STEVENSON: I think this question is very, very well taken, and I would encourage anyone who is involved in this process around legislation and around these kind of issues, particularly counsel issues, to ask that question over and over again. It is really the determining influence in whether these things make a difference. I come from the State of Alabama, for example. We have a resource center, and notwithstanding the kind of recognition that even Attorney General Preate mentioned for the whole notion of resources centers, we don't get a penny from the State of Alabama, even though the federal government promised to match funding if the State of Alabama provided support. Our center exists solely because we raise money from private sources to create non-federal support to justify the grants that we seek. It's a very difficult process. It's very time-consuming. Running around giving speeches to raise three hundred dollars here and three hundred dollars there is not an efficient way to manage the system of justice. And the same thing is true of other states, particularly in the "death belt" of Texas or Louisiana or Mississippi. A lot of these states don't give any funding for the work that is being done, and in addition to that, there is still this very irrational political dynamic that comes from people, not necessarily prosecutors, but sometimes prosecutors,

too, in challenging even that. This year in fact there were motions made, and bills produced in both the House and the Senate, to totally eliminate funding for resource centers under the present regime and, as a result, their fundings will probably be cut back fifty percent. A very important question to consider in evaluating any provision is whether the funds will be there to make it meaningful.

DEAN REDLICH: Would any of our other panelists like to comment on that? Susan?

SUSAN JOHN: Even here in New York State where we provide some limited funding for a center to help public defenders around the state, every year when New York State's budget passes, there is an amendment to eliminate that funding. That always has to be defeated. And the political reality is that to the extent that we are able to provide resources to the public defenders in this state, it is only by providing an equal amount or two or three times that amount, to the District Attorneys in the state. There is always that formula. That's part of the political reality even here in New York State, where people think that we're a little more liberal than some other states.

CHIEF JUSTICE EXUM: I am glad to say that we in North Carolina do find state funding for our death penalty resource center, and we also get federal funding. We have to battle for it in each session of the general assembly but they have done it.

DEAN REDLICH: Thank you, Chief Justice. . . .

ATTORNEY GENERAL PREATE: I want to add one more thing. The hammer here [in the Biden Bill] to get funding is that the states would not get their full share of crime-fighting funds from the federal government, that would be reduced by seventy-five percent. That means all the drug-fighting funds that would be coming from the federal government, for example, to the state, would be reduced by seventy-five percent. Now that's an enormous hammer of the federal government over the head of the state to come up with certification authority, to come up with funds for capital resource centers, to come with reasonable counsel fees and investigative fees.

DEAN REDLICH: This is Jack MacKenzie of the New York Times.

JACK MacKENZIE: I would like to ask the Attorney General another question about this rational discourse and when it will begin. Was the defense bar also excluded in the dealings with the Justice Department over the Biden bill?

ATTORNEY GENERAL PREATE: No one was excluded. As far as I was concerned, Senator Biden could ask anybody in the world that he wanted to get advice, and so could Janet Reno and so could Howard Metzenbaum and anyone else who was participating. But we were asked to work with them. We did work with them. The Bill is now on the table. It's open for rational discourse.

JACK MacKENZIE: No, I didn't say you excluded them. I said were they excluded?

ATTORNEY GENERAL PREATE: Not to my knowledge. Anybody could talk to Senator Biden any time or Janet Reno at any time. The point I'm making is that now there's a bill that is submitted to Congress at least on the Senate side, and it is now open for rational discourse.

BRYAN STEVENSON: I have just one comment on this. Again, it is not directed to substance. With regard to the question about the process, I guess I consider myself a member of the defense bar, and I am certainly not aware of any people who do defense work in capital cases in the habeas community that were very involved, and certainly not in a position of negotiation, on the terms of this Bill. So, I do think it's fair to say that the defense bar was not involved in these discussions; and whether substantive provisions that have come out of that are acceptable is something I still cannot say — I still have not seen this bill — but I do think it's fair to say that there was a question about process around this that ultimately says something about whether or not we are engaged in a rational discourse.

AUDIENCE: Not to pick on the Attorney General, but I would like to address my question to you. Does the fact that the man to your right, Shabaka, that he was nearly executed by mistake, does that suggest to you that there is a casualness about life that is perhaps disturbing in the death penalty, and what does that say about the death penalty in general?

ATTORNEY GENERAL PREATE: I don't know the facts about Shabaka's case, but this is a very serious matter. There is no more serious matter and I take my responsibilities, as every prosecutor that I know takes them, very seriously. We don't ask for the death penalty in every single case nor are we permitted to ask for it in every single case. But I think we believe that our system of justice needs to be improved. We are part of the system, we have responsibility to insure that the innocent are set free just as much as the guilty are convicted, and one of my proudest moments as a prosecutor was standing up in the middle of the trial saying, "I can-

not proceed to convict this man of first-degree murder because now in my heart I believe he is innocent because the witness lied to me in the privacy of my office, the key witness." And I told that to the judge, and he stopped the trial, and it took a lot of courage to do that. You just don't do that in every single case, but that's our responsibility, and it's just like the Deputy Attorney General in Florida stood up at the hearing Shabaka mentioned and said that he believed that Shabaka was innocent. That's our responsibility to do that, and you and I may differ, and some of the others may differ, on the merits of the death penalty, but it is there, and has been upheld as constitutional. Now, let's talk about it in terms of our responsibility to the profession. That's what I'm here to talk about.

DEAN REDLICH: I started the substantive part of the discussion by exercising the privilege of introducing myself and I would like to conclude the substantive part of it by quoting myself. I would like to read to you just a couple of paragraphs from a document that I wrote and that was submitted to a New York State Commission on the Provision of the Penal Law and Criminal Code, and it was as follows:

The administration of Criminal Justice is designed to establish proof of criminal guilt beyond a reasonable doubt because of a recognition that our system contains too many uncertainties to permit a standard of no doubt. Yet, the death penalty assumes a standard of guilt beyond any doubt and is applied in those cases where the doubts are the greatest. The death penalty assumes that we know all the answers about criminal responsibility, criminal intent, the finding of fact, the choosing of juries. The death penalty assumes a perfect system although the system itself recognized long ago that it could never meet a standard of perfection and therefore created a standard of reasonable doubt. Similarly, the death penalty is irreconcilable with the system of penal administration, which speaks in terms of rehabilitation, deterrence and public security. The dead cannot be rehabilitated. All the evidence demonstrates that capital punishment is not a unique deterrent to murder, and public security is actually endangered by the retention of the penalty that creates a false sense of protection, thereby distracting the public from coming to grips with the realities of crime prevention and prison rehabilitation.

The electric chair is the ultimate symbol of irrationality, vengeance, discrimination, the embodiment of all we've tried to overcome in the march toward a humane and rational system of criminal justice. It is like a cancerous growth that affects the

entire body of our penal system from the moment a crime is committed to the time the prisoner has had the last contact with the State. It affects the behavior of the police, the press, prosecutors, juries, lawyers, judges — everyone who has any contact with the administration of justice. It makes a humane system of punishment impossible because it sets a benchmark of irrational vengeance from which all other punishments are measured.

I read that statement before the commission on December 7, 1962. It was an important message then. Tragically, thirty-one years later, I think it is even more important now. And if I've abused the privileges of the chair by making a substantive comment, I apologize to you and to the panelists, and I thank all of you for being here.

I will ask Ron Tabak to make a few announcements to you. Thank you very much.

RONALD J. TABAK: I would like to thank Dean Redlich and all the members of the panel for their excellent presentation.

There is a crying need, as you have probably figured out from this program, if you didn't know it before, for lawyers to volunteer to represent death row inmates once they have had their first appeal. In the state of Texas alone there are currently at least four people under warrant of death who have no lawyers. Esther Lardent, in the front row here, is the head of the ABA Postconviction Death Penalty Project, of which Sally Determan, also in the front row, is the chair. If you have the courage and the commitment to learn how to do these — and it can be done, I am proof of that, a civil lawyer who handled one of these cases and wound up in the Supreme Court a year later — you can do it. Esther would be happy to sign you up and get you all the training you need. And you can work with someone like Bryan at the Alabama Resource Center, which also needs help.

If you would like to be involved in the ABA's strong support of habeas corpus — and among other people, Judge Sylvia Bacon who I notice here, was a major contributor toward getting the ABA to take the strong position in support of habeas that it's taken — or if you would like to be involved in the ABA Individual Rights and Responsibilities Section's Death Penalty Committee, please see me after the program. Finally, if you know anybody who might wish to watch a video tape of this program, let me know because the people who have been videotaping are from Skadden, Arps, to which I am special counsel, and we will be happy to provide videotapes for either no fee or a very reasonable one for anybody who would like one. Thank you very much.