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PANEL DISCUSSIONS

REFLECTIONS ON A QUARTER-CENTURY OF CONSTITUTIONAL REGULATION OF CAPITAL PUNISHMENT

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MR. RUEBNER: Good morning. Welcome to The John Marshall Law School. I'm Ralph Ruebner, the Chair of the Braun Committee and a member of faculty of the law school. I bring to you greetings on behalf of the Dean, Robert Gilbert Johnston, who is heading the academic commission of The John Marshall Law school professors in China. I wish to acknowledge the valuable service of the Braun Committee members. They are Susan Brody, Donald Beschle, Carol Robinson, Walter Kendall, Timothy O'Neill, Arthur Sabin, George Trubow, Lawrence Glick and Mr. Joseph Hammond. I thank you for the dedicated work.

I would like to thank Professor Julie Spanbauer, the Vice-Chair of the Braun Committee. I recognize her singular efforts and contributions. She has attended to all of the details of the academic components of this conference with great skill and dedication. We also welcome the Niles Township High School Seminar for Scholars. It is my pleasure now to introduce the Chair of our program, Professor Julie Spanbauer.

MS. SPANBAUER: Thank you, Ralph. Good morning. Welcome to everybody. It has been nearly a quarter of a century since the 1972 United States Supreme Court, in *Furman v. Georgia*, invalidated every death penalty scheme in the nation. Some believed that this decision would mark the end of capital punishment in America. It did not. Instead, many states quickly passed new death penalty statutes, some of which, as early as 1976, were upheld as constitutional by the United States Supreme Court. Thus a new era in the American experience with capital punishment was underway. Yet as we approach the year 2000, no one seems satisfied with the current state of the law.

Those who support the death penalty complain of endless appeals and intolerable delay from the time of conviction to execution. The critics, however, argue that the death penalty is imposed inordinately on minorities and the indigent. The tension existing in the death penalty area is exemplified in the career of Justice Blackmun, who began his tenure on the Court by dissenting in *Furman* when he declared that he yielded to no one in the depth of his personal "distaste, antipathy and, indeed, abhorrence for the death penalty with all its aspects of physical distress, fear and moral judgment exercised by finite minds." He, however, included that as a matter of history, law or constitutional pronouncement, the death penalty was an appropriate punishment.

Justice Blackmun ended his career when in 1994 he made a complete turn around. He declared that "the death penalty remains fraught with arbitrariness, discrimination and mistakes. Experience has taught us that the constitutional goal of eliminat-

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of Pennsylvania, and for Justice Thurgood Marshall in the United States Supreme Court. Professor Steiker is currently co-director of the Capital Punishment Clinic at the University of Texas Law School.

ing arbitrariness and discrimination from the administration of death can never be achieved without compromising an equally essential component of fundamental fairness in individual sentencing."

The purpose of this conference is to explore the current state of the death penalty in the United States, including the most recent developments. Most notably, *Felker v. Turpin*, a 1996 United States Supreme Court decision which upheld provisions of the Anti-Terrorism and Effective Death Penalty Act, a federal congressional Act with limited habeas corpus appeals. We have brought together those who work within the death penalty system: professors, prosecutors, defense lawyers and judges. In addition, other commentators including philosophers, theologians and concerned citizens. This conference promises to be an opportunity for a fruitful exchange of ideas on capital punishment in America: where we have been, where we are and where we are heading.

To initiate this discussion, Professor Timothy O'Neill of The John Marshall Law School will serve as moderator for the morning panel. Prior to teaching, Professor O'Neill spent six years in the Cook County Public Defender's Office. He received an A.B. from Harvard University and his J.D. from the University of Michigan. He is a member of the faculty of the National Judicial College. His articles on criminal law have appeared in the *New York Times* and *Chicago Tribune*. He also writes a monthly column for the *Chicago Daily Law Bulletin* on criminal law issues. Since 1989, Professor O'Neill has served as a reporter to the Illinois Supreme Court Committee on Pattern Jury Instructions in criminal cases. I give you a wonderful colleague, Professor Timothy O'Neill.

MR. O'NEILL: Good morning and welcome to the symposium. As Julie mentioned, in 1972 *Furman v. Georgia* struck down all death penalty schemes in America, at that time invalidating 629 death sentences in one opinion. Yet during the three years after *Furman*, well over thirty states passed new death penalty schemes. In 1976, the United States Supreme Court validated death penalty schemes in three of the five cases that they looked at. The first execution of an inmate after *Furman* who contested his sentence was John A. Spenkelink in 1979, in Georgia.

Since that time, the popularity of the death penalty in America appears actually to be on the upswing. Eleanor Mood wrote, "capital punishment is the most premeditated murder to which no criminal's deeds, however calculated, could be compared." Yet the Princeton Religious Research Center this year says that eighty percent of Americans currently support the death penalty. Also, the National Opinion Research Center at the University of Chicago has compared stands on the death penalty by race in America. It's interesting to note in 1974, two years after *Furman* invalidated the death penalty, at that time seventy percent of whites

in America supported the death penalty. By 1996, that figure increased to seventy-nine percent, almost four out of five.

Contrast that with the African-American experience. In 1974, only forty percent of African-Americans in this country supported the death penalty. By 1996, fifty-seven percent support it. In other words, in 1974 almost three out of five African-Americans opposed the death penalty. By 1996, almost three out of five support the death penalty.

On the political front in the world, South Africa recently abolished the death penalty. Yet here at home, of course, New York State recently voted to reinstitute it. Politically, not only do our two major party candidates running for president support the death penalty, but President Clinton has created sixty new federal death penalty crimes. In fact, this is a cornerstone of his crime control platform.

If you contrast this with what is going on in the judicial front, on the Supreme Court, Justices Brennan and Marshall never accepted the Court's jurisprudence. Justice Blackmun, as Julie mentioned, of course, after a quarter of a century on the Court and one of the architects of our death penalty scheme in America, left with that bitter farewell where he said, in effect, the death penalty is broken and simply cannot be fixed.

On the other side of the coin, if you take a look at Justice Scalia in *Walton v. Arizona*, who said that the two strands of the Court's death penalty analysis that we are going to be talking about today—the so-called "channeling function" that we have in *Furman* and the "unlimited mitigation strand" that we have in *Lockett v. Ohio*—that these strands were merely tensions. To say that these two strands were merely strands would be similar to saying that there was somewhat of a tension between the Axis and Allied powers during World War II. Justice Scalia then said he would ignore the *Lockett* line of cases.

Where do we stand? Well, that's why we are here for the next two days, to discuss exactly where we are in this country on the death penalty. Some of our panelists this morning support the concept of the death penalty. Some are abolitionists. One of the things we would like to do this morning is to explore the abstract idea of the pros and cons of the death penalty. But, at the same time, it also seems clear that the death penalty is going to be with us, at least, for the foreseeable future here in America. I think the one bit of consensus we certainly would have on the panel is that everybody believes if there is going to be a death penalty it has to be done in a fair manner. So the second topic we're going to be dealing with this morning is what, if any, problems there currently are with the use of the death penalty today in America and how those problems can be solved.

I want to talk a little bit about the format this morning. What

we propose to do is have our six panelists present fifteen-minute papers on different aspects of the death penalty. After they have finished their presentations, we're going to take a fifteen-minute break. When we return, we would like to have maybe twenty or twenty-five minutes of a round-table discussion where the panelists can respond to each other from what they heard this morning. But, we would like very much to keep you, the audience, involved here today. And we want to give the audience at least an hour of questioning time. What I would ask, though, is that any of the questions that you think of while listening to the panelists, if you would, jot them down and save them.

Having said that, I would like to introduce our panelists. And it always seems so cliché to talk about distinguished panelists. But, it's no cliché in this case. We truly have a distinguished and accomplished group of people who know about the death penalty in America. Stephen B. Bright is the Director of the Southern Center for Human Rights. This Center represents persons facing the death penalty and also represents prisoners who are challenging their prison convictions in eleven southern states. Since 1979, Steve Bright has been involved in numerous cases ranging from the trial level to both state and federal appellate courts, including the United States Supreme Court. Steve is a prolific writer, and a very busy speaker. He is frequently called upon for expert testimony before both Congress and state legislatures. His extraordinary efforts on behalf of indigent defendants have been recognized by the awards that he received from the American Civil Liberties Union, the National Legal Aid Defense Association and the American Bar Association.

William Kunkle, Jr. If there is a phrase that really comes to mind to describe Bill Kunkle, I think it would be a prosecutor's prosecutor. Mr. Kunkle received both his B.A. and J.D. from Northwestern University here in Chicago. After three years with the Cook County Public Defender, he moved to the Cook County State's Attorney's Office where for the next twelve years he rose from a supervisor, to the Chief of the Felony Trial Division, to the post of First Assistant State's Attorney in Cook County. Mr. Kunkle was a chief trial prosecutor in the John Wayne Gacy prosecution where he obtained thirty-three murder convictions in one case—twelve of those meriting a death sentence. Mr. Kunkle has taught and lectured in classes and legal seminars all over America, and is a named partner in the firm Cahill, Christian & Kunkle, Ltd., here in Chicago.

Mr. George Kendall, after graduating from Antioch Law School, engaged in private practice for several years before becoming a staff attorney for the A.C.L.U.'s Eleventh Circuit Capital Litigation Project in Atlanta, Georgia. In 1988, he joined the NAACP Legal Defense and Education Fund in New York as a staff

attorney in its capital punishment project. He and the other Fund attorneys in New York work with attorneys handling those cases before the Supreme Court. On a personal note, I can add that a couple of years ago, I was co-counsel involved in a case with the U.S. Supreme Court, a habeas corpus case. And I can certainly vouch for the great deal of help the Fund attorneys are for anyone who is appearing before the Court. I might add that we did lose the case, but thanks to George's help, we looked really good losing. George Kendall lectures and teaches capital litigation seminars throughout the country. In 1995, he was awarded the New York State Defender's Association Service of Justice award.

On my left is Joseph Bessette. Mr. Bessette is the Alice Tweed Tuohy Associate Professor of Government and Ethics at Claremont McKenna College. Professor Bessette has been there since 1990. He teaches courses in American government, ethics, statistics and crime. From 1985 through 1990, he served first as deputy director for data analysis, then as acting director of the Bureau of Justice Statistics in the U.S. Department of Justice. He also served for three years in the Cook County State's Attorney's Office where he was director of planning, training and management. He has taught at the University of Virginia, the University of Chicago and Georgetown University. Mr. Bessette is the author of several books on American government and politics. He is currently working on a book entitled, *Justice and Punishment: Crime, Public Opinion, and Democratic Politics*. Mr. Bessette this morning is the only non-lawyer on the panel, who is no doubt going to be a breath of fresh air by the time we finish today.

Finally I would like to introduce our first two speakers, Carol Steiker and Jordan Steiker. Carol Steiker is an Assistant Professor of Law at Harvard Law School. She is a graduate of the Harvard Law School where she served as President of the Law Review. After clerking for J. Skelly Wright in the D.C. Circuit, she then clerked for Justice Thurgood Marshall on the U.S. Supreme Court. Professor Steiker practiced law as a staff attorney in the D.C. Public Defender Service. Ms. Steiker then joined the Harvard faculty in 1992 where she teaches and does research in the areas of criminal law, criminal procedure, and capital punishment.

Jordan Steiker is the Regents Professor of Law at the University of Texas School of Law. He also graduated from Harvard Law School in 1988. He clerked for Justice Louis Pollak in the U.S. District Court in the Eastern District of Pennsylvania. That followed with a clerkship with Justice Thurgood Marshall in the U.S. Supreme Court. Professor Steiker has taught constitutional law at the University of Texas since 1990, and he is co-director of the law school's Capital Punishment Clinic. He has written extensively on federal habeas corpus and on the death penalty. Last year, Jordan Steiker and Carol Steiker published what I consid-

ered one of the influential and most important articles on the death penalty that has been published certainly within the last decade. It was a lead article in the *Harvard Law Review* entitled, *Sober Second Thoughts, Reflections on Two Decades of Constitutional Regulation of Capital Punishment.* I might add that the article influenced us so much that really it's the cornerstone of our program here for the last two days because they suggested that a quarter of a century after *Furman* it was time to look back and see where we have been, and where we're going. I'm very proud to introduce Jordan Steiker and Carol Steiker.

MR. STEIKER: Thank you very much. My sister, Carol, and I are grateful for the opportunity to participate in the Braun Symposium. For reasons that will be apparent during our presentation, we do believe it is a timely and valuable opportunity to address the state of death penalty law in America. We are also grateful for the gracious hospitality of the professors of the John Marshall Law School. The death penalty raises an enormous number of important and intricate issues. There are foundational philosophical questions about the role of deterrence and retribution in criminal law generally, and there are deep theological questions about human fallibility and redemptive possibilities relating to the death penalty in particular.

There are important practical and prudential questions about the implementation and administration of the death penalty. Indeed, the afternoon panel today will consider, I take it, the important theological questions and philosophical questions surrounding the death penalty. And the capital litigation workshops tomorrow will focus on many of the more practical concerns about litigating death penalty cases.

Our presentation focuses on yet another enormous and significant aspect of the death penalty that is unique in the United States. That is the extensive legal regulation of the death penalty through the United States Constitution. In some respects, it is surprising how recent the Supreme Court's regulation of the death penalty is. As late as 1968, a famous observer of the death penalty, Hugo Bedau, was able to observe that not a single death penalty sentence, not a single death penalty statute, not a single mode of execution had ever been found to be cruel and unusual punishment under either state or federal constitutions. That, of course, changed, and changed dramatically in 1972 with *Furman v. Georgia* when the court invalidated all existing death penalty statutes as violative of the Eighth Amendment.

Furman, of course, was not the last word. Or we wouldn't be here today. Four years later the Supreme Court reacted to the massive state reaction to *Furman*. Thirty-five states passed new statutes in the wake of *Furman*. The Court in 1976 upheld three, and struck down two, of the five statutes that it was reviewing.

From then on, the Court has embarked on a course of constitutional regulation.

Almost a quarter of a century separates us from *Furman*. Over that time an enormous body of constitutional doctrine has emerged surrounding states' administration of the death penalty. We believe that this body of doctrine should be evaluated in at least two aspects. First of all, what does the doctrine actually require? How does the Constitution currently regulate the death penalty? Second, how responsive is this regulation to the concerns that motivated the Court to step in the constitutional fray in the first instance? So the first question focuses on the character of the current state of regulation. The second question concerns the extent to which the Court's foray in the capital punishment thicket sheds light more generally on the capacity of courts to speak through the Constitution to effect or reform social policy.

As to the first question concerning the scope of constitutional regulation of the death penalty, as Professor Spanbauer indicated, there is a surprisingly deep disagreement about the state of the law and what it means. One set of critics view the doctrine as failing tremendously because it excessively intrudes on state prerogatives. This set of critics would focus on the number of death sentences that are overturned by federal courts, the complexity of the current doctrine and the tremendous delays between the sentence of death and moment of execution. Another set of critics laments the current constitutional regulation as not doing enough to ensure equality and to rationalize the death penalty. This set of critics sees a failure in that the Court simply hasn't lived up to the promise that the 1972 and 1976 cases held out. We believe that both of these critiques are right.

What we want to do today is explain just how it could be that we have a massive system of regulation that doesn't accomplish very much. Death penalty law is, in fact, extraordinarily intricate, difficult to apply, complex, and a tremendous burden on our criminal justice system. And yet this seemingly complex, comprehensive scheme of regulation does little to address the core problems surrounding the implementation of the death penalty. To make our argument, we're going to speak to three issues in our presentation. First, we would like to go back to the foundational cases and describe what we take to be the central concerns which led to regulatory intervention by the Supreme Court under the Eighth Amendment. Second, we'll examine the ways in which the doctrine addresses these concerns, highlighting both the complexity of the current rules and their limited effectiveness. In doing so, we'll try to examine some theories that might explain what we regard as the worst of all possible regulatory worlds. How does the Court manage to successfully disappointment both supporters and opponents of the death penalty? Finally, we're going to speak to the

more global question. We're going to explore some possible lessons to be drawn from the near quarter of a century experiment with constitutional regulation of the death penalty.

MS. STEIKER: As Jordan said, the first question to be addressed is the following: why did the Court step into the constitutional fray in the first place? What brought the Supreme Court, after nearly 200 years of constitutional interpretation, to think that the Constitution had something important to say about death penalty proceedings in the fifty states?

To understand what the Supreme Court's concerns were in *Furman v. Georgia*, it is important to understand what the imposition of the death penalty looked like at the time of the *Furman* decision in 1972. Granted, there were, I believe, forty-one states that had the death penalty in 1972. And among those states there was a great deal of variation. But some general things can be observed. One thing that might be surprising to people in 1996 is that many more crimes were eligible for the death penalty in 1972 than today. Not only capital murder, but other, lesser forms of homicide were also subject to the death penalty. And in many states rape, kidnapping, and even armed robbery or assault with the intent to commit a rape were potentially capital offenses. At the same time, however, death sentences were handed down in very few cases. Considering the large numbers of defendants who were "death eligible" under the pre-*Furman* statutes, remarkably few of them were ever selected for the death penalty by individual sentencing juries. This situation led one of the Justices in the majority in *Furman* to note that the death penalty seemed to strike like lightning—rarely and unpredictably.

How did juries pick out the few who were to be executed from the vast array of those eligible for the death penalty prior to 1972? It was very common for jurors to have complete discretion in making this decision. For example, the rape statute that was at issue in *Furman*—Furman had been charged with rape, convicted, and sentenced to death—told the jury that the crime of forcible rape could be punished by death, by life imprisonment, or by a prison term ranging from as many as twenty years to as few as one year. The decision about which of these punishments to impose—a year in prison or the death penalty—was left completely in hands of the sentencing jury. What was the jury told about how they should decide whether to sentence a rapist to one year in prison or to death? The juries were told generally—for example, in Georgia—that this was simply a question for their own "conscience." They were given no guidance about what they should consider or what they should not consider in imposing the death penalty. Other states were very similar: for example, Florida sentencing juries were told that it was up to their "profound judgment."

This was the situation that the Supreme Court confronted in

1972 in *Furman v. Georgia* and still had in mind four years later when it decided *Gregg v. Georgia* and its companion cases. In those years, from 1972 to 1976, and in those two sets of opinions—*Furman* and *Gregg*—one can see what we have designated as the four primary concerns that the pre-*Furman* state of death penalty law raised in the minds of the Supreme Court Justices. The first of these concerns is what we have called "desert"—that is, a concern about whether the people who were getting the death penalty could actually be said to be the ones who most deserved to be sentenced to death. We also use the term "over-inclusion" to describe this concern. In other words, did the group of those who were sentenced to death include within it people who really shouldn't be there, who really didn't deserve the death penalty? The reason that the scheme of death penalty imposition that existed in 1972 gave rise to this concern was because there were so many people who were eligible for the death penalty and so few who were actually sentenced to death. It was very hard to know what was motivating those juries who picked the few people who actually got the death penalty. Could it be said that these juries were really reflecting the considered judgment of their communities, when they were given no guidance as to how to pick those who should die? It was hard to say whether a person who was sentenced to death was executed because of something distinctive about what that person had done and who that person was or because of something distinctive about the jurors who imposed the sentence. So the Supreme Court was concerned that the sentences as they were meted out did not reflect any attempt on behalf of the states to collectively designate who the worst offenders are or who deserves to die. Instead, the decision about these crucial matters was left in the hands of individual jurors with absolutely no guidance or control.

A second concern, which we think is distinct from the first, is a concern about "fairness," or what we also call "under-inclusion." That is, even if the courts were sure that each person selected for death by sentencing juries was really someone who deserved the death penalty according to the considered judgment of the community, there would still be a concern that some people who deserved the death penalty were not being picked by sentencing juries. In other words, a person sentenced to death could make one of two distinct complaints. He might say simply, "I don't deserve the death penalty." But he also might intelligibly say, "Whether or not I deserve the death penalty, there are other people who also deserve it and who are not getting it." This concern about fairness across cases is both a concern about arbitrariness in the imposition of the death penalty and a concern about the possibility of invidious discrimination. Fairness was a particular concern of Justice Douglas in *Furman*, who documented patterns in the imposition of

the death penalty prior to 1972, noting that it seemed to be mostly young, poor, ignorant, minority, and dissident defendants who were sentenced to die. He declared that death penalty schemes that result in patterns such as these are "pregnant with discrimination." Even if the then-existing, open-ended death penalty schemes did not direct juries to impose the death penalty for arbitrary or invidious reasons, argued Douglas, they certainly permitted it. A statute that on its face exempted from the death penalty those who earn over $50,000 a year would clearly be unconstitutional. How, asked Douglas, could it be constitutional to permit in practice the same thing?

A third concern that gave rise to the Supreme Court's constitutional regulation of the death penalty was one about what we term "individualization." One possible response to the Court's first concern, the concern about desert, would be to say that the problem with open-ended death penalty statutes was that they permitted states to abdicate the responsibility to declare who really deserved the death penalty. And a solution to this problem could be for states to enact mandatory death penalties—statutes that say: Any person who commits a certain crime (such as killing a police officer) will get the death penalty no matter what. Some of the states that legislated between the time of *Furman* in 1972 and *Gregg* and its companion cases in 1976 thought that this was the answer. And they legislated mandatory death penalties. In 1976, however, the Supreme Court considered the constitutionality of several of the new statutes and decided that such mandatory penalties could not pass constitutional muster. True, such statutes address the problem of desert in the sense that states that enact them are indeed telling us who they really think deserves the death penalty. But what such statutes fail to do is to permit—or better, require—sentencers to confront the humanity of the people who appear before them for sentencing. The Court held that the idea of human dignity requires that someone who is eligible for the death penalty be considered as an individual. That is, not merely what the person *did*, but also who the person *is*, needs to be considered by the sentencing jury.

Finally, between 1972 and 1976, the Court developed its fourth and final concern—what is commonly referred to as the "death-is-different" doctrine. This doctrine holds that the decision to take a human life is qualitatively different even from so harsh a sentence as life in prison without possibility of parole. The death penalty differs from any other penalty both in its severity and its finality. As a result, the procedures leading to the imposition of the death penalty should be subject to a requirement of "heightened reliability." Only through such specially stringent procedures can we insure that the first three concerns are addressed—that the people who are getting the death penalty de-

serve it, that there is fairness across cases, and that each defendant is treated with recognition of his or her intrinsic human dignity. Thus, the Court's fourth procedural concern is a way of making good on its first three substantive commitments.

These are the four concerns that we have developed from the Supreme Court's opinions in *Furman* and *Gregg*. We think that success in addressing these concerns is the criterion the Court itself would agree is a fair measure by which to judge its next twenty or twenty-five years of constitutional regulation.

MR. STEIKER: I am going to very briefly talk about what happened in the last twenty years with these four concerns because, I think, there are four areas of doctrine that correspond quite closely to those concerns. One area of doctrine concerns narrowing the class of death-eligible. One of the problems that *Furman* identified is this enormous chasm between the extent of death eligibility and the limited number of defendants who actually are sentenced to death and ultimately executed. One promising way to avoid that chasm is to identify in advance a small group of especially deserving offenders. The problem in this area concerns states' efforts to promulgate objective aggravating factors to narrow the class of the death-eligible.

There has been an enormous amount of litigation over state decisions to adopt subjective aggravating factors that don't meaningfully assist in death penalty decision making. For example, in Arizona, one aggravating factor asks the juror whether or not the crime was "especially" heinous, atrocious or cruel. The problem with such vague aggravating factors is, obviously, that most people regard most murders as heinous, atrocious or cruel. Essentially such factors ask jurors to distinguish between especially heinous or atrocious murders and ordinarily heinous, atrocious or cruel murders. The problem is that most states have adopted these kind of subjective aggravating circumstances.

Much of the continuing litigation results from the fact that states have not purged these very dubious aggravating factors from their capital punishment schemes. So the simple requirement of having an objective aggravating factor has gone unmet. And much of the litigation is the product of miscommunication. The states have not responded to the requirement that they articulate objective factors: for example, killing a police officer, killing someone while escaping from prison, and killing more than one person. Apart from its demand that states enunciate objective factors, the Supreme Court has never limited the number of aggravating factors that states can enumerate. The result has been that enterprising states, and there are many, have enumerated enormous numbers of aggravating factors that cover virtually all murders. So basically today, as in the pre-*Furman* regime, there is remarkably broad death eligibility and a similarly unacceptable disparity be-

tween the numbers of people who are death-eligible and the number of people who actually receive the death penalty.

As to the concern about fairness across cases, the Court's doctrine has turned to the notion of "channeling" sentencer discretion. The aspiration is to give extensive, clear criteria for decision-making throughout the entire decision-making process to ensure that "like" cases are treated alike. The Court has essentially abandoned the notion that states have to "channel" sentencers in their death penalty decisions. What is remarkable today is that a state could satisfy the Court's doctrine by requiring the sentencer to find one objective aggravating factor and thereafter asking the sentencer simply whether the defendant should live or die. No state currently has an unstructured death penalty system with such unfettered discretion. Under current regulation, however, it appears that states could do so.

On the issue of individualization, the Court did strike down mandatory death penalties in 1976. And under current doctrine, juries are required to be allowed to consider any and all possible mitigating evidence. The problem with such a broad individualization principle has been apparent. Such breadth runs counter to the whole idea in 1972 that the sentencer should be disciplined in the decision-making process and not be afforded unfettered discretion to exempt anyone they like. The Court has basically given up on the possibility that there be disciplined, consistent decision-making.

Finally, on the issue of reliability, the doctrine has turned out to be extremely unimportant. Basically, the Court's regulation concerns the periphery of capital trials, focusing, for example, on certain kinds of prosecutorial arguments. One aspect of contemporary regulation that is extremely important and often misunderstood is the fact that death is not different. For example, the Court has said that lawyers in death penalty cases are not going to be held to different standards than lawyers in non-death penalty cases. Nor has the Court provided that there should be special post-conviction procedures, for example, in capital cases that are not available in non-capital cases. In essence, the "death is different" doctrine applies at the margin, but doesn't touch the core issues which really affect the administration of the death penalty. So overall we have an enormous doctrinal apparatus that actually demands quite little.

That is how it happens to be that the critics are both right, that we have enormous delays, but we have little regulatory return. I want to briefly talk about what might account for this state of affairs. How did we end up with a system that satisfies no one? I want to explore two theories that I think don't accurately capture why this happened, but which are nonetheless often offered as theories about the death penalty and about public law litigation.

One theory would say that the death penalty regulation has failed in the same way that the court regulation in *Brown v. Board of Education* failed. That is, the death penalty regulation failed because the courts tried to lead the country too far, too fast in regulating against popular decision-making. That explanation, I think, does have a lot of power in the *Brown* context. But I think the analogy fails in the death penalty context. It fails primarily because to regulate the death penalty is not like providing education. Education is something out there in the world, something that is hard for the court to reach out and administer. The death penalty, on the other hand, is about the criminal justice process and regulating matters about which the Court has extraordinary expertise and credibility. The Court has been successful, for example, in reforming many police practices throughout its regulation. So we really don't believe the *Brown* analogy captures the current state of affairs.

Another theory would say, well, the death penalty is inherently the kind of decision that resists rationalization, resists clear decision-making. And the famous proponent of this, Justice Harlan, basically said that the death penalty is constitutional precisely because the courts can't teach the states anything about who deserves the death penalty and who doesn't. We think this analysis evades the question because what the Court has done is focus on regulating the moment of decision, who should get the death penalty, instead of regulating the aspects of the criminal justice system that we think are more susceptible to regulation, such as quality of counsel and availability of post-conviction procedures. So we're not persuaded that the "death is different" argument accounts for the current state of affairs.

We think that the most plausible explanation for the current state of affairs is a political one about the Court's membership. One of the tremendous ironies about the last twenty years of regulation is that the majority of the Court hasn't been interested in regulating the death penalty. That is, the conservative wing of the Court never believed it was promising to intrude on state prerogatives. The other wing of the Court, the left wing of the Court, concluded that we should abolish the death penalty altogether. Basically a majority of the Court doesn't believe in reform. So the middle of the Court, the coalition that has promulgated the doctrine, essentially has to draw as colleagues fellow Justices who don't believe in the project at all. A metaphor we use to describe this phenomena is a dynamic of "warring architects." The architects of the current death penalty don't agree that it should be regulated. As a last comment, I would remind the audience of one of the old saws about Washington D.C.: that it's a geographic region that reflects the worst of all possible worlds. It reflects a combination of northern charm and southern efficiency. Well, I

would argue that in contemporary regulation, the death penalty is similar because its political geography combines the best of conservative compassion and concern for equality, and liberal concern for efficiency and public order. That is how we've arrived where we are.

MS. STEIKER: What might the Court have done instead of what it did do? I will address this question and then conclude with a comment about some of the hidden costs of current death penalty jurisprudence. Jordan has already mentioned some of the things we think that Court might have considered or still could consider as ways to regulate the imposition of the death penalty more successfully than by erecting an enormous apparatus to attempt to control the sentencer's discretion at the moment of decision. One thing that is interesting to note about the Court's constitutional regulation is that it is almost entirely procedural in nature. The Court has tried to set in place procedures that are fair, hoping that such procedures will produce outcomes that are fair as well. One path that the Court has resisted, but that we think might prove more profitable, is regulation that looks at actual outcomes, in addition to procedures.

One way that the Supreme Court could regulate outcomes is by requiring states to limit the number of people who are eligible for the death penalty. For example, the Court could impose upon the states a ratio between the number of people eligible and the number of people actually sentenced to death. Such a limitation would help address the current problem—much the same as the pre-*Furman* problem—of vast death-eligibility. Today, we have seen a proliferation of aggravating circumstances, including some very vague ones, which create broad death eligibility, while only a relatively few are actually sentenced to death. The Supreme Court could essentially say to states, "Yes, you may pick who gets the death penalty, but you can't pick a whole lot. You have to be selective and decide who really deserves it."

Another way of regulating outcomes would for the Supreme Court itself to narrow the class of people who are eligible for the death penalty. One way for the Court to narrow the class of the death-eligible would be simply to exclude some groups as intrinsically not deserving enough for the death penalty. Such groups might include, for example, children under the age of eighteen, the mentally retarded, and those who participate in a crime but do not themselves kill, attempt to kill, or even intend to kill, but rather are the get-away car driver or the look-out. Currently, such people are often eligible for the death penalty and, indeed, are often sentenced to death. And the Court has resisted designating groups that, in general, are not culpable enough for the penalty of death. But even if the Court did not narrow the class of the death-eligible by wholesale exclusions, it could do so retail, by developing a more

robust idea of proportionality in individual cases. The Court could require individual state courts to conduct "proportionality review" of all death cases to ensure uniformity, or it could conduct its own review, or both.

Finally, the Court could regulate the imposition of the death penalty procedurally, but more rigorously than it has done so far. The Court could require procedures in capital cases that truly constitute what one commentator has called "super due process for death." If you put a group of lawyers—or even of lay people—in a room and told them that they had to establish procedures for a judicial proceeding that was going to determine something very, very important, what would be the first thing they would think of? I submit that it wouldn't be anything resembling the Supreme Court's death penalty jurisprudence.

Instead, the first thing on anyone's list would be experienced, competent lawyers on both sides. Lawyers and judges will tell you that good counsel on both sides insures better, fairer results; indeed, this is the theory that underlies our adversary criminal justice process. Steve Bright has written about the actual state of capital representation, and the picture that he paints is absolutely shocking and shameful. One of the things the Supreme Court could do, which it resolutely has avoided, is to demand certain kinds of experience, demonstrated competence, and compensation for death penalty counsel.

Another idea that our hypothetical group of lawyers or lay people would likely endorse in order to ensure the accuracy of such important judicial proceedings would be the appointment of some expert to look over the proceedings after they are concluded to make sure that there weren't any important mistakes. We call this appellate review. Our group might also want to make sure that federal courts review death penalty cases in addition to state courts, whose members often are elected and thus much more subject to political pressure. We call this post-conviction review. As in the counsel context, however, the Supreme Court has headed in exactly the opposite direction; it has limited both kinds of review by generating deferential standards for harmless error and by strictly curtailing the availability of the writ of habeas corpus.

Even if the Court did some or all of the things we suggest, we are not necessarily confident that the death penalty would be rationalized to an acceptable degree. But we do believe that there are "roads not taken" in the constitutional regulation of capital punishment that could be—should have been—pursued.

I want to close by noting a cost of our current death penalty regime that is perhaps a bit less visible. Jordan has pointed out how costly and burdensome our current system of regulation is. As proponents of the death penalty have forcefully argued, it is indeed a real burden on states to have to understand and attempt to

comply with the massive regulatory apparatus constructed by the Court. On the other hand, the costs of the current system to opponents of the death penalty are obvious, too: the system simply has not done very much to eliminate the concerns that many opponents have that the death penalty is unfair, irrational, and discriminatory in the way that it is applied. But these two critiques together suggest a third critique. When the regulatory apparatus is so massive and seemingly oppressive, but after all does so little, we worry that people both in and outside of the justice system will *think* that the apparatus is doing a lot. They thus may be more comfortable than they otherwise might be with the death penalty as a penal sanction.

For example, today, when jurors are asked to impose the death penalty, all of the regulatory apparatus is out on the table for them to see. They are given complicated jury forms with lists for aggravating and mitigating circumstances, lengthy admonitions about they need to do first and next. We worry that this makes it easier for jurors to feel that it is not really they, the jurors, who are sentencing the defendant to death. Rather, it is really a quasi-scientific, even mathematical decision: "We've got five aggravators, but only three mitigators. Just do the math. It's not our fault." The Court's regulatory apparatus gives an air of scientific precision and weighty review to the imposition of the death penalty that might lull people within the system to feel greater confidence in the system's fairness than they otherwise might have or than is warranted. This effect applies not only to jurors imposing the death penalty, but also to prosecutors seeking the death penalty, and to judges overriding a jury's verdict of life or upholding a jury's verdict of death on appeal.

We also worry that this effect operates outside of the criminal justice process; we worry that maybe all of us, those who aren't part of the death penalty apparatus as jurors or judges or prosecutors, just people at large, might feel more comfortable about the death penalty because they hear that there is all this regulation. People hear about lengthy delays and many appeals. And they figure, "Look, anyone who gets through this long process with the death penalty still intact, well, they have got to be the right person." Unfortunately, that public impression is wrong, as we spent a lot of time demonstrating in our article. But the Supreme Court's constitutional regulation of the death penalty, as it now exists, actually helps to create and maintain that impression.

This is the deep irony with which we end. The abolitionist lawyers who pushed for the very reforms that the Supreme Court has endorsed believed that these reforms would end or at least rationalize the death penalty as a social institution. In fact, this litigation that was meant to end or limit the use of the death penalty has probably done something towards reinforcing capital punish-

ment and stabilizing it as a continuing social practice.

MR. O'NEILL: The Steikers have given us such a good overview, such a fine keynote of what we're going to be doing for the next two days. The next person I would like to call is George Kendall, who is going to take us from sort of a macro-level down to a micro-level of two extremely important issues dealing with the death penalty. One is the issue of habeas corpus. For many years federal habeas corpus was one of the main routes for state prisoners who received the death penalty to receive any kind of relief from the judicial system. As you know, there has been habeas corpus reform over the last couple of years, both judicially and legislatively, that George is a very familiar with and is going to address today. Secondly, of course, is the question of race. This is going to be something that is going to come up a number of times during the next couple of days—what role does race play and what role will race be playing in the future? George Kendall.

MR. KENDALL: Thank you. Good morning. I am going to speak to this issue on a different level than did the Steikers. I would, before leaving them, recommend very highly their article to you. It is really "one-stop shopping" in many respects for how the death penalty has been operating in this country and what is wrong with it. If you haven't looked at it, you ought to.

As I look out in this crowd, I am glad to see some old friends. I am a practitioner in the death penalty business. I do trial work. I do post-conviction work all over the country really. And what I am going to talk about this morning really comes largely, if not entirely, out of those experiences as a practitioner. I am glad to see colleagues from the defense side in the audience today from Illinois and others who toil up against enormous odds in Illinois and do remarkable work. I'm glad to see prosecutors here who prosecute capital cases because I think tragically—increasingly—whether or not people are going to be death-sentenced fairly in this country, whether we're going to execute innocent people or not, is going to increasingly fall upon the shoulders of prosecutors. I am glad to see distinguished academics here. Bill Bowers and Austin Sarat, who long thought about and wrote about this enormously important issue, they are here. I am glad they're going to add their voices to this discussion for the next two days.

I am most glad to see many students. I think that the one verdict that many of you will probably reach at the conclusion of these two days is that my generation has failed on this issue and failed miserably. I hope that before my generation is through, that we'll either leave you with no death penalty or one that actually might have the prospects of working more fairly. But if not, I hope that you will take up the responsibility of the mess that we leave you and once and for all clean it up for this country.

If I were going to put a theme or moniker on my brief re-

marks, I would say that looking back at these past twenty years, where we have been and where we are going, I think two clauses sum it up. First, promises were made in 1976 that largely have been broken. Those promises were made by the states to operate a new system of capital punishment fairly. I think the overwhelming evidence now is that has not happened. Second, there were commitments made. Commitments made by the Supreme Court of the United States and other entities that, in fact, this system would be regulated in a way that would ensure fairness. And if it didn't ensure fairness, these death sentences would not stand up. Tragically, I think the second legacy of the past twenty years is that those commitments largely have been abandoned.

First, let's start with the promises. In 1976, the states returned to the United States Supreme Court and basically said we have fixed the system. We agree that in the pre-*Furman* era our system had problems. Racial discrimination was not a small problem, but a large problem in the administration of capital punishment in many parts of this country. There were people being tried under circus like half-day trials. That was unfair. The review that was given these cases oftentimes was comical. You're not going to see that anymore. We have now got a new system in place that will require at the trial level a narrowing. Only the most extreme cases and only the most deserving offenders are likely going to wind up with a death penalty.

We split the trial into two parts. We're not going to have the jury or sentencer decide guilt and punishment at the same time. There will first be a trial on guilt or innocence. And if the defender is found guilty, only then will the jury essentially go to decide which sentence should be imposed. When that process takes place, we promise you we are going to guide that very important deliberate process. The jury or sentencer is going to know these are the facts and circumstances that you need to look at to see whether this crime is more aggravating or this offender is more deserving of being sentenced to death. Here are some other factors and circumstances that you're going to decide, whether or not this crime is more mitigating or whether this offender is less deserving of a sentence of death. In fact, that system of trial somehow malfunctioned. And the wrong people are receiving death sentences.

We are providing you these new statutes, a very, very special heightened appellate review. Now, you're not going to be able to waive your appeal. The state supreme court is going to have to look at these cases whether or not the offender wants them to be reviewed. And that review is going to be careful and deliberate. In fact, even if an error is not raised by the death row inmate on this appeal, in many of the states, the state supreme courts were told you must look at that record, find that error and decide whether it was wrong or not, and throw out that sentence or conviction. Even

if there was no error found, many statutes require state supreme courts to look at the body of cases and make a determination: is this sentence in this case excessive?

Basically when there's a combination, as Jordan and Carol already discussed, the state supreme courts said because of these achievements we can make death work and work fairly. Let's fast forward about ten years. What the Court did in 1976 is—with no empirical support—forced states to handle the issues independently, although there wasn't much evidence to suggest that this would not work. I can say that the parties in those cases, *Gregg v. Georgia* and in the other cases in 1976, told the Supreme Court, "don't be fooled. We think that for the most part the states have papered over the real problem in the administration of capital punishment. We don't think these are going to work." But the state or the Supreme Court decided to take the states at their word and give the states a chance.

Okay. Let's see if these new systems can, in fact, reduce or eliminate racial discrimination, or reduce arbitrary unfairness. When we fast-forward about ten years, we see that there is a lot of empirical evidence to test these promises that were made by the states. So we can ask ourselves whether the states were, in fact, enforcing their capital punishment laws? Were they getting only the worst offenders? Were they getting the persons who committed the most egregious or aggravated crimes? Has race disappeared as being an influential factor in these cases? I think you're going to hear from other people about the arbitrariness. When Justice Stewart voted to strike down the death penalty in 1972, he stated that it was like being struck by lightning. There was no rhyme or reason in the pre-*Furman* era as to who would get the death penalty and who would not. I think that the large body of evidence in the ten years after the *Gregg* statute shows virtually the same thing.

You can look at a map of Texas. You can look at a map of Georgia. And you can see for identical crimes committed in county A and county B, the prosecutor in county A might seek the death penalty in every case. The prosecutor in county B might never seek the death penalty. If you look at a map of where we have the death penalty, any state in the country, it would be like the lightning strike maps you see at the weather stations. There's nothing in the statutes to—in any sense—control the discretion of the prosecutors in deciding which case goes to the death penalty and which ones do not.

What about this promise of jury discretion? Would the jury's discretion be funneled and channeled in a way that the results would show that only the worse crimes or only the worse offenders would receive death? Here, again, I think the evidence is overwhelming that that was not how the system was working at all.

Professor Bright will speak eloquently about one of the chief reasons. And that was because the states in many places failed to provide adequate legal representation.

These statutes can't work properly. The juries can never know about the mitigating evidence. And in many cases the jury never heard any mitigating evidence because the defense appointed to these cases were paid $500 to do an entire case, were given no investigator, or else never even bothered to look or present the evidence at all. Texas and Florida for years prevented the consideration of oftentimes the most important, compelling mitigating evidence. So at least on the score of these statutes operating fairly, I think the empirical evidence shows that they were not. What about race? Remember, the states claimed in 1976 that we have constructed a system that really operates like a filter. It will see racial discrimination coming and will filter that out. It will not influence the process of trial. And even if it does, we will see it on direct appeal and take it away. I think, again, that the evidence is compelling. It shows that in state after state, race continues to play a very large role in who is charged with capital murder and who, in fact, gets the death sentence.

Many of you, I am sure, heard about the Baldus study. That was a study that was done the first seven years of cases after *Furman* in Georgia. That study controlled over 230 factors that might have influenced the prosecutor to seek the death penalty and the jury to impose a death sentence. The best news for the state in that study was that persons who were charged with and convicted of killing whites were more than four times more likely to be sentenced to death than persons who killed non-whites. Now that might not sound like a very disturbing figure until you think about other studies where we've drawn other conclusions from. Most Americans, I think, have come to believe if you smoke, it is going to increase your chances of getting lung cancer. Well, the studies have shown that basically your chances of getting lung cancer from smoke double. People who smoke have twice the chance of getting lung cancer than those who don't smoke. The Baldus study showed in Georgia if your victim was white you're more than four times likely to get the death sentence than if your victim was black. So had race disappeared? Hardly.

There was also other evidence coming in on a less macro level in various circuits where prosecutors often used the death penalty. In Columbus, Georgia, every year, sixty-five percent of the homicide victims there are not white. They're African-American. But year after year, over eighty percent of the cases where the prosecutor would seek the death penalty were the white cases. Which communities had a homicide problem? It wasn't in the white community. It was in the African-American community. But overwhelmingly, the death penalty was not used in those cases. It

was used in the cases where the victim was white.

We have seen these kind of patterns in many other communities as well. What about jury selection? Will race affect the jury process? In capital cases, again, the evidence was coming in quite strongly that it was. The prosecutor in one southern state has put more people on death row than any other. In the thirty cases that he tried, he used eighty percent of his preemptory challenges to remove African-Americans in those cases. In the cases where there was a white victim and black defendant, he used ninety-four percent of his preemptory strikes to remove African-Americans from that jury system. Several of those cases were tried before all white juries. Since then, evidence has come in that in at least one Arkansas jurisdiction the striking patterns were so bad that the federal court found violations in twenty percent of them. To prove a violation is almost *Mission: Impossible.* You have to show almost total exclusion of minorities in case after case after case. In three Alabama counties, where many death cases were tried, we now know that the prosecutors were using their preemptory strikes in virtually the same way. Same thing in one Georgia county that we have evidence of, and several others.

So has race been taken out of the system? I think hardly not. What about the promise of appellate review? This was a very, very important safeguard that the states relied upon for seeing that only the most deserving would be executed. I think one way to look at how effective the state court review has been in these cases is to look at the second set of inspectors and what records the federal courts have looked in cases that have been reviewed oftentimes one time, two, three times by the state supreme court. And one is not left with great confidence that the appellate review that is going on in those cases was working as it was promised. In the years 1978 through 1983, in the state capital cases that have reached the federal court, over seventy percent of the cases were found to contain at least one harmful violation of the Bill of Rights that had gone without remedy and oftentimes repetitive reviews in court. That is an astoundingly high reversal. And if you even look through the entire decade of the 1980s, from 1978 to 1991, when the federal branch became dominated by Reagan and Bush appointees, the reversal rate continued to be over forty percent. That remained an astronomical reversal rate—an enormous reversal rate—in criminal cases in most states of three to six or seven percent. I don't know of any other category of cases where the reversal rate is that high.

The reversal rate was not because the federal justices were all abolitionists. I was in Atlanta for the first five years reviewing these cases. I probably saw 200 oral arguments in capital cases in Florida, Georgia, and Alabama. I can tell that you those judges in those cases were very unhappy about having to grant relief in

those cases. But in order to uphold their oath of office, with the kind of errors they were seeing not remedied in the state court, left them with no choice but to grant the relief. We have a number of cases where . . . we had a client a couple of years ago in a Georgia case where the federal judge found six harmful violations of the Bill of Rights. This was a death case involving a seventeen-year-old woman. In another case, a federal judge, who hated habeas corpus review—in fact, he referred to it as S.O.B. jurisdiction—granted relief in a case where he said it was hard to see where the errors began and where they ended. This was a case where the same lawyer had been appointed to represent all three capital defendants in the same case and was paid $500 per defendant. He filed no pretrial motions in the case, he referred to his clients, all of whom were African-Americans, as niggers. In fact, there was a fourth client in that case who had an Hispanic last name who was referred to as a "Mexican nigger." The lawyer did not file a brief on direct appeal in that case. That case went through a review twice by the Supreme Court of Georgia.

Another case on our docket was the *Richards* case in Tennessee. The Federal District Court granted summary judgment after finding seven harmful violations of the Bill of Rights. Again, it was reviewed twice by the Tennessee Supreme Court and no errors were found.

Promises made. The empirical evidence came in. The review was not working. What does this mean for the future? I agree with Jordan and Carol that the Supreme Court has basically abdicated its responsibility here. It has never taken a case and held that the representation provided was ineffective in the capital case. They have been asked hundreds of times to do so, but never have. They can. The Supreme Court can do a lot to see that people have better lawyers in these cases. They can make this matter a lot more difficult with decisions like *Strickland v. Washington*.

Congress has also just added to the problem. It started with a need for lawyers in these cases. In 1988, Congress funded resource centers. And just this year took all the funding away. We are now in a very, very deregulated system. With race, the Supreme Court basically said in *McCleskey* that there was no statistical evidence strong enough to show race as having the kind of effect that would show a violation of the Constitution. There has been no case that I know of since *McCleskey* in 1987 where a state court has held race discrimination on state-wide basis and county-wide basis that was extreme enough to require overturning death sentences.

The last twenty years of a sort of uneven review have saved the states from humiliating themselves on countless occasions. We know that more than sixty innocent people have been death sentenced in this county and have walked off only by the grace of God,

not by this system. I can tell you in this new system of deregulation we are going to execute innocent people. Racism is going to play a much larger role than it is already playing now. And we're going into a very, very dark time in the administration of capital punishment. Thank you.

MR. O'NEILL: It is so important not to lose sight of the human factor in death penalty cases, and not just from the defendant's perspective, either. I don't know of anyone who has done a better job of talking about the institutional actors in death penalty cases, the judges, the prosecutors and the defense attorneys than our next speaker, Stephen Bright. Mr. Bright is going to address some of those concerns this morning.

MR. BRIGHT: Thank you. Good morning, everyone. My perspective on this comes as one who has wandered during the last fifteen years in the vineyards—or perhaps, more accurately, the briar patches—that pass for criminal justice systems in the death belt, that part of the country where most people are sentenced to death: Alabama, Florida, Georgia, Texas and other states of the old Confederacy. Those states have carried out about ninety percent of the executions that have taken place since the Supreme Court upheld the death penalty in 1976. In the courts of those states, the regulation of death cases is neither very massive nor very complex. For several years after 1976, the Supreme Court dealt with fundamental questions such as what crimes were punishable by death, what evidence could be admitted, and whether death could be imposed based on information in a pre-sentence report to the judge that was not provided to the defendant. But once those issues were resolved, there has been little regulation of the process employed in capital trials.

For example, for the most part there is no regulation today of jury selection. The Supreme Court retreated from its decision in *Witherspoon v. Illinois* that set a demanding standard for the exclusion of citizens from jury service based on their scruples against the death penalty. In 1985, the Court held that great deference must be given to the trial judge's ruling about whether a juror's attitudes about the death penalty disqualify him or her from jury service. The trial judge can grant or overrule a motion to strike a juror for cause and, regardless of the ruling, the appellate and reviewing courts will probably uphold it. Today, there is little or no regulation of aggravating circumstances, which are supposed to narrow eligibility for the death penalty to the "worst of the worst." Anything can be an aggravating circumstance. In states like Georgia, virtually every murder is eligible for the death penalty. Texas has written a death penalty statute in a way that juries always answer the statutory questions "yes," thereby sentencing the defendant to death. So prosecutors will get the death penalty in the cases in which they seek it. With regard to mitigating evi-

dence, it could not be any simpler. Any evidence the defendant proffers as a basis for a sentence less than death must be admitted. But the amount of weight to be given the evidence is up to the sentencer, so the sentencer is not required to pay any attention it.

The Supreme Court held that proportionality review is not required, in *Pulley v. Harris*. Before *Pulley* was decided, the Georgia Supreme Court had found the death penalty disproportionate in one case. Once the Georgia court found that the federal courts would no longer review the issue of proportionality, it has not found death to be disproportionate in another case. The Georgia Supreme Court has reviewed over 300 cases and found only one disproportionate death sentence. That court is also required by statute to review capital cases to determine whether a death penalty was imposed under passion, prejudice or any arbitrary factor. Although a good case can be made that most death sentences in Georgia were imposed under the influence of one of those factors—most often racial prejudice—the Georgia Supreme Court has not found a single instance of these factors existing.

The United States Supreme Court held that judges can override jury sentences with regard to punishment. In Alabama, even if a jury imposes life imprisonment without parole, judges can override and impose the death penalty. The United States Supreme Court has held the Constitution establishes no standard and requires no particular process for an override. Some judges in Alabama routinely override sentences of life imprisonment without parole and impose the death penalty at every opportunity. In cases before those judges, the jury's determination of sentence makes no difference; those judges are going to impose the death penalty. There are other judges who do not override at all. So the sentence depends entirely on the predilection of the judge who has it. There is no regulation.

The most important two decisions made in every death case are made by the prosecutor: whether to seek the death penalty in first place; and, if a notice of intention to seek death is filed, whether to agree to a sentence less than death as part of a plea bargain. There is no regulation by the courts of those two critical decisions. Another important factor which determines whether a person is going to be sentenced to death is the quality of legal representation the person receives. Almost anything passes for effective assistance of counsel under the Supreme Court's decision in *Strickland v. Washington*. There are no standards for the performance of defense counsel.

The system of capital punishment has been described as a "house without a blueprint." However, in my experience, that analogy is not quite right. It is more like a group of unskilled workers grabbing hammers and saws and trying to build a house without ever consulting the blueprint. The people involved in

death penalty cases in many jurisdictions—the judges, the prosecutors and the defense lawyers—have no more notion of what the Supreme Court of the United States has said in capital cases than I have of what it has said in antitrust cases.

Let me give you an example. In a post-conviction hearing I was handling earlier this year in Georgia, the lawyer who had defended my client at trial was testifying. He seemed very confused every time he was asked about the case of *Gregg v. Georgia*, the Supreme Court case which in 1976 upheld Georgia's current death penalty statute. Finally I asked him if he had ever heard of *Gregg v. Georgia*. He answered that he had not. I asked if he had ever heard of *Furman v. Georgia*? He had not. Had he ever heard of *Lockett v. Ohio*? No. This "lawyer" who has defended people in hundreds of cases and tried a number of death penalty cases in the last thirty years was not even aware of these cases. I was speaking to a group of lawyers not long ago in Alabama. I mentioned *Lockett v. Ohio*, the seminal decision by the U.S. Supreme Court holding that evidence offered by the defense as a basis for a sentence less than death must be admitted in mitigation at the penalty phase of capital cases. I got nothing but blank looks. It was clear that no one there knew what I was talking about when I mentioned *Lockett v. Ohio*.

The courts in Houston, Texas condemn more people to die than any jurisdiction in the country. More people sentenced to death in Houston have been executed than have been executed in Florida, which has the second highest number of executions of any state after Texas. If Houston was a state it would have one of the largest death rows in the country. The defense lawyer there who has had the most clients sentenced to death is Joe Frank Cannon. Joe Cannon sometimes sleeps during trial. In at least two capital cases, there was testimony and findings by judges that he slept during portions of the trial. Carl Johnson was executed even though Mr. Cannon slept through parts of his trial. A provision of the state or federal constitution, a state law or rule, or a decision of the United States Supreme Court means absolutely nothing at a trial if the defense lawyer is sleeping. The rights that ensure the fairness of the process do not apply if the defense lawyer is not aware of them or awake to assert them.

The reality is that in many jurisdictions, almost all murder cases—except manslaughter and vehicular homicide—are eligible for the death penalty. Death is imposed in only about two percent of the eligible cases in this largely unregulated process I have described. That means that all power has been given to the district attorney to decide of the many cases in which death could be sought which few will actually be prosecuted as capital cases. How that is that decision going to be made?

First, does a district attorney care for the death penalty?

Some do not care for the death penalty. They think it is a waste of time and waste of money. In Georgia, for example, which has sentenced more people to death in this century than any other state, death is routinely sought by some prosecutors, like those in Columbus, and never sought by others. Atlanta, which has one of the highest murder rates in the country, sent only two people to death row in the whole decade of the 1980s. Yet some Georgia counties, which do not have as many murders in a year as Atlanta has in a month, send several people to death row in a single year. It all depends upon the local prosecutor. The same thing is happening in New York, which recently adopted a death penalty statute. The prosecutors in the Bronx and Manhattan, where many of the murders in the state take place, are unwilling or reluctant to seek death, but in upstate New York, which does not have nearly as high a murder rate, prosecutors are going for death.

The second factor is the district attorney's ambition. Does he or she want to be elected judge, attorney general or governor? If so, seeking the death penalty ensures lots of press coverage that will help build name recognition. Capital cases may also help the district attorney stay in the good graces of influential people in the community. I had one case recently, for example, a very tragic case—as all of these cases are—involving a convenience store robbery in which the clerk at the store was murdered. Generally this type of case is not capitally prosecuted. But the victim in this case was the son of a brigadier general at the local military base. That made it a capital case. When the person accused is black and the victim is white, that is a death case because of who the victim is, because of the publicity that case is going to have in the community, and because of the political benefits to the prosecutor.

The overwhelming majority of death-eligible cases are going to be resolved by district attorneys with no regulation by anyone. Until very recently all forty-four district attorneys in Georgia were white men. There is now a white woman; now soon there will be the first African-American district attorney. Those district attorneys decide whether to seek death all by themselves, with no input from the community and no review by a judge or any other actor in the process. They also decide whether a case will be resolved with a sentence less than death in exchange for a guilty plea. These two decisions will dispose of most death-eligible cases without any regulation by the courts or anyone else.

The quality of defense counsel often influences this critical exercise of discretion by prosecutors. A prosecutor in Houston who knows that Mr. Cannon has been appointed to defend the accused and probably will not even be awake or defend the case properly, has no incentive to agree to a plea bargain because there will be little or no resistance at trial. A prosecutor in another jurisdiction who knows that his former boss, the former district attorney who

is now a judge, has appointed a defense lawyer who is not competent to handle a minor traffic matter, will also see no reason to plea bargain the case. Plenty of death cases go from jury selection to the imposition of a death sentence in one, two or three days. In those cases there is very little likelihood of a plea bargain and virtually no constitutional regulation of the process.

Moving on to the judges and their role, I learned very early in my career the relationship between local trial judges and United States Supreme Court. There was an occasion when judge in a small rural county in Kentucky was reversed by the United States Supreme Court. The judge reacted philosophically, saying that it was the first time in his twenty years on the bench that the Supreme Court ever reversed one of his decisions. But, he added, every day in his court he reversed some decision of the Supreme Court. Most trial judges preside over a huge volume of divorce, child custody, automobile accident and other types of cases. They are not reading the decisions of the Supreme Court of the United States. I have now had two judges—one in Mississippi and one in Georgia—tell me not to cite federal cases to them because they did not have access to the federal reporters. They told me I was just wasting my time citing federal decisions.

In addition, judges in most death penalty jurisdiction are elected. They have to stand for election every four years or every six years. The most important thing to most judges is getting reelected. Many judges are terrified by the idea of going back into private practice. A friend of mine who recently became a judge said the only thing the judges talk about in the cafeteria is their pensions. They do not want to lose their pensions. Judges have been voted off the courts in California, Texas, Mississippi, and, most recently, in Tennessee because of their votes in death penalty cases.

Justice Penny White was voted off the Tennessee Supreme Court because of a decision made by that court in a capital case that she did not even write. The governor, the two senators and the Republican Party came out against her. After she was removed from the court, the governor said that he hoped that from then on judges would be thinking about their political futures when deciding cases. Others who had opposed Justice White pointed out that other members of the state supreme court will be on the ballot in two years and said they would be watching their decisions to see if they got the message. What they are telling the justices of the Tennessee Supreme Court is that they cannot enforce the Bill of Rights in capital cases because if they do so they will be signing their own political death warrants.

Right now there is a justice of the Alabama Supreme Court seeking reelection who is running a thirty-second advertisement on television which recounts the facts of a murder; then, the vic-

tim's daughter looks into the camera and says, "thank God Judge Ingram imposed the death penalty." Another judge opposed in an election for an Alabama trial court ran newspaper advertisements saying it does not matter whether a judge is a Democrat or Republican as long as he will hand down the death penalty. This judge set a capital trial for the week before the election so that every day he was on the front page of the newspaper and on the evening newscasts ruling presiding over a death penalty case. The defendant was sentenced to death and the judge won the election.

It would not be accurate to say that capital punishment is corrupting our criminal justice system. Unfortunately the criminal justice system has suffered for many years from neglect, underfunding and a lack of commitment to having an adversary system. Poor people have long had grossly deficient representation in all types of criminal cases. Racial bias infects the entire process from arrest to sentencing. Racial disparities exist in all types of sentencing. But the death penalty has made it worse. A commitment to fairness has been sacrificed in the quest for more death sentences and speedier executions.

MR. O'NEILL: We have just heard Stephen Bright for the defense. And now we move across the aisle to Mr. Kunkle. I have heard discussions about the death penalty where I hear people say, "I'm appalled at the death penalty," or, "I don't agree with the death penalty." I heard someone come up with, "okay, how about the Gacy case?" And I heard the response, "well, maybe just once, just the Gacy case. That's the only case. Other than that, I'm opposed to the death penalty." We have Bill Kunkle with us. Bill Kunkle was the chief prosecutor in the Gacy case. I give you Bill Kunkle.

MR. KUNKLE: I appreciate the initial introduction as a "prosecutor's prosecutor." And as it turns out, in a strange sense, I am one again. I was appointed by the Chief Judge of DuPage County with the full powers of a separate state's attorney in Illinois in that county, in that judicial district, to examine the conduct of the police and prosecutors in the Rolando Cruz case primarily, and also in other cases and investigations surrounding the murder of Jeanine Nicarico in DuPage County in 1983. The other matters really preclude me from any discussion about it. But I mention it in that context. And I will mention it again in a minute. Other than that connection, I am not sure what category that was mentioned before that I fit into. Professor Spanbauer listed a number of them. Maybe concerned citizen is the fairest one at this point.

I left the State's Attorney's office as a regular prosecutor in 1985. When I was a public defender in the 1970s, Illinois, like most other states, did not have the death penalty. So at that time we did not defend death penalty cases. I have been involved in a couple since I left the prosecutor's office. I was appointed to represent one

of the seven or eight that have been executed in Illinois. His name was Charles Walker. Judge Stiehl, a federal judge, noted that Mr. Walker had been a volunteer ever since his initial appeal in the Illinois Supreme Court and wanted to waive his appeal, wanted to go directly to the lethal injection without further ado.

The Illinois Supreme Court stood in his way for sometime. But eventually it was coming down to the actual execution. And a number of lawyers without his request had filed, among other things, a class action in the Federal District Court for the Northern District of Illinois challenging the method of execution provided for in the Illinois statute. Judge Stiehl appointed me to represent Mr. Walker for the very limited purpose of determining: (1) whether he intended to be part of that class or wanted to be part of that class at all; and (2) to continue to represent him along with other appointed counsel that he already had through the process of his execution—if that was what he desired.

Mr. Walker did not wish to be part of that class. He made that perfectly well-known not only to me, but the court, in affidavits and otherwise. And when he was executed, I attended his execution at his request and spoke with him no more than thirty to forty minutes before that process was carried out. And I will tell you, and I am not sure what it's worth, but just as an observation, the Charles Walker who had been an armed robber much of his life, with premeditation and malice aforethought, who put a gun in people's faces and gave them the alternatives of their money or their life, was not the Charles Walker that was put to death. On the last occasion when he did that with a young couple in southern Illinois, even though they gave him the money, one noted that they knew who he was. This was a serious error in judgment on their part, he executed both of them after tying them to a tree, taping their eyes with duck tape, stealing their fishing equipment and their car to go on what amounted to a later crime spree for the last time.

But having that personality, perhaps it shouldn't surprise me as much as it surprised the media that he was so calm and so willing. And, indeed, what he said to me minutes before his execution was, you know, "I made my peace. My reverend is here. I am ready to go." He said, "you'd really expect a few butterflies at this point, wouldn't you? But I don't have any." That's one case. That's one person's attitude about the difference between death and life in the penitentiary. And in that case he had the power to make that choice. It's a very small ingredient of one of the major themes I would like to address, which is the idea that "death is different."

When the Supreme Court first said that, it continued to refer to it and continued to elaborate. I did not believe that death penalty litigation should be different. By that I do not mean to say that I disagree with the concept of the elaborate, as some might

say, sentencing period law that has developed through the United States Supreme Court and through the state supreme courts certainly in this state and some others—perhaps not Georgia. I don't disagree with that. I think it's appropriate. But in the basic rules of evidence and the conduct of the guilt phase of the trial and the conduct of jury selection, the rules of evidence don't change. The laws of science don't change. The emotions of people on the jury or on the court or in the role of prosecutor or defense attorney don't change.

If we accept the concept that death is different, then what we're saying is that we're not giving a full measure of due process to criminal defendants who aren't charged with a capital offense. In the 1980s in Cook County there was a very highly successful, nationally reported and highly-lauded program called the "Repeat Offender Court." The proposition was that those defendants charged with serious felonies who had defined prior records of serious felonies would be specially assigned to a panel, in effect, of six courts. If the statutory substitution of judges' motions was filed either as a matter of right on the first kick or for cause after that, even though the case might be transferred to a second judge and perhaps even a third, it would remain within that circle of those six or eight judges.

There were defense challenges to this scheme. "You're creating a special court . . . You're improperly changing the effect of reasonable doubt or the process by considering the prior record, which you shouldn't be able to do." Those challenges all failed. I had a problem with that as a prosecutor at that time, and I was the only one in the office, frankly, that was opposed to the concept. And many were very surprised that I was opposed to the concept. My opposition came on the basis of fairness. To me, it was a self admission by the system that we're not going to regulate cases right. An admission that in order to provide the kind of speedy trial that both the victims, the state and the defendant ought to be entitled to, and to provide the kind of judicial experience that some might argue would produce the correct sentence for a convicted felon. Others would say that proper judicial experience is to at least have some concept of what reasonable doubt means, and enough knowledge of U.S. Supreme Court and Illinois Supreme Court law, and to properly handle the rules of evidence and run a trial. The problem is that we're going to afford that to these serious felons, but we're not going to afford that to anybody else. To me that made no sense. I was overruled.

It was a tremendously successful program, lauded by lawyers, judges, media, citizenry, practically everyone. So I kept my mouth shut. I went for elected state's attorney at the time, as you do in Illinois. It was not my place. Quite frankly, I didn't feel that strongly about it. I don't want to suggest that I'm some kind of

martyr on this issue. I wasn't at all. It was just a matter of philosophy. I thought it was basically wrong. Ultimately it disappeared, not because any court ever struck down the concept, not because any rule was ever raised as an impediment to it, not because anybody ever agreed with my original second thoughts about it, but simply because the judges that weren't on that panel were jealous of it. I think that's the real reason that it disappeared. Those judges' court calls were getting the publicity, were getting all the good cases. And the judges' rebellion affected it.

Well, repeat offenders shouldn't be different. Death shouldn't be different in terms of the trial of the case and in terms of the application of the rules of evidence. I was amazed recently when I spoke to prosecutors at the first and then the third statewide training session for prosecutors in New York. Years ago, I was a member of the organization and at one time, president. It's called the Association of Government Attorneys in Capital Litigation, which has probably the worse acronym on record, G.A.C.L., which still exists. Many people thought this was some kind of proselytizing organization for people who were in favor of the death penalty. It was never that. It is not that now. Rather, what it really is, is a group of prosecutors from the prosecutor's office and attorney general's office in states that have the death penalty whose purpose is to provide training, provide case resources to see to it that—if not the judges—at least the prosecutors who are trying capital cases know what they're doing and can do the job hopefully without serious error by following the rules set by the state supreme court.

One of the functions of that organization, in addition to having a national seminar each summer, was to request various state prosecutor associations to go to those states with newly passed statutes and teach courses on everything from opening statements to closing arguments to death eligibility and so forth. And that's the context with which I was teaching in New York. And some of the same people from Nebraska and other places were still on the circuit doing some of that teaching at that time. And I was amazed to learn that the eighty percent figure mentioned here this morning as the statistical thing for favoring the death penalty on nationwide surveys is true in New York—in one of our, at least the perception is, most liberal states. Certainly one of the most liberal legislatures over the years. Eighty percent favor the death penalty?

I also learned—I didn't pay a lot of attention to New York's legislative history before—that for twelve consecutive years the New York legislature passed death penalty statues. Every one of which was vetoed by the government. And only when a governor came in that was going to sign such a statute, then New York, in fact, had a death penalty statute. One of the things I learned at the first conference was that there were a couple of prosecutors,

and two of them were in Manhattan of the five, who had publicly stated that they had no intention whatsoever of ever pursuing a capital case notwithstanding the fact that the New York legislature had passed one that the governor had signed into the law. I suggested two things to the group at that point. One was that the citizenry of that borough certainly ought to vote them out at the next election if they're going to selectively choose which laws of the state they're going to enforce after having sworn under oath as prosecutors to follow the laws of the state, both the constitution and enforce the laws of that state. And perhaps ask them what other laws of the State of New York they might selectively choose to ignore in the process of conducting their office. And the other thing they ought to ask them is to set aside a particular area of razed vacant lots, which are predominant in some areas of New York, and put some yellow tape around it and put a parking area so people from the other three boroughs, New Jersey, doing the outfits hits and gangbanger hits can bring the bodies there to deposit them so they will be found in a borough where there is no death penalty because they're going to need some space for that because that's exactly what is going to happen.

Why do I mention that? For a prosecutor, jumping back into that role, that is the relevant issue, "what is the law of this state?" If the law of the state is we have a death penalty, your oath demands that you enforce it. I certainly and absolutely agree with Steve Bright that one of the functions of enforcing that law properly and pursuant to the oath of a prosecutor is to see to it that there is a fair trial. The problem of a bad defense lawyer is not just a problem for the defendant, not just a problem for the system and this society. It's a problem for the prosecutors. The prosecutor doesn't want the case to go to appeal. And if you have inadequate counsel in Illinois, it will be. Many cases have been reversed on that issue. Maybe in the State of Georgia this doesn't happen or only happened once. But it happens a lot in Illinois.

One of the ways that this can be prevented is by the active role of the prosecutor, within the limited degree that he or she can, to ensure that there is adequate counsel for the defense in a death case in their courtroom. Obviously that role falls much more heavily on the judge, and is clearly a function of the judge that should be performed. It's very hard, very hard to get a judge to look a licensed lawyer in the eye in Illinois—or I would expect anywhere else—and say, "you know, I am interrupting this trial. And I am appointing the public defender to assist you, or I will declare a mistrial. We're going to start again in six months because you're not hacking it." But that's what needs to be done on that point. I have no disagreement with Steve at all on that issue.

Aside from the technical judicial process of the U.S. Supreme Court in particular—others have a much better scholarship base to

talk about than I—I will just spend a second on the issue of the public perception, the media perception of what issue remains embedded in capital punishment. To me it seems to be, as has been mentioned this morning, well, sooner or later we're going to actually execute a truly innocent person. I would suggest to you that anyone on that eighty percent poll or any judge that filed a penalty appropriately, knew that from the beginning or certainly should have. This is a human system. It's going to make mistakes. To me that is a non-argument. Regrettably sooner or later, it's going to happen. If you're not going to accept that possibility, then you can't support that death penalty whether as a voter, judge, prosecutor, whatever.

In terms of philosophical arguments, you know we're going to respond to each other later. But I really can't. I see Walter Berns in the audience, one of my idols. You'll hear from him this afternoon. And he will say it much better. But when you put the human dignity argument out there, it makes a nice philosophical argument from lawyers and academics. But I can tell you, if you go out and poll the populace, you're going to find they agree with Dr. Berns. When a defendant commits the kind of crimes that, at least in Illinois, are death-eligible, they surrender any shred of human dignity they ever had, if they ever had any. One of the illustrations Dr. Berns uses in his response to the problem is that a society that cannot distinguish—and I am going to use different names than the original—could not distinguish between Abraham Lincoln and John Wilkes Booth; between Robert Kennedy and Sirhan Sirhan; between Martin Luther King and James Earl Ray, doesn't understand human dignity. To live with nothing else does not comport human dignity. It is a quality which can be surrendered. And I suggest it is surrendered by the people who commit these kind of acts. And a society which cannot distinguish between living and living with dignity, cannot distinguish between those unspeakable violators and those heroes of our country, doesn't deserve to use the term human dignity because it doesn't understand what it means.

MR. O'NEILL: We deliberately planned to save Professor Bessette for our last speaker this morning before our break. After Professor Bessette, we are going to take a fifteen-minute break. But we do want to hear Professor Bessette first because we have just heard from five lawyers this morning. We want to hear the perspective of a non-lawyer, somebody who is a little scientific, somebody with a little bit of perhaps a different view. One of the things that Professor Bessette is going to speak about this morning is the symbolic role the death penalty plays.

MR. BESSETTE: Thank you, Tim. As Tim has told you, I am not a lawyer. I am certainly not an expert on the case law or the administration of the death penalty. I come here rather as some-

one who has been studying punishment for violent crimes more generally and someone who is currently engaged in a large scale study of punishment for homicides in California, about which I will say more in a few minutes.

Let me begin with a question. What is the relevance of the death penalty in the United States for the vast majority of those who have killed their fellow human beings? This question will carry through most of my discussion here. In several respects, as I will try to briefly elaborate, the death penalty appears to be largely irrelevant. We can begin with the obvious fact that in statistical terms, so few murderers end up sentenced to death and even fewer, of course, are executed. Only about two to three percent of the 12,000 persons convicted by state courts of murder or non-negligent manslaughter each year in the U.S. are sentenced to death. That is to say ninety-seven to ninety-eight percent of convicted murderers escape the death sentence. Or to put it differently, in a nation that experiences 22,000 murders each year—it has been going down a little bit in recent years, but it is still about 22,000—only 300 offenders are added to death row annually. Moreover, about 100 inmates are removed from death row each year through successful challenges to their conviction or to their sentence.

Given the current sentencing practices in the United States, it takes on average seventy-three murders to produce one death sentence. Here in Illinois, with 1378 murders reported to the police in 1994 and only eleven death sentences meted out by the courts, it takes about 125 murders to produce one death sentence. And here in the City of Chicago in 1995, there were 824 murders and only two death sentences. That's a ratio of one death sentence for 412 murders.

The comparison is even more dramatic if we compare murders to actual executions. For example, from the beginning of 1977, six months after the Supreme Court reinstated the death penalty in *Gregg v. Georgia*, until the end of 1995, there were 408,000 murders in this country. During the same time, there were 313 executions, or an average of one execution for every 1300 murders. This ratio of executions to murders will, of course, increase if the number of executions each year—it has been in the range of thirty-one to fifty-six over the past four years—if that number begins to approach the number of death sentences that are upheld by courts, about 200 each year. In a steady state where the nation's death rows are not increasing, that is, if executions each year match new death sentences minus successful appeals and assuming no dramatic changes in sentencing patterns, the ratio of executions to murders in the future might approach one in 100, but no more than this.

This means that the typical murderer in this country faces not

death, but for most, some period of time in state prison. Actually, three percent of those convicted of murder and non-negligent manslaughter in state courts receive a straight probation sentence. And another four percent are sentenced to local jail for up to a year. Thus, ninety percent of convicted murderers receive a sentence to state prison. This is the great reality of how we punish murder in this country. And it is a reality that has been obscured by the enormous attention that the death penalty has received in this nation over the past several decades.

The death penalty has almost entirely dominated the public—and indeed the professional—debate about how to punish murder. This is not surprising. The death penalty after all is our ultimate punishment. It is entirely appropriate that it has received such extensive attention by academics, journalists, jurors, talk show hosts and others. And it is entirely appropriate for The John Marshall Law School to conduct a symposium such as this. Yet I know of no equivalent symposium on the use of prisons as punishment for murder. Perhaps, however, the existence today of the death penalty and its application in a small number of cases has the effect of drawing up prison terms to the maximum of life in prison. Thus, the death penalty's relevance to the vast number of convicted murderers who go to prison may lie in its impact on prison sentences. The data, however, strongly suggest that the existence of the death penalty has had no such effect, or only a minimal effect of this sort.

First, only a small number of convicted murderers—just over two percent—are sentenced to life in prison without parole, which is the harshest prison sentence available. Most murderers sentenced to life in prison receive an indeterminate term that allows for eventual parole board release. In California, for example, the sentence for non-capital murder is twenty-five years to life for first-degree and fifteen years to life for second-degree murder. The fact is that the overwhelming majority of so-called "lifers" will eventually be freed from prison. A 1986 study done by my old agency, the Bureau of Justice Statistics of the U.S. Department of Justice, found that those serving life sentences who were released from prisons in thirty states—three-fourths of whom had been convicted of murder—served an average of eleven years and nine months behind bars and a median, or middle value, of ten years and nine months. So with the exception of true life sentences—that is, life in prison without parole—life really means something much less, something in the range of ten to twelve years on average.

What about the large majority of convicted murderers who receive a sentence to prison short of life? National data show that although judges hand down murder sentences with maximum terms that average twenty-one years, murderers actually serve

only about forty-four percent of their sentences in prison before they are released, either by parole boards or expiration of their sentence. So the average expected time served in prison for those sentenced by state courts to a term of years for murder is only about nine years.

Now, when we actually examine how long those leaving prison for murder and non-negligent manslaughter throughout the United States actually served, looking at people coming out of prison, which the Department of Justice does for about forty states, we find an even smaller time served, an average of seven years and one month. Half actually served five years and ten months or less. That's the median figure. Again, these figures do not include the three percent of convicted murderers who get probation, or the four percent who go to local jails for a year or less.

In my own study of 553 homicide offenders (we excluded vehicular manslaughter from the study—there were about 200 people convicted of vehicular manslaughter released from California prisons in 1993) 553 offenders convicted of various levels of homicide, other than vehicular manslaughter, we found an average time served of four and a half years and a median time served of just over four years. Even these numbers somewhat overstate the true time served for the homicides themselves because seventy percent of our offenders were convicted of collateral offenses, such as use of a firearm or a knife that resulted in additional prison time.

When we examine the time served just for homicide itself in our study, we find an average of three years and eight months and a median of three years and four months. One reason that these figures are even lower than the national average is because ninety-seven percent of the homicide offenders were released from California prisons in 1993—again excluding those convicted of vehicular manslaughter which is a different kind of crime—ninety-seven percent of them have been serving time for manslaughter, voluntary or involuntary, not murder. Indeed, voluntary manslaughter alone accounted for eighty-four percent of the total. And with the statutory presumptive sentence for voluntary manslaughter in California at six years and with good-time and other sentence reduction credits averaging fifty percent until 1994, when the legislature in California reduced this to fifteen percent for many violent crimes, it is not surprising that actual time served is in the range of three to four years. For these many hundreds of killers—and, again, we're talking here about 550 killers released in one year from California prisons—for these many hundreds of killers, we are a long way, indeed, from the death penalty.

Central to our California homicide study is not just the numbers themselves, but the details of the crimes committed by these offenders and a comparison of those details with the punishment

they received. So some students and I have been traveling all over California visiting courthouses and examining case files. With some sampling in Los Angeles and Alameda Counties, the two counties that produce the largest number of those convicted of homicide, we will end up, when we're done, with 360 cases that we will actually look at. And to date we have done 260. So we're more than halfway through the original data. What have we found, then, and what is the relevance of our findings to the death penalty in particular and to punishment for homicide in general?

First, although ninety-five percent of these cases ended up after a guilty plea or trial—eighty percent guilty pleas and twenty percent trial—although ninety-five percent of them ended up in a manslaughter conviction, ninety-seven percent entered the system as murder cases. And nearly all of them that went to preliminary hearing resulted in a finding of probable cause for the crime of murder. There were a few where that was not the case, but almost all of them resulted in a probable cause finding of murder.

Second, when you read the details of the crimes themselves, you find very few that appear to meet the statutory definition of voluntary manslaughter in California, which is an unlawful killing without malice upon a sudden quarrel or heat of passion. In fact, most of these cases look like real murders under the California penal code: an unlawful killing with malice aforethought. I am going to give brief descriptions of two cases. I have a whole stack of these, but I only have time here to very briefly describe two cases.

Both are spousal murders. And both resulted in time served at the higher end of the distribution that we have seen in our studies so far. The first case involved Sue Morgan, a thirty-two-year-old mother of three young children aged two to thirteen who moved out of her home in Alameda County in California outside of Oakland. She moved out of the home with her children after being beaten by her husband of fourteen years, Michael Morgan. She moved into a shelter for battered women and obtained a protective order against her husband.

Two months later, she was scheduled to attend a court hearing on visitation rights with her husband. At Michael's urging, the family went to a public park and had lunch. Michael told Sue that he had some gifts for the children and wanted her to see them first. He then drove off and purchased a shotgun. When he returned, Sue got in the car and left with Michael. Within a few minutes, he shot his wife in the head, killing her instantly. He then shot himself in an apparent suicide attempt, but inflicted non-fatal injuries. Later, Michael pled guilty to voluntary manslaughter, unlawful use of a firearm, and kidnapping. He received a total sentence of fourteen years. He ended up serving seven years and eight months—again, at the high end of the ones that we have been looking at.

In the second case, after several violent arguments witnessed by neighbors, twenty-nine-year-old Audrey Colston of San Bernadino, California, moved out of the house she shared with her husband, Michael. She got a restraining order to keep her husband away and was in the process of getting divorced. Sometime later she moved in with another man. One night she and her new boyfriend ran into her husband in a restaurant and got into a heated argument. A few days later, the day of the crime, Audrey went to the home she had shared with her husband, and there she and her husband began arguing. Michael shot her seven times, including several times in the back.

The prosecutor maintained later that because the weapon only held six bullets, he must have reloaded. Michael cleaned up the scene, got rid of the gun, dumped his wife's body at an empty warehouse, and picked up his sons—six and eight years old—and brought them to his mother's house. Two days later, he told his sons that their mother died in an accident. The next morning he called his wife's boyfriend and admitted to the crime over the phone. He then turned himself in to the police.

At the preliminary hearing, the boyfriend testified that when Michael called him several days after the crime, Michael said to him, "I told the bitch if she ever left me I'd kill her." Also, when the boyfriend told Michael that he must have been crazy to kill his wife because he would get the gas chamber, Michael responded, "This is California. There is no capital punishment. I'll get five years. My boys will be around fourteen. I'm not worried . . . I will get out in five years." This is from the preliminary hearing transcript.

Michael Colston pleaded guilty to voluntary manslaughter and unlawful use of a firearm. He received a sentence of thirteen years, but only served six years and ten months. Technically, Michael had been wrong about capital punishment. There *was* a state death penalty law at the time he murdered his wife. But practically speaking, he was right. No one had been executed in California since before *Furman*.

In any event, Colston was convicted, through his guilty plea, of a crime far down the hierarchy from first degree murder with special circumstances, which is the only type of homicide that qualifies in California for the death penalty. And on actual prison time, Michael Colston proved remarkably prescient. He had apparently believed that the kind of homicide he committed would get about five years in California, and he was not far off. I suspect, although I cannot demonstrate, that many of the homicides in my study would have gotten the offender the death penalty earlier in our history. The murder-manslaughter distinction is, of course, thousands of years old and it is based on the principle that not all unlawful killings merit the punishment of death. You find this

principle as far back as Hammurabi's Code, for example.

Sometimes a killing results from a provocation so great and a heat of passion so intense that we cannot reasonably hold the offender as culpable as one who kills intentionally or in the course of some other unlawful act. Real murders, under the traditional view, merited the punishment of death on the simple principle that those who intentionally take the life of another deserve to forfeit their own. Real manslaughters, on the other hand, were typically thought to merit a less severe punishment. So if a jury, say in eighteenth century England, wanted to spare a killer from the death penalty but not let him free, it could find him guilty of the lesser crime of manslaughter. Today, of course, this is no longer the case.

The California Penal Code, for example, spells out in great detail the specific kinds of first-degree murders that could merit the death penalty. These include murder for financial gain; multiple murders; murder by using an explosive device; murder of an on-duty peace officer or firefighter; retaliation murders against witnesses, prosecutors and judges; torture murders; intentional killing while lying in wait; murder by poison; and murder during the commission of other major felonies such as kidnapping, rape, robbery, arson and burglary. I do not know how many homicides in California would technically qualify for the death penalty under the law, but it seems clear that very few in my study of those released in 1993 would so qualify. Few, if any, of the 260 cases we have examined match in brutality, for example, the kidnapping, sexual assault and strangulation of Polly Klaas by Richard Allen Davis, one of California's most recent additions to death row. On the other hand, nearly all the cases that we have looked at—or perhaps eighty percent of the cases we looked at—seem much worse than the barroom brawl that got out of hand, which is the classic voluntary manslaughter. In fact, we have a couple of barroom brawls in our study—maybe three or four—that ended up as involuntary manslaughter convictions with time in prison of one to two years.

In sum, what has struck me, my researchers, and the students and colleagues who have seen the preliminary results of this research, is how unjustly lenient these punishments for homicide appear. These offenders seem to deserve more punishment than they actually received for what they did. And I suspect that if you put these crime scenarios before the people of California in some kind of poll, together with all the relevant aggravating and mitigating circumstances, which we were very careful to collect in our study, the people of California would agree.

This suggests to me, perhaps the deepest relevance of the death penalty—to get back to the death penalty—to our contemporary punishment practices: namely, its link to a now 2500 year old

philosophic tradition—which is, of course, the formal subject of this afternoon's session—that emphasized the centrality of justice to legal and political institutions. However technically irrelevant the death penalty remains to the vast majority of convicted murderers in the United States and to the thousands of other violent offenders, it more forcefully evokes the standard of justice in criminal punishments than does time in prison for murder or other violent crimes. Now I obviously realize that many thoughtful people disagree about the connection between capital punishment and justice. There has been a vigorous philosophic debate on this issue for at least 200 years now in the Western tradition. But what seems clear to me is that the American people have decided, after years of intense coverage of this issue and exposure to a wide variety of arguments on each side, by nearly a four-one margin—a margin, by the way, which hardly reduces at all when you specifically ask the American people, "what if we knew that about one in 100 of those convicted and sentenced to death were really innocent?"—that the death penalty is the appropriate punishment—the just punishment—for some murderers.

The death penalty debate reminds us that the purpose of punishment is, or ought to be, to do justice. The challenge, it seems to me, for criminal justice experts as well as the nation, is to apply that same concern with justice to a searching analysis of how we punish the ninety-eight percent of murderers who will never spend a day on death row as well as the hundreds of thousands of offenders each year who are convicted of such serious crimes as rape, robbery and assault.

MR. O'NEILL: I want to thank our panelists. For the last hour of the segment this morning, what we propose to do now is to open this up to the audience. We would like to encourage people to ask questions. We have two microphones. The questions have to be asked from a microphone. We have a microphone here in front. We also have a microphone over on the side. The panel would be interested in questions from anyone. Please feel free.

Joe, I will begin with sort of a general question, something that I think you were referring to from a political scientist's perspective. What do you think about the ritual of the death penalty? I had a colleague who pointed out an article that he saw discussing the significance of the last meal and talking about how this would go back thousands of years to the idea of fattening up the sacrifice, the human sacrifice before it's given to the gods. We have all this baggage and ritual that goes along with the death penalty. You were talking in some sense of the ritualistic aspects. Is there anything other than death? First, how important is it, and second, is there anything other than death that could ever fulfill that?

MR. BESSETTE: Well, of course, ritual is not the language I used. What I am interested in, in part, is the way in which the

death penalty focuses our attention on the issue of justice. Think about, for example, punishing the rapist. The average time served by rapists leaving prison is about four to five years. In California it's a little bit less than that. The philosophic argument of what justice requires by way of punishment for rape is much more difficult. It's much more difficult to argue philosophically that rape requires twenty years in prison—or ten years or five years or two years or less—than it is to argue, as people have for thousands of years, that murder requires the death penalty; that the just punishment for murder is death. So that doesn't really answer the question about ritual, but that is really what I'm interested in: the way in which the death penalty links us with this long tradition and keeps us thinking about the issue of justice. The debate itself, with all this disagreement about whether justice requires the death penalty, at least keeps us focused on the issue of justice. And I would like to see us look at other penalties for other crimes and raise that same issue because I think the public does approach punishment from the point of view of justice. And there isn't much professional discussion that I am aware of about what justice requires for rapists, or for robbers, or for those who commit serious assaults.

MR. STEIKER: Just to respond to that comment, I think that it is certainly true that there is a traditional linkage between the crime of murder and death as a punishment. But I don't think that makes it any more philosophically compelling as an argument that the death penalty somehow is what justice requires for the crime of murder. And I think that I am sympathetic to the argument that the best justification for the death penalty is a retributive one—the notion that we punish people because it's what they deserve. But I am not sure that it's necessarily death that they deserve. It's a highly contested issue. And I would also argue that at least in the last 150 years of the American tradition that there's a very compelling moral tradition that says death might be a just punishment in some murder cases, but never necessarily the correct punishment. So it's this sort of moral absolute position which says justice requires death for murder that seems to ignore at least a lot of the American historical experience that suggests less culpability may warrant less severe punishment.

MR. KUNKLE: I think several years ago Joe and I both participated on a panel in various seminars at the University of Michigan sponsored by the Justice Department. The topic or question was assigning the level of punishment for a whole range of different crimes other than capital murder type crimes. And the two things that struck me out of that statistical data that the Justice Department came up with was there's almost a perfect correlation—at least an excellent link— between the public's view of the hierarchy of various violent and non-violent crimes relevant to

each other. Actually, there is a pretty strong correlation between the public view of how many years it should be versus what actual sentences were—which again I agree with Joe—is vastly different than how much time is actually served on those sentences. So there's a pretty good public correlation between the sentence issue, but not good at all with what is actually served. And my point is with the reference to the death penalty—and again I don't have the numbers to back it up . . .I don't know if Joe has done that research either—but I think if you went to that eighty percent that supports the death penalty on the various opinion polls, I think you're going to find a very, very high percentage of them, based on what I saw at Michigan, the audience at Michigan, that says, if anything, we're not applying it to enough murders. There isn't an over-inclusion. There's very much an under-inclusion, not as a result of the criminal process, but as a result of limited statutes. I'm not suggesting we should do anything about that. What I am suggesting, though, is that you go to the actual public debates. I don't think there is much hand-wringing over too many people getting the death penalty.

MR. BRIGHT: Well, I don't know about that. I want to say this first about the polls that we heard a lot about. Unfortunately, so much of the crime debate in this country has been irresponsible and demagogic. It is only about who can be the "toughest" on crime. It used to be that a politician could not be soft on Communism. Now one cannot be soft on crime. Of course, we are all against crime. I do not know anyone who is *for* violent crime. But anything that an irresponsible opponent can argue shows "softness" can be turned in to a sound bite that may end a political career. Just being for fairness may result in accusations of being "soft on crime." There have been campaigns in which the candidates competed to prove just how against crime they were. In a race for governor of Texas, the attorney general claimed he was responsible for executing a number of people; his opponent, a former governor, disputed that claim and asserted he was responsible for executing them. *Saturday Night Live* suggested they cut out the middle man and make the executioner the governor of Texas. In that sort of debate, there is not a very thoughtful discussion how best to protect citizens from crime and how different types of punishments contribute to a rational and effective approach to crime. If you look closely at the polls, they show that if you give people alternatives—particularly if you talk about life in prison without parole—support for the death penalty drops significantly. The support is a mile wide, but only an inch or two deep. It is very much the result of this very one-sided and irresponsible discussion of crime.

Surely the argument is not being made here that the United States ought to imprison even more people for longer periods of

time. The United States today incarcerates a greater percentage of its population than any other country in the world. The United States is now ahead of Russia in terms of our rate of incarceration. The United States is one of only five countries in the world that has executed children in the last ten years. The others are Iran, Pakistan, Saudi Arabia and Yemen. Normally the United States does not identify itself with these countries.

I did not quite understand Bill's reference to Walter Berns, my good friend here. We do not have any trouble distinguishing between Abraham Lincoln and John Wilkes Booth. We have monuments to Abraham Lincoln all over this land. He was one of the greatest people in the history of the country. And John Wilkes Booth is regarded as a murderer. We do not have any trouble differentiating between Martin Luther King, Jr. and James Earl Ray. James Earl Ray was not given the death penalty, but society has certainly shown its moral condemnation for what he did by the fact that he has been in prison since he was convicted of killing Dr. King.

Whether we have a death penalty also involves questions of necessity and what kind of society we want to have. Today, we do not cut off people's fingers for crimes. We no longer boil people in oil or put them in the stocks on the courthouse lawn. Some states are bringing back the chain gang, but most people believe we are past such primitive forms of punishment. In a frontier society, it was a different situation. If someone was convicted of a crime out West in the frontier days, there may have been no prison to put him in. Hanging may have been the only way to punish an offender for a serious crime. But today, we can punish without violence or degradation. The South African Constitutional Court discussed the question of what kind of society a country desires when it decided last year whether the death penalty was allowed by that country's new constitution. South Africa has a history much like the United States in some respects; both have a long history of racial oppression, of apartheid, of racial violence and of using their criminal justice system to keep people of color "in their place." The South African court unanimously concluded that because that country is moving to a new day—one of understanding in place of vengeance, and of reconciliation in place of hate—the death penalty is no longer an appropriate penalty. Yet the United States still clings to the death penalty, a vestige of past racial oppression. The death penalty puts the United States in another time and another era—on the wrong side of history—and not where it should to be in today's world.

MR. O'NEILL: Once again I want to invite any of our audience. If you would like to ask a question, please approach the microphone. I will get one more in as long as I'm right here. Steve, I want to pick up with your comments that you've written so much

about, the elected judiciary and the problems with an elected judiciary. There was a news item last week in San Diego--maybe you saw it--it was a trial judge who overturned a jury verdict. The judge in the case was Judge Thompson, who is being heavily criticized. You mentioned a justice on a state supreme court was recently turned out because of her supposed stance on the death penalty. And I might ask a political scientist. I'll ask Professor Bessette. Are there any problems? What do you see as the problem just with the idea of an elected judiciary handling these death issues? Is it a problem?

MR. BESSETTE: Well, the most famous example was Rose Bird, of course, in California being removed from office as Chief Justice in the California Supreme Court. That happened before I arrived in California, so I didn't follow it very carefully. But there was an argument made—and I am not in a position to say it was 100 percent sound or not—that she and the California Supreme Court had refused to carry out the public policy of the people of California to have a viable death penalty. In case after case after case, some long list of numbers of cases, fifty or sixty, seventy cases, she had refused, she and the majority, to carry out the death penalty. Now, if that was true—and I am not in a position to say definitively—again, I didn't follow it that closely, I wasn't in California at the time, I was in Virginia—but if that's true, then you have to ask what recourse do the citizens have if the judiciary refuses to carry out public policy. Bill Kunkle mentioned prosecutors refusing to carry out death sentence statutes in their states. There was a reference earlier that prosecutors in the south, in some counties refused to bring death penalty cases forward. So while there might be a danger, at the same time this is a democracy, after all. And the American people, eighty percent, are in favor of the death penalty. And thirty-eight states have acted through their legislature to enact death penalty laws. So it can cut both ways. And so where there are dangers, there are also opportunities for the citizenry to make their will known.

MS. STEIKER: It seems to me that the problem with elected judges being responsible in death cases is, of course, that when judges are elected they are faced with an irreducible conflict. They are meant to be properly responsive to what the community wants. But they also have another obligation, too. They are meant to be responsive to the constitutions both of the United States and of the state in which they are a judge. And, frankly, our constitutional system envisions that the Constitution of the United States and the constitutions of individual states are going to conflict sometimes with legislative will. They are meant to do so. By establishing constitutional rights, the Bill of Rights meant to put beyond the reach of popular majorities those rights we really want to protect. If judges were not responsible to a higher constitution, there

would have been no recourse in the case of racial segregation in the south. And so that conflict is brought very much to the court when judges feel that there is very strong popular will, especially in highly publicized cases, to execute. But the constitution might demand that evidence be excluded or that certain procedural rights be accorded to the defendant that will make execution either not possible, not proper, or much more difficult to obtain. It seems to me that putting judges in a position where their job security and their fidelity to the constitution are in conflict is just a recipe for disaster. I know that Steve has many stories—he was telling me some last night over dinner—in which such real-life conflicts have arisen. Maybe he will share one or two.

MR. BRIGHT: Well, I just think the point, particularly for those students that are here from high school, is the notion that judges are different, as Carol was talking about, from other officials that are elected. We expect our legislators to reflect the populace. We expect an executive to do that. But judges are supposed to uphold the law regardless of whether it's popular or not. One of the things that is so unfortunate in the crime debate is the suggestion that the provisions of the Bill of Rights are nothing more than a collection of technicalities, that judges are letting people off on technicalities. If someone wants to put out a newspaper that may be very unpopular, and the powers that be, whether the mayor, the governor or whatever, wants to stop the publication, a judge has a responsibility not to see whether it's popular or not, but to say: the First Amendment of the United States Constitution guarantees free speech. One has a right to publish a newspaper whether the contents are popular or not.

The New York Times has a right to publish the Pentagon Papers whether the Pentagon wants them published or not. Justice Jackson has said it as well as it has been said: the whole notion of a Bill of Rights is that we take certain principles and put them up on a shelf away from popular opinion. Freedom of speech, freedom of religion, freedom of assembly, the right to a fair trial, all of those things are not subject to popular opinion, to the passions of the moment. We expect judges to enforce those things. And the only thing that separates a trial from a lynching is that there is some process, that the result will be reached in a fair and orderly and systematic way, rather than just let it be by the passions of the moment. Unfortunately, there are many cases caught up in the passions of the moment.

I file many habeas corpus cases in one rural circuit in Georgia. The only two judges there have been in office now about fifteen years. They have never once granted relief. And that's only half the story. They're never going to. They're elected by a small community where the dominant industry is the prison. The employees of the prison do not elect those two Superior Court judges

to uphold the Bill of Rights in death penalty cases. If either of those judges granted relief in any case, he would be out on the street in the next election. And they're well aware of that. Two-thirds of the cases reviewed from those judges have ultimately been reversed by life-tenure federal judges. It's not because those judges are so dull that they can't figure out the law. They're not the brightest judges in the world, but they're not wrong two-thirds of the time. It's because there are political realities. And the price that is paid for this is enormous.

When I went to law school, we used to study decisions of the California Supreme Court. It was one of the greatest supreme courts in this country. Justice Traynor and many other distinguished people served on it. Today the California Supreme Court is a very undistinguished death mill. It's only real contribution to jurisprudence today is its many refinements of the harmless error doctrine. The California Supreme Court affirmed one hundred consecutive death penalty cases. The perception that you have is, of course, that it's giving the voters what they wanted, lots of death. They're grinding out death cases. The quality of justice has suffered, not only in capital cases, but in all kind of cases that have been considered by the court. One of the indictments in the Declaration of Independence of King George III was that he made judges dependent for their tenure in office on his will alone. If you didn't make the king happy, you couldn't be a judge. And the same thing is increasingly true in our country today. If you do not impose the death penalty and if you uphold the Bill of Rights, then you cannot be a judge. And that is very, very troublesome if you have a commitment to the rule of law, the notion that principles of law are going to be enforced in this society regardless of whether they are popular or unpopular because that is what we count on to protect us from the passions of the moment.

MR. KENDALL: I think one of the important charades, or at least dangers, is that whenever you heard about habeas reform, Congress cutting back, this affected death row appeals. This was to make sure that Ted Bundy could not jerk the State of Florida around for the five or six years before his execution. The tragedy is that the habeas corpus right is the right of every American. It's a piece of Waterford Crystal in our system. And that means if you found yourself tried in front of a state court and for whatever reason felt that you could not enforce the Bill of Rights, you could march over to federal court. And you could have your day in court before a judge who didn't have to look at the election returns in deciding whether or not to enforce the Bill of Rights. And tragically that writ drops dramatically when you do that. And then all of our rights eventually will be less available or far easier to offend.

MR. KUNKLE: I agree with Steve. I have been on more

committees than I like to think about that work in various ways trying to get various selection of judges in Illinois. I don't see it happening any time soon unfortunately. But I think it is important for judges. And I agree with Steve on that point. I think it's even more important for prosecutors. We have been very fortunate in Cook County to have some very talented, some very big-hearted, and some very well-meaning, intelligent prosecutors over the years from both parties. But it might not go on forever. Quite frankly, I would like to see short-term appointed prosecutors in Chicago, Cook County and the rest of Illinois who don't bear that same shackle of being responsive to election every four years. Instead, they can truly do this, what they think is right, totally unfettered.

MR. BESSETTE: I want to just say one more word about the passions of the mob and public policy on criminal punishment. Here's an example. This is something I learned in California, to my surprise. From 1976 until 1994 in California, the statutory punishment, the presumptive punishment, for rape was six years in prison. Good time averaged fifty percent. So subtract fifty percent: three years in prison. For eighteen years, that was the punishment for rape. That was the official public policy in California: a determinate sentencing state with no parole release. So, three years in prison after half off for good behavior for the crime of rape. And very strict limits, complex and strict limits, with multiple rapes, how you would add up to get consecutive sentencing.

Now, the people of California, I am convinced, had no idea that was the statutory punishment for rape. If they knew it was the statutory punishment for rape, they would have wanted it to be otherwise, to be much higher. I don't have survey data. I can't prove that. But certainly given the reaction of the people of California to a whole series of repeat rapists who were released in 1994 and 1995, I think it's very likely that had the people known that was the statutory punishment for rape, they would have been upset about it. Now, there's some evidence that, in fact, that punishment was way out of kilter with public opinion. In 1994, Pete Wilson, facing—I should say I'm no great fan of Pete Wilson—but facing the re-election process, he decided to make an issue out of that. And he proposed first life imprisonment for rape, and then agreed with the legislature on a bill that allows twenty-five years to life for the most aggravated rapes, fifteen years to life for some slightly less aggravated rapes, and then the basic six years presumptive sentence for other rapes.

So now we have a different rape law in California, since 1994. Now a rapist *can* get twenty-five years to life on a first rape, or fifteen years to life. Whereas before, the most you could have gotten was three, six, or eight years in California with the presumptive sentence, the middle one; aggravated sentences could kick it up, and mitigating circumstances could drop it down. The legislature

has also now reduced good time, as mentioned in my talk, from fifty percent for the most serious violent crimes down to fifteen percent. Those two changes mean that rapists in California will now receive more severe punishment than they did for eighteen years. I think that's a good thing. I think the people of California think that's a good thing. It was Pete Wilson's political ambition that helped to make that good thing come about. It is not always the case that politicians' ambitions correspond with good public policy. But sometimes it happens. And I think in this case it did happen.

MR. KENDALL: I think one thing that's left out of that is that many states saw people who were committing violent offenses who were being paroled far earlier than I think many people thought they should be paroled. Because at the same time Pete Wilson and people like him were urging tougher sentences for rape, they were supporting a mandatory minimum for non-violent offenses—mainly drug offenses. The war on crime dumped thousands and thousands of people in prison, non-violent people on mandatory sentences. It could be ten years before they could be paroled. That is a prison cell. That is a bed. For every year that a person—non-violent person—occupies a cell, it means that a violent person can't occupy that cell. Mario Cuomo, who will go down in history, has built more prison cells in New York than every other governor in New York put together. We have got an enormous number of minority persons in prison in New York who never committed a violent offense. If we got rid of some of those folks, then we can keep rapists and other people who commit aggravated assaults for longer.

MR. O'NEILL: Question.

AUDIENCE MEMBER: Yes, please. I wonder if the panel, starting with maybe Mr. Bright, would respond to the outcome, which seems to be basically not much, of Raymond Herrera, that clemency, executive clemency, which of course is political, is the correct historical and judicial response to actual innocence when procedures of the court make this impossible, something which at least as far as I know Texas has dodged. The latest case I know is the Gary Graham case. The last time I updated that, a very low level court in Texas had decided that he had a due process right to some type of clemency proceeding and ordered to hold a hearing. And then, instead, the Texas courts created a new method of habeas in Texas state courts that had set the standard for actual innocence so high that the dissent pointed out if you passed that standard it meant that you could have passed a lack of sufficient evidence challenge to the original trial and wouldn't have needed this. Is there any real hope that anything will be done with that?

MR. BRIGHT: No. What happened with regard to Mr. Herrera is typical. First the courts say—and the Supreme Court

knows better—that they are not going to deal with innocence because that is a matter for executive clemency. Herrera was to be executed in Texas, where clemency has never been granted in the modern history of the death penalty. The procedure there is so unwieldy that the Board of Pardons is not even in a position to investigate and resolve questions of innocence. The courts pass the buck to the executive and then the executive branch denies clemency saying it has done so because the courts upheld the sentence. The courts say it's for the executives. The executives say it's for the courts.

This same kind of avoiding responsibility is seen in other situations as well. One example is the case of Ricky Rector, who then-Governor Clinton executed right before the New Hampshire presidential primary in 1992. After committing several crimes, Rector shot himself in the head, blowing the front of his brain out. The Arkansas Supreme Court on direct appeal said that Rector's brain damage presented no legal issue, but was a matter for executive clemency. However, when the time came for the governor to decide on clemency, Clinton, who needed to divert attention from the Gennifer Flowers controversy and prove he was tough on crime, justified his decision to deny clemency on the fact that the courts had upheld Rector's sentence.

Governor Hunt of Alabama once refused to grant clemency in a case, saying that he was not going to disturb what the jury did. But the jury had sentenced that defendant to life imprisonment without possibility of parole. The judge had overridden the jury's sentence and imposed death, as allowed by Alabama law. But Governor Hunt, as was often the case during his tenure as governor, was not really clued in.

Clemency is not realistic in any of these instances because of the politics. These are very hot potatoes to handle. So people are trying to avoid responsibility. And that is why the independence and integrity of the courts are very important, because somebody has to make the hard decisions in these cases.

MR. KENDALL: Let me suggest one case. There's a man set for execution in Virginia the first week of November. His name is Payne. The premise of the case is it comes down to one witness. And if he was to say to any of us in this room who knew his history, "today was Thursday," we would check our calendar before we believed him. He just lost relief in the Fourth Circuit Court of Appeals and also the Supreme Court. He has got a very, very powerful innocence claim, which--I suspect Steve is absolutely right--the court is not going bother. It comes down to if George Allen, the Governor, is going to stop that case. I think if it weren't death, if it was some other form of procedure that rests solely on the credibility of this one person, whose credibility has been totally destroyed, there is no question. If I were a betting person, I would bet heav-

ily that Virginia is going to execute Mr. Payne in November.

AUDIENCE MEMBER: First of all, I was grateful for the proposition that we didn't all have to be lawyers to be here. Thank you. I'm in a position and I'm sort of shocked by the multiple examples of what appears to be incompetence on the part of attorneys, judges, et cetera. Having lived in Illinois for many years, and as you know, in the last six to eight months we have had six people that were found to be completely innocent of the crime who spent a significant number of years on death row. Four of them come from my suburb or my suburban area. What I would like to ask the panel to comment on is, would some notion of malpractice be applicable in these cases or other cases, and can civil suits correct some of these disparities that apparently cannot seem to be corrected internally?

MR. BRIGHT: Well, frankly, the legal profession looks out for its own. The courts allow a standard of practice for lawyers in criminal cases that they would never tolerate for doctors or any other professional who engages in malpractice. The criminal justice system is in terrible shape with regard to the defense of poor people. Any lawyer can be appointed to defend people accused of crime and very little is paid for the lawyer's services. The representation is usually provided by one of two groups of people—young inexperienced lawyers just learning to practice, many of whom do not care for criminal practice, or the old, broken-down, alcoholic lawyers who cannot do anything else. I once observed one of this latter group of lawyers reach into his coat pocket while standing before a judge in court, and the judge quipped, "Counsel, I see you're going back to your office." That was his office right there, his pocket. He did not have a law office, investigators or secretary or any of the kind of things one needs in order to practice law. Yet those are the lawyers that are often appointed to represent people in criminal cases.

I am not quite as calm as Bill was earlier about the notion that it is acceptable to kill innocent people. I hear that more and more now. It is a very disturbing aspect of the death penalty debate. A lot of people now argue that there is a war on crime and, as in any war, some innocent people will be killed. The criminal justice system is not infallible by any stretch of the imagination. The case of Joseph Payne in Virginia is a good example. The key prosecution witness against Payne is probably the person who committed the crime. He probably pointed at Payne to avoid being charged with the crime. We will never know with any great degree of certainty, but the evidence points in that direction.

We do know that fifty-nine people have been released from death rows in the last twenty years when it became clear that they were innocent. Many of those people were released, not because of anything that was developed in court, but because of media or

other public attention. Randall Dale Adams was released from Texas' death row after his innocence was established by the filmmakers who made the movie, *The Thin Blue Line*. Walter McMillian was released from death row in Alabama and Clarence Brantley was released from death row in Texas only after the CBS news program, *Sixty Minutes*, ran segments about their innocence. The innocence of a number of people sentenced to death has been established by DNA evidence.

This disturbing number of cases in which people were convicted and sentenced to death for crimes they did not commit is partly a result of the poor quality of legal representation provided the poor. But the bar associations are not particularly interested in doing anything about the poor quality of indigent defense because if they did, the whole system would crumble. When the system is paying lawyers only $20, $30 an hour to represent poor people—less than the overhead it takes to keep an law office open—it is going to get a very substandard level of representation. You get what you pay for. Unfortunately nobody—particularly the bar associations—wants to admit that the emperor wears no clothes.

AUDIENCE MEMBER: Doctors do care for poor people as well. And doctors can be sued by the poor people certainly through the offices of lawyers. I mean, I am just astonished. First of all, Mr. Kunkle said that if you have the death penalty, you're going to have to kill innocent people. I mean, I can't imagine introducing anything to the FDA and saying, oh, by the way in order to establish this particular procedure, we're going to have to kill healthy people. It just doesn't work.

MR. KUNKLE: We have got it. It's called the EPA. The FDA knows that a certain number of children inoculated with whatever it is for the mumps are going to die.

AUDIENCE MEMBER: Oh, yes. But then what happens is they have insurance. Part of the cost of that is covered by insurance. So what they're doing is saying there may not be any malpractice here, but we are holding the profession, including the pharmacy, culpable. And it seems that you don't even have that notion.

MR. KUNKLE: In all the cases that you referred to, to answer your specific question, there are civil suits pending.

AUDIENCE MEMBER: In medicine, correct.

MR. KUNKLE: No. No. I'm talking about the criminal cases that you're talking about.

MR. BRIGHT: The main reason that the wrongfully convicted almost never recover anything is prosecutorial immunity. Ruben "Hurricane" Carter spent twenty years in prison for a crime he did not commit and then was released. He was not compensated at all by the State of New Jersey. After Walter McMillian was released

after six years on death row, Alabama officials did not even say they were sorry. Alabama did not give him one penny for the six years it denied his freedom and held him on death row. He has sued the state, so we will see what happens. Both of those cases involved prosecutorial misconduct. Kirk Bloodsworth was given some money by the Maryland legislature for the six years he was wrongfully imprisoned for a crime he did not commit. He was released after DNA evidence exonerated him. But it took an act of the legislature to compensate him for the six years of his life that he lost. He had no chance of recovering in court any money from either the prosecutor who prosecuted him, the state, or the lawyer who defended him.

MR. STEIKER: I think part of the problem is not merely collecting money from a prosecutor who might engage in misconduct, but from incompetent lawyers whose clients end up on death row and get executed. There are really two issues. One issue is from a theoretical perspective, it is virtually impossible to prove that there necessarily would have been another outcome, that you would have gotten life instead of death with a competent lawyer. And the second and more practical and more pressing concern is, no lawyer is going to represent an indigent death row inmate to recover damages or for his estate to recover damages. There's nothing to be gained. And there's such a high level of proof.

AUDIENCE MEMBER: Could I just suggest a one million, three million dollar malpractice insurance? That will make sure that everybody has insurance.

MR. STEIKER: It's not that lawyers don't have malpractice insurance.

AUDIENCE MEMBER: One million to three million is the going rate.

MR. STEIKER: It doesn't even matter, however, because there is virtually no chance of prevailing in a case to show that your lawyer's incompetence caused you to get a death sentence because what you have to argue is that the court would have accepted the argument from a better lawyer and would have been able to necessarily come up with a different outcome. And I guess part of the problem gets to the frequent argument that you see in Supreme Court cases that representation is an art and not a science, that we have much less understanding of what causes cases to be resolved in one way rather than another.

MR. KENDALL: I think what we need is leadership on this issue. It didn't happen because the Supreme Court of the United States got tired of looking at cases of people who might be innocent getting convicted. I dare say today, that if that issue went before the Supreme Court, I am not at all confident that it would have come out the way it did thirty years ago. Janet Reno this year was nowhere to be seen when the attacks were made. And there's no

question it was absolutely needed. But no one was there, no leadership, nor from the Bar. Some lawyers now make millions of dollars each year in private practice and will not lift a finger to represent the indigent. That is wrong. The private bar ought to be doing more to help out. Ultimately it's our elected leaders, prosecutors, judges and legislators. If we want to have the death penalty, we have got to be willing to pay for it. And thus far they're totally unwilling to do so.

AUDIENCE MEMBER: I want to continue this same public policy thing, but on a different point. There was mentioned a figure of eighty percent of the population supports the death penalty. David Baldus, who you all know as the lawyer and social scientist who presented the evidence on racial discrimination to the Supreme Court, had a recent study in which he concludes that support for the death penalty is very, very thin in this country. In other words, that maybe most people or eighty percent would support the death penalty for, say, Ted Bundy. I'm not going to use Gacy. As far as I am concerned, Gacy was a classic schizophrenic who was totally insane. Anyway, supporting the death penalty for Ted Bundy, but would not support the death penalty for all the hundreds of people who were found eligible for death under these statutes where almost anything is an aggravating factor. His conclusion is that if people were aware of that, the support for the death penalty would drop dramatically. And I think if we can go off the record . . . at least he thinks it's under fifty percent. I'm not sure if his study comes to that conclusion. So many of you have mentioned how the death eligibility these days merely requires a homicide and practically nothing else and how the Supreme Court is politically sensitive to this and how our public policy makers are supposed to be sensitive. It seems we ought to make more of that argument.

MR. STEIKER: I have one comment which goes to public support for the death penalty that sort of reinforces something that Steve stated earlier, which is that support for the death penalty drops dramatically when there's an alternative like life without the possibility of parole. The situation in Texas, where I am from, is tragic, because in Texas the person who is convicted of capital murder who is not sentenced to death is sentenced to life in prison without the possibility of parole for forty years. The jury is not allowed to know that. And if the defense lawyer tries in any way or fashion to instruct the jury that a non-death sentence would require forty years without the possibility of parole, the defense lawyer would be disbarred. So we have a system in which we're keeping from the jury information which would allow them to choose a very serious alternative punishment to the death penalty. And year after year when there is a suggestion that the alternative should be life without the possibility of parole. Period. It's the

prosecutors and the police who object to that on the grounds that if you have a serious alternative punishment, the death penalty will not be available in a practical way for the public.

MR. KUNKLE: What the audience ought to be aware of, in particular the students, is that many of the things you heard about statutes in other states, about practices in other states, for example, it's only an example, and those things aren't necessarily true in Illinois. And that's one right there. Exactly the reverse is true. By Illinois law, the jury must be told about the reduced charge. There are other examples that have been cited. The application of *Enmund v. Florida* where, according to the U.S. Supreme Court, if you can prove any one of the three factors involving presence—a look out or a mere participant, if you want to call them that—in an armed robbery or a felony murder situation, either that they actually committed an act that contributed to death, or knew ahead of time that there was going to be the likelihood of a murder ensuing as the result of the armed robbery, or other crime in their presence. In Illinois you have to prove all of those. One alone is not sufficient. Different states have different minimum age levels for what is a juvenile and what isn't. So, you know, many of the these statements are absolutely valid for the states in which they're measured. But they're not absolutely valid in other places.

AUDIENCE MEMBER: Excuse me, Mr. Kunkle. While you're speaking to that, would you please then, since you keep pointing out how much better the law is in Illinois, explain why there has been a rash of, I think, five or seven people released after the court system and prosecutor's office said for years and years and years there was overwhelming evidence of guilt?

MR. KUNKLE: Including the Illinois Supreme Court. They said that there was overwhelming evidence of guilt. I'm not going to get into the details because I'm involved in three of them. But I will say this. To make that debate intelligible, one has to deal with legal proof, not total innocence. And that can go both directions. You can be absolutely factually innocent and still be proven guilty beyond a reasonable doubt. And by the same token, you can be acquitted and still be factually guilty of a crime. It can go both ways. And that fact has to be recognized to make that debate mean anything.

MR. BESSETTE: Let me just say something on public opinion quickly from a previous question. I have the poll results in front of me from 1994 from Gallup. Here is the question: "In your view, what should be the penalty for murder: the death penalty or life imprisonment with absolutely no possibility of parole?" That's the question. Here are the results: fifty percent, death; thirty-two percent, life without parole; eleven percent, depends; three percent, neither or something else; and four percent said they don't know or refused to answer.

So it's true: that's down from seventy-seven to eighty percent when you just ask straight out, "do you support the death penalty for murder?" But still fifty percent, even given that option, would still say they would choose the death penalty. And notice that the question—one has to be very careful in reading the questions that are asked. This question says with *absolutely* no possibility of parole. What if you took out the adverb "absolutely?" I suspect, and people who do polls know this very well: a slight change in the wording can dramatically affect the results. I suspect that the number fifty percent would go up somewhat if you took out the adverb "absolutely." But imagine if you were to ask the people of California, if you were ask the same question and then say not for murder in general, but for multiple murders, for murder by explosive device, for murder for financial gain, for murder of an on-duty peace officer, for retaliation murders against witnesses, prosecutors and judges. Go through the specific murders in California that can get you the death sentence, and then ask the people, do you support death or life without parole? Again, I suspect that the fifty percent would go up even higher. So rather than the argument, the view, that these data *overstate* public support, I would say these data might well *understate* public support by always asking generically about murder, but not specific kinds of murder, or specific murderers.

MR. BRIGHT: But they are also wrong because they ask the question in the abstract—whether you are for or against the death penalty. It is one thing to say philosophically that one supports the death penalty. Often that support is based upon assumptions that the system works much better than it actually does. When it comes to putting a particular human being to death based on a flawed process, it is a much more difficult question. People may support the execution of a Ted Bundy or a John Wayne Gacy, but, fortunately, those types of individuals are very rare. The most common candidate for execution is a poor person of limited intelligence who comes from a dysfunctional family and who may have some serious mental health problems. For example, Horace Dunkins was executed in Alabama several years ago. Many people's support for his execution vanished when they learned that he was mentally retarded. One juror in his case even wrote to the governor saying the jury would have never voted for the death penalty if it had known that Dunkins was retarded. The jury heard nothing about his mental limitations because his court-appointed lawyer never bothered to get school records that showed Dunkins had been in special education classes and had an IQ in the fifties. So the jury did not have the information it needed to make a sentencing decision. When the full picture emerged, everyone, including some of the jurors, were disturbed about executing such a seriously impaired person.

Georgia, Alabama, Texas and Virginia have killed a good number of people and executions have become common in those states. Yet each time a new execution is scheduled, there are qualms about carrying it out. For example, in the *Felker* case, which is included in the title of this symposium, the Georgia Supreme Court recently stayed the execution yet again because it was discovered that the prosecution had four boxes of information it had not disclosed to Wayne Felker's lawyers, some of it suggesting that there were suspects and that Felker may not have been the person who committed the crime. Georgia gets to the brink of execution and is still trying to determine whether it is executing the right person. Alabama has executed fourteen people since the Supreme Court upheld the resumption of capital punishment in 1976. Eleven of the fourteen have been African-American. Some people are concerned that so many of the people being executed in Alabama are African-American. In all of these states, people familiar with the process know that something was terribly amiss with regard to the quality of legal representation provided poor people sentenced to death.

The ABC network recently aired a program about Antonio James, a mentally impaired man who was executed in Louisiana. The warden of the prison—the person in charge of killing him—says he does not understand why they are killing this man. Don Cabana, the former warden at the Mississippi State Penitentiary, who presided over two of the four executions that have been carried out in that state in the last twenty years, has expressed grave reservations about the death penalty as a result of his experiences. So it is one thing to ask people in the abstract whether they are in favor of the death penalty and it is quite another thing to ask them to put someone in an electric chair and put 2000 volts of electricity through his body and eliminate him from the human community. The number of people favoring the death penalty would drop much, much lower if people knew something about the people being executed and how poorly the criminal justice system actually works.

AUDIENCE MEMBER: I would like to address the question of what is going on here in Illinois because I think we're getting a bit of a false picture and since there are a lot of students here. Most of the people are from Illinois. I think that needs to be addressed. In fact, the death penalty in many states, when it was first passed in legislation, did have fairly narrow—I think only six aggravating factors—that made people eligible for the death penalty. But as the years have gone by, the legislature pounds in new aggravating factors. And it becomes broader and broader to the point where today, I believe, one of the aggravating factors is if the murder was cold, calculating and premeditated, which would include virtually ninety to ninety-five percent of every murder that

occurs in Illinois. So again we're right into the same system that we have throughout the country here. So when Mr. Kunkle says we're narrowing it down in Illinois, that absolutely is not true. In fact, we're broadening it all the time.

MR. KUNKLE: Do you want to explain why we only had two death sentences last year when we had over 800 murders?

AUDIENCE MEMBER: Well, I guess that's because you're out of the prosecutor's office. Perhaps, Mr. Bessette, the problem with saying that the populace is so in favor of the death penalty is the fact that this is the same populace that also said these people are not deserving of death. I think that sort of undercuts this idea that eighty percent of the populace wants these people sentenced to death.

MR. BESSETTE: Well, 300 times a year those people are deciding that some people are deserving of death.

AUDIENCE MEMBER: Okay. The other thing I would like to address is the number of people on death row here in the State of Illinois. I believe we have the sixth largest death row in the country. We have been the fifth largest for a number of years. But Pennsylvania has jumped ahead of us. We have 165 people on death row in this state.

The other point that I would like to make in that respect is that we have, I believe, the highest percentage of African-Americans and other minorities on death row in the country. We're hearing talk from Steve and from George about the practices in the south. We all tend to think this is a southern question. But I know Illinois has, as I said, the highest percentage of minorities in the country on death row. And looking at that, I was wondering why that was happening. Of course, we have the same practices going on over and over in this country and throughout the counties of Illinois, where we have all white juries sentencing people to death. It is true, for example, some things have been fixed up occasionally, but not very well. It is true that now, since 1988, juries have been instructed that the alternative to the death penalty is natural life. However, prior to that time, they were not instructed that way.

The man that was executed four weeks ago, Mr. Stewart, there the judge refused to instruct the jury that the other alternative to the death penalty was natural life. And then the prosecutor was permitted to argue to that jury, well, if you don't sentence this man to death, he is liable to be out on the streets again killing people. So that man was executed. In 1994, the United States Supreme Court said that is an unconstitutional procedure. But because of what we've done to our habeas corpus law to ensure that people are executed regardless of whether or not certain procedures have been followed, Mr. Stewart did not avail himself of that 1994 ruling.

I apologize for talking so long, but I do think these things need to be answered because we're talking Illinois here. The quality of representation in trials is atrocious. And the idea that we can pretend that the Illinois Supreme Court is routinely reversing these cases based upon the ineffectiveness of counsel is simply not true. On a personal note, two years ago one of these cases where counsel had done absolutely nothing to prepare for the mitigation phase of the sentencing hearing, which means if he doesn't present any evidence, his client, once he has been found eligible for the death penalty is going to be sentenced to death. The Circuit Court of Appeals held that the attorney acted atrociously in that case in not making any preparation at all. And then, in fact, the little bit of attempt he made at calling a witness, they said, was probably more harmful than helpful. In that case in the district court, Mr. Kunkle testified as an expert in the defense of criminal cases. He testified that, in fact, that man's performance had easily met the standards of competence in this state even through that man had made no preparation for his defense. I guess if I have to close with a question . . . I know that Mr. Kunkle, as a defense attorney, walked Mr. Walker into the death chamber and was happy that he was able, as a defense attorney, to perform that function and uphold his right to be executed, and as a defense attorney came and testified as an expert that a man who did absolutely no preparation had performed properly. My question is, have you decided that you can probably be more successful having people executed as a defense attorney than a prosecutor?

MR. KUNKLE: No. But I would say this. The tenured-for-life judge in the appellate court and the federal court that heard that case upheld the conviction. So you might want to consider that in making that kind of attack. And I will also point out that I have handled capital cases in addition to those two. And I don't know what your gripe is. But you're welcome to it. By the way, here is a list of the 174 inmates on death row with the facts of their cases, their age and their race. And I would like to have you check it over to see if you think you're right about that statement as well.

MR. BESSETTE: Let me just add one number to the discussion. There isn't obviously time for a lengthy discussion. But let's not lose sight of the fact that most of the people on death row are white, not black, in this country. Maybe everyone knew that beforehand. But at the end of 1994, the federal government reports 1645 whites on death row and 1197 blacks. That's a fact we shouldn't lose sight of.

MR. BRIGHT: Wait a minute. African-American people are twelve percent of the population in the United States, but almost half of those on death row are African-American. That's way, way out of proportion.

MR. KUNKLE: African-Americans commit ninety percent of

murders in Cook County.

MR. BRIGHT: I am talking about the entire country. If you look at the country, which you ought to do, Mr. Kunkle, you would find—and this is a remarkable statistic—that black people are only twelve percent of the population of this country, but almost fifty percent of the victims of murder are African-Americans. And yet if you look at death row, not only in Illinois, but all around the country, you will find that eighty-five percent of the people who are under death sentence or have been executed are there for the murders of white people. That is where you see the strongest racial disparity in death sentencing.

One reason that some cases are prosecuted as capital cases when many similar cases are not, is that the decision to seek death is usually made by one white man, the District Attorney. He is much more likely to seek death for the murder of someone from his community, someone who is a member of his country club, someone whose son or daughter goes to the same private school that his children attend. Those cases are likely to be a death penalty cases. But if the same crime is committed against someone from the African-American community, the Korean community or some other community, it is much less likely that the case will be prosecuted as a capital case.

If a case involves an African-American charged with a crime against a white person, it is even more likely to be prosecuted as a capital case. With regard to most crimes in this country, the perpetrator and the victim are of the same race. It is either black on black or white on white. This is because we still live in a very segregated society. In Georgia, only eight percent of homicides are interracial. But Georgia prosecutors seek the death penalty in seventy percent of the cases where the person accused is an African-American and the victim of the crime is white, and less than thirty-five percent cases involving any other racial combination. What makes a death penalty case, first and foremost, is the race of the victim of the crime. And the likelihood of death is raised even higher if the person accused of that crime is a person of color.

MR. O'NEILL: We have five minutes left. If you have a question, please approach the microphone.

AUDIENCE MEMBER: My name is Reverend George Brooks. I am a chaplain at the Cook County Jail. I visit the cell blocks everyday at the Cook County Jail in maximum security. Just as an aside, I practiced law. And I owned a law firm until I was ordained in 1991. And I was in court on a daily basis prior to 1991. And as part of my chaplaincy, I do go to court with some of the inmates. I think there is another subtlety about this death penalty that is being ignored and that maybe a lot of the people in the audience aren't aware of. But it's become a very effective tool.

The threat of the death penalty has become a very effective

tool in intimidating defendants who are guilty or innocent, some of whom are innocent. Believe it or not, some people arrested are innocent. It has been a very effective tool in intimidating defendants to plea bargain. If the State's Attorney will seek the death penalty, obviously it must be pretty egregious. And all of a sudden it gets plea bargained down to an offer of twenty years. And though I have seen defendants maintain their innocence, as soon as they are threatened with the death penalty, all of a sudden they cop out. And the case might be reduced to eight years on a plea bargain. I think it's a subtlety. And many of the minorities, blacks and Latinos, are well aware of the inadequate representation in Cook County and are, therefore, more than willing to plea bargain under those circumstances.

AUDIENCE MEMBER: Mr. Bright, I am a second year law student at John Marshall. When I arrived here from Boston, I was convinced that I wanted to prosecute the scum. But listening to you, I am beginning to change my mind. That's not a question, just a comment.

AUDIENCE MEMBER: I came up here to learn something about the process. I have been near twenty-five years a trial lawyer. And my question is, I heard this morning a passing reference. We are focusing on the courts. We're focusing on the prosecutors. I don't believe that we're focusing enough on the legislature and on the crimes themselves.

I was on the bench when *Furman vs. Georgia* came down. A citizen called me and said, "the United States Supreme Court just struck down the death penalty. I want to know what you're going to do about it." I wasn't going to do anything about it. I was a trial judge. But there is a public concern about punishment. There is a public concern about justice. But in the death penalty area, the death penalty is being used to serve a utilitarian purpose politically so that the legislature can be efficient in the operation of the prison on the executive side by focusing the public's attention away from the fact that people are getting shorter sentences in rape and other things.

The second thing that was bothering me was the observation earlier that people don't get the death penalty for 7-11 Store robbery killings. In our state that's the number one reason they get the death penalty. And as long as that's the case, we can predict with some degree of certainty who is going to get the death penalty. And I think one of the things we need to do is define what it is we want to do. And then define what crimes will carry the death penalty and define who will get those death penalties. And we need to focus our attention on the definition of capital murder just as much as on the process itself. I haven't heard that discussion.

MR. BESSETTE: Let me just say a word about that. I don't know the death penalty statute in those other states well. But in

California it's very specific. It has to be first degree, which means willful, deliberate and premeditated. It has to be a first degree. And, it has to fit into one of these ten or so categories. So, the California statute is quite specific in defining what kind of murders render you eligible for the death sentence.

MR. STEIKER: California expanded the provisions that you made mention to, actually. And some of the new provisions in California included in the death penalty are offenses such as the killing of a formerly-appointed state official, or killing during the course of a train wreck. There is an incredibly expansive definition of capital murder, such that California really does capture virtually every murder committed in California.

MR. BESSETTE: That's not true. It's completely false. I can show you. I did a study with 160 cases. Hardly any of them met the statutory definition of capital murder.

MS. STEIKER: Would you say voluntary manslaughter or a charge of kidnapping a wife is capital murder?

MR. BESSETTE: and that was about the worst case in my study.

MR. O'NEILL: We're running late. I suggest two more questions. The woman in green. I didn't realize your difficulty in getting to the microphone. Would you still like to ask a quick question? Would you like to go first?

AUDIENCE MEMBER: In *Furman vs. Georgia*, I was just wondering for clarification purposes the precedent set in those cases there.

MR. BRIGHT: What precedent was reached in *Furman vs. Georgia*?

AUDIENCE MEMBER: And those other cases related too.

MR. BRIGHT: It is a difficult case to understand. The U.S. Supreme Court issued a one-paragraph order saying that the death penalty was unconstitutional. Five justices each wrote separate opinions explaining their reason for reaching this conclusion, but none of the five joined in the opinion of another. Some justices concluded that there was too great a risk of discrimination against minorities or the poor. Justice Stewart found the death penalty was unconstitutionally imposed because of its arbitrariness. He said being sentenced to death was so random it was like being struck by lightning. Justice White concluded that the death penalty was used so infrequently—in only a small number of the many cases for which it was authorized—that it was not needed as a punishment and was serving no state interest. Two members of the Court—Justices Brennan and Marshall—concluded for different reasons that there comes a time when the standards of decency in a society evolve to the point that some punishments are no longer allowed. They felt the United States had reached that point. As a result of these five opinions, the death penalty was

declared unconstitutional in 1972. The other four members of court disagreed. They voted to uphold the death penalty.

In 1976, in *Gregg v. Georgia* and two other cases, the Court upheld certain death penalty laws which were supposed to solve the arbitrariness and discrimination found by the five justices in *Furman*. The Court held that as long as juries are given some guidance about aggravating circumstances, as long as the death penalty is limited to certain types of cases, and as long as certain procedures are followed, the death penalty may be imposed. But the statutes upheld in 1976 have not worked. One reason is the statutes define the aggravating circumstances very broadly. Any murder accompanied by a robbery, a kidnapping, a rape, or certain other crimes, may be punished with death. And most states have a catch-all aggravating circumstance. In Georgia and some other states, for example, death may be imposed for any murder that is outrageously vile, horrible and inhuman. The catch-all in other states provides that death may be imposed if the murder is heinous, atrocious or cruel. Of course, all murders are heinous, atrocious and cruel. All murders are vile, horrible and inhuman. So once a state defines its aggravating circumstances so broadly, it has made the entire universe of first degree murder and felony murder cases eligible for death. Because the aggravating factors are so widely defined and so many are eligible for death, but only a small percentage of the eligible are actually sentenced to death, the aggravating circumstances have not served their intended purpose of preventing race, poverty, politics and other arbitrary factors from influencing the sentencing decision.

MR. O'NEILL: If you want to learn more, I recommend that you become a student at The John Marshall Law School. Final question.

AUDIENCE MEMBER: This is for Professor Bessette. In England, there's a case made in support of the death penalty. They don't have the death penalty there. But a sizable portion of the population, in the abstract, would like to see it reinstituted. A high-ranking official has said absolutely no, although he's very conservative and a great fan of President Reagan. A friend of mine who is a professor at a British law school found that very interesting and did a study. And instead of just asking, you know, would you like to have the death penalty even if life without parole was certain, he went further and gave people scenarios. Oh, yes, for murder, yes. That got a very high percentage. As he started narrowing it down, he found that there was almost total agreement for somebody who murdered a child. But for a lot of other ones, what about this situation and what about that situation, people started backing off. I mean, did you look at those type of things in your study? You keep citing eighty percent, eighty percent. Do you think it would go down as you narrow the question?

MR. BESSETTE: Well, I looked for poll results in this country as narrow as I can find in terms of the questions. I am not aware of a poll, for example, that asked the people in California whether Richard Allen Davis deserved the death penalty. I have certain suspicions about what the results would be if you did that poll, or John Wayne Gacy. It would be very interesting to do, if one were to take everyone on death row in California.

AUDIENCE MEMBER: But I also said that was the case if a child was murdered. They agree with that. But in other types of crimes—John Wayne Gacy or Ted Bundy, I don't want to say they're irrelevant because of their victims. But I think if the public really knew what the people have done, the majority of people might change in terms of option with the guarantee of public safety.

MR. BESSETTE: There are two possibilities. If you took everybody on death row and described what they did and did a public opinion survey, your view is that public support would go down. My guess is that public support would go up, not down, if you go through case by case by case of these people. There are a lot of very vicious people, murderers, on death row that the public hasn't heard about. So I think it would go the other way. But we can't prove either one here.

MR. O'NEILL: I would like to thank our panelists.