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## Death Penalty: A Philosophical and Theological Perspective, 30 J. Marshall L. Rev. 463 (1997)

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**Death Penalty: A Philosophical and Theological Perspective, 30 J. Marshall L.  
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# THE DEATH PENALTY: A PHILOSOPHICAL AND THEOLOGICAL PERSPECTIVE

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MR. RUEBNER: It is my pleasure to introduce Professor Spanbauer, who chairs today. She will introduce the moderator.

MS. SPANBAUER: Thank you, Professor Ruebner. Professor Donald Beschle of The John Marshall Law School will serve as moderator for our afternoon panel. He teaches anti-trust, constitutional law, property and religion and the law. Before joining the John Marshall faculty, he was associated with the New York Law Firm of Phillips, Nizer, Benjamin, Krim & Ballon. He received a B.A. and J.D. degree from New York University. He has published over a dozen law review articles, the most recent of which is entitled, *You Have Got To Be Careful*. This article will be forthcoming in the *North Carolina Law Review*. His publications have been cited not only by commentators, but also by the United States Supreme Court. I give you a colleague who I am proud to be associated with, Professor Donald Beschle.

MR. BESCHLE: I am going to keep this very short. I sort of feel that moderators at these things should be judged largely like baseball umpires, the best of them you hardly notice that they're there. A law school has a very strong tendency to think that legal issues are decided in a self-contained world of lawyers and judges. Of course, that is not the case. When dealing with constitutional issues, there is a tendency for gab. To term something is constitutionally permissible does not necessarily determine whether it is a course that should be taken. And with those two caveats in mind, we can begin with our second panel of the day.

Unlike the morning panel, most are not lawyers. Rather, they bring a number of different perspectives. From empirical and theoretical, insights from jurisprudence, to religion, sociology and political science. And they bring to bear on the recurring and agonizing question of whether it is not better that one man should die so that the whole nation should not perish. Our format, as it was this morning, is that each speaker will be given approximately fifteen minutes to present his or her paper. Those who work in constitutional law know there is an ongoing debate about the meaning of words and how hard fixed they are. Dictionary meanings are very flexible. Amazingly, when we come to these conferences, even those who argue about the hard and fixed nature of words, tend to be very flexible when interpreting the phrase fifteen minutes. But we do have a long, long list of very distinguished speakers. And, again, we do want to leave some time for colloquy among the speakers and questions from the audience.

If I were to fully introduce each of our panelists, we would be out of time. Having said that, I am sure that they will understand if I just drastically shorten their backgrounds instead. I am sure they would rather speak than be spoken of.

Starting at my immediate left and working down the podium, we begin with Walter Berns, who is a university professor emeri-

tus at Georgetown University and a resident scholar at the American Enterprise Institute. Dr. Berns received his bachelor's degree from the University of Iowa, his post-graduate degree from the London School of Economics and received his doctorate from the University of Chicago. He has taught at Yale, Cornell and the University of Toronto in addition to Georgetown. He has been a member of the National Council on Humanities and the Council of Scholars in the Library of Congress.

In 1983 he was the alternate United States representative to the United Nations Commission on Human Rights. He is the author of numerous books and articles. The most relevant for purposes of this conference is his 1979 work entitled *For Capital Punishment*.

To the left of Dr. Berns is Ms. Nancy Bothne. She is the Midwest Regional Director for Amnesty International, USA. She works with staff and volunteer members developing strategies on amnesty and human rights. She has lobbied cities and states and the federal government on behalf of the civil liberties and civil rights issues. She has a Master of Science in Communications from Northwestern University.

To Ms. Bothne's left is William Bowers, who is a professor at the College of Criminal Justice Northeastern University. He received his bachelor's degree from Washington and Lee University and his doctorate in sociology at Columbia University. For the last twenty-five years he has conducted extensive research and has been published widely on the subject of capital punishment. Since 1990 he has been a principal investigator in the Capital Jury Project, which studies how capital jurors make sentencing decisions. Early findings of that study were reported in the Fall 1995 symposium issue of the *Indiana Law Journal*, which was devoted to that project. Those of you not familiar with the Capital Jury Project may want to take a look at this issue of the *Indiana Law Journal*.

Next, as we move down the line, is Richard Dieter, Executive Director of the Death Penalty Information Center. He received his Bachelor of Science degree from Notre Dame, his M.S. from Ohio State University and his law degree from Georgetown. He has written and spoken on the death penalty issue for both professional and popular audiences. He has presented legislative testimony and prepared reports for the House Judiciary Subcommittee on Civil and Constitutional Rights.

Next to Mr. Dieter is Dr. Richard Land, the President of the Christian Life Commission of the Southern Baptist Convention. He received his bachelor's degree from Princeton, his Master's of Theology at New Orleans Baptist Theologic Seminary and his Ph.D. from Oxford University. In 1987 and '88, he was Administrative Assistant to the Governor of Texas on church, state and

family values issues. He also served on the Governor's Welfare Reform Task Force. He has been published in scholarly and popular journals. He is an ordained Southern Baptist minister who has pastored churches in Texas and Louisiana.

Next is James Lund, Co-Director of the Office of Ministry of Peace and Justice, which has an Archdiocese in Chicago. Mr. Lund received his bachelor's degree from Holy Cross University, and Master's in Theology at Colgate-Rochester Divinity School. He is chairman of the Illinois Community Affairs Division, and co-authored with Mary Highcamp *Moving Faith Into Action*.

At the end of the line there is Austin Sarat, Professor of Jurisprudence and Political Science. He received his bachelor's degree from Providence College and his Master's and Ph.D. in Political Science from the University of Wisconsin. Not satisfied with that, he then went to law school and received his J.D. from Yale University. He has an extensive list of books and articles. Much of his work deals with the subject of the relationship of law and violence, both actual and symbolic.

This should be an extremely interesting panel. So we should get to it. I will turn the microphone over, literally, to Dr. Berns.

MR. BERNs: Thank you, Mr. Beschle. It's true I am not a lawyer. I have a daughter who is a lawyer. And I come from Washington. So almost all my friends are lawyers. But as I listened to Steve Bright this morning, I'm rather glad I am not a lawyer. I am referring to the fact that he had some nasty things to say about lawyers this morning. So be it.

Karl Marx was mistaken about many things, and somewhere on the list of mistakes would be his statement to the effect that mankind never poses a problem for itself until its solution is at hand. He obviously never paid sufficient attention to the problem of capital punishment, a problem long since posed but, as Carol and Jordan Steiker remind us, one for which no solution is at hand—or, for that matter, even in sight. Other countries have solved it—so to speak—by abolishing it, but that is not likely to happen here. Rather than abolishing it, last year the Congress added to the list of federal offenses carrying the death penalty, which met with the approval of the American people, an overwhelming majority of whom continue to favor capital punishment.

The opponents of the death penalty had reason to believe that their cause was won, or was about to be won, when, in 1972, the Supreme Court held that the manner in which death sentences were being imposed by judges and juries—capriciously or discriminatorily—constituted cruel and unusual punishment in violation of the Eighth Amendment. But their hopes were dashed four years later when the Court held that capital punishment is not, under all circumstances, unconstitutional. Since then, about 400,000 murders have been committed in the United States, about

5000 persons have been sentenced to death, and, at year's end 1994, 257 convicted murderers have in fact been executed, thirty-one of them during 1994. At the same time, 2890 prisoners were under sentence of death, and, since the average time between sentencing and execution is slightly over ten years, they will remain on death row for a long time. This delay is due, in part, to the inability of the Supreme Court to speak with one voice in any capital case that comes before it.

Consider *Walton v. Arizona*. As one might expect, considering the heinous character of Walton's offense, the jury convicted him of first-degree murder. In a separate hearing before the trial judge who, before passing sentence, was required by the Arizona statute to weigh both aggravating and mitigating circumstances, the State argued that two aggravating circumstances were present. In mitigation, and again as one might expect, Walton presented a psychiatrist's testimony that he, Walton, had a long history of substance abuse "which impaired his judgment" and, another favorite, that he "may have been sexually abused as a child." His counsel also argued that Walton was only twenty years old. The judge sentenced him to death, and Walton, of course, appealed. In due course—actually, in undue course—the Supreme Court affirmed the judgment.

I cite this case not because there is anything unusual about it—in fact, it is typical of the capital cases coming to the Court—but merely to illustrate the cacophony that issues from the Court in a capital case. I read from the official report of the case: "Justice White filed separate opinion in which Chief Justice Rehnquist, and Justices O'Connor and Kennedy joined . . . Justice Scalia filed separate opinion concurring in part and concurring in judgment . . . Justice Brennan filed dissenting opinion, in which Justice Marshall joined . . . Justice Blackmun filed dissenting opinion in which Justices Brennan, Marshall, and Stevens joined . . . Justice Stevens filed dissenting opinion." Divisions like this are either the cause or a reflection of the situation reported in the Steikers' paper.

Leaving aside the question of fairness or discrimination—that is, whether blacks are more likely than whites to be sentenced to death; of the 257 prisoners executed since 1976, 140 have been white, 98 black, 17 Hispanic, and 2 "other"—the issue has to do with the effectiveness, and ultimately the morality, of capital punishment. Its proponents believe that criminals should be made to pay a price, the worst of them with their lives; the opponents argue that capital punishment is immoral, inhuman, a denial of human dignity, and, as a deterrent, no more effective than long-term prison sentences. Who is right?

On the deterrence issue, it is a question of whom or what to believe, common sense or social science. According to common

sense, executions not only punish the guilty in an appropriate manner, but send a much-needed message to others, reminding them of the price they will pay if they commit a capital crime. The flaw in this argument is that, as things now stand in this country, few criminals are apprehended, and fewer still convicted, and that by the time a murderer is executed—ten plus years on average and fifteen years in the case of the notorious Robert Alton Harris—his crime has long since been forgotten. Everyone agrees that to be an effective deterrent, punishment must not only be sure but swift, and as now administered, it is neither.

This is especially true with capital punishment. As I mentioned, since 1976, about 400,000 murders have been committed in the United States and 257 persons have been executed. If we make the admittedly unlikely assumption that the number of murderers is equal to the number of murders, this means that 99.9 percent of the murderers are not, or have not been, executed, which is not much of a "message." Not surprisingly, therefore, the typical social science study reveals that capital punishment is not an effective deterrent of capital crimes, or, to be more precise, is no more effective—or no less ineffective—than long-term prison sentences. In fact, of course, long-term prison sentences, even for convicted murderers, are the exception rather than the rule.

But the social science methods used to prove the ineffectiveness of capital punishment are just as likely to prove the ineffectiveness of every other form of punishment, and no one believes that—or, at least, no one is willing to draw the conclusion that punishment in general serves no purpose and, like capital punishment, ought to be abolished.

On the moral issue, the proponents of capital punishment can cite the Constitution and a good deal of impressive authority. True, the Constitution forbids cruel and unusual punishment, but it also contains five provisions: Article II, section 2 reprieves; grand jury indictment in capital cases; double jeopardy; and the two due process clauses, making it clear that its Framers did not put the death penalty in that category. The proponents can also call upon George Washington, Thomas Jefferson, and Abraham Lincoln who, albeit with a befitting reluctance, authorized the execution of 267 persons during his presidency; and the famous English liberal, John Stuart Mill; and that greatest of moralists, Immanuel Kant; and the first philosophers of natural right, Thomas Hobbes, John Locke, and Jean-Jacques Rousseau; and Plato, Aristotle, Thomas Aquinas, and, almost without exception, every other political philosopher; and they can appeal to *The Bible*: *Genesis* 9:5-6; *Leviticus* 24:16-17; *Numbers* 35:31; and *Matthew* 18:6-7; and even William Shakespeare. Against this formidable line-up, the opponents can field a team of Cesare Beccaria, Arthur Koestler, Albert Camus, various Freudians who contend that there is no act,



even cold-blooded premeditated murder and dismemberment, about which society may express moral outrage, and a few minor leaguers in the Academy and ACLU.

Camus is the man to be reckoned with. Indeed, leaving aside the question of whether it can be administered rationally or without invidious discrimination, the issue of capital punishment can be said to depend on whose is the truer account of murder, Camus' or Shakespeare's. What can a novelist or dramatic poet tell us about crime and punishment? More, perhaps, than anyone else, if he or she is a writer worthy of our consideration. In *Macbeth*, Shakespeare shows us murder and its consequences in a world governed by laws divine as well as human. The play is about ambition, murder, tyranny, and in response, horror, anger, vengeance, and, perhaps more than in any other of his plays, about justice. Macbeth had broken the most solemn, or as Shakespeare would say, the most awful of the laws, and because of that, because of justice, he had to die, not by his own hand—as he said, he will not “play the Roman fool, and die on [his] own sword”—but at the hand of the avenging Macduff. Yet, in spite of the horrors provoked in us readers by his crimes, he excites no anger in us, only pity. He had deserved the respect of king, countrymen, army, friends, and wife; and he lost it all. We pity him, but we also appreciate the anger of his countrymen and the dramatic necessity of his death. The dramatic necessity would appear to rest on its moral necessity. Was Shakespeare right about this? Lincoln thought so. “Nothing equals *Macbeth*,” he said. “It is wonderful.”

Lincoln aside, would we be satisfied if Shakespeare, instead of having Macbeth pay for his crimes with his life, had had him sentenced to prison? I doubt it. Most of us would think that Shakespeare got it right. Put us in that Scottish kingdom; put us in Macduff's place—“All my pretty ones?/Did you say all? . . . What, all my pretty chickens and their dam/At one fell swoop?”—and we, too, would demand retribution, and feel justified when it is exacted. Most of us—the opinion polls confirm it—would also think it right if Shakespeare were writing about our world; but here we would have to contend with Camus. Our world, he writes, is a world guided by no moral law, no truth or principle “that is superior to man,” and, as a result, “has lost the only values that, in a certain way, can justify capital punishment.”

In his novel, *L'Étranger*, variously translated as *The Stranger* or *The Outsider*, Camus shows us a world without God, as he puts it, and one for which he, a hero of the French Resistance during World War II, has great disdain. Except for the novel's leading character—a man unable to love, hate, hope, care, admire, regret, or grieve, and who never once frowns, smiles, or laughs—this world is inhabited mostly by hypocrites, people who only pretend to care for others and to be angry with the criminals who molest or

kill them. Nevertheless, the novel is a modern masterpiece, and Meursault, its antihero—for a world without anger can have no heroes—is a murderer.

He is a murderer whose crime is excused, even as his lack of hypocrisy is praised, because the universe, Camus tells us, is “benignly indifferent” to how we live or what we do. There is no basis in this world for friendship, for community, and, therefore, no basis for the anger expressed when someone commits a crime, even a murder. Of course, the law is not indifferent; under it, Meursault is sentenced to death. But Camus the novelist tells us that the law is simply a collection of arbitrary conceits.

It might occur to his readers that if the universe is truly indifferent to what we do, with the result that society is not justified in disapproving of murder, then the members of that society, Camus for example, are not entitled to disapprove of capital punishment. But Camus anticipates that objection. He says there is one thing that connects us one to another, a “solidarity against death,” and a judgment of capital punishment “upsets” that solidarity: the purpose of human life is to stay alive. The response to that, of course, is why bother?

So what world do we inhabit: Shakespeare’s or Camus’, a moral or amoral world? To be specific, are we truly—or do we merely pretend to be—both saddened and outraged by the death of twelve-year-old Polly Klaas? Whatever the answer, and whatever the answer to the deterrence question, at least one thing is clear: if the man who kidnapped and murdered her had been executed for his previous crimes—he had twice been convicted of kidnapping—Polly Klaas would be alive today. The same is true of Kara Kelley Voss, a twenty-year-old newlywed, and her brother, Mark Kelley, twenty-six, whose second child was four weeks old, who were killed by Leo Jenkins, who had served time for burglary and theft. Three days after he had walked into the Kelley family shop, intending to rob it in order to feed his drug habit, he was arrested and confessed to the killings. Eight years later, with the rest of the Kelley family looking on, he was executed. I read from the press account:

“At 6:22 p.m., Friday [Feb. 9, 1996], Mrs. Kelley watched with a steady gaze, anger and hate still pounding in her heart, as a lethal dose was pumped in Jenkins’ veins. Surrounded by her husband, her remaining daughter, her daughter-in-law, and her husband’s ninety-year-old mother, Kelley stared coldly at the gurney where Jenkins lay, thinking of everything he had ruined, everything she had lost. It was so easy, she said afterward, to look on as he died. . . . What she saw, she said, ‘was immensely satisfying.’”

Are we prepared to say she was a hypocrite? That she only pretended to grieve, to be angry, to feel justified in seeing Jenkins die? Are we—those of us who share her grief and her satisfaction,

who, in some small way feel that we, too, were victims of Jenkins' crime—are we hypocrites? What sort of world do we inhabit? The issue of capital punishment turns on the answer to that question. Thank you.

MS. BOTHNE: My name is Nancy Bothne. I work as the Midwestern regional director of Amnesty International. I find myself sitting here right now and feeling much the same way I think that Bob Dole and President Bill Clinton felt last night. Do I respond to the previous answer, or do I go ahead with my remarks. I think what I will do, for right now at least, is move ahead with my remarks.

I would like to tell you a little bit about Amnesty International. What I am going to talk about this afternoon is how it is that the death penalty, in and of itself, consists of an act of torture, and that the death penalty is a violation of international standards and universal human rights. I would like to talk just briefly about what the experience of the death penalty is here in the United States because I'm afraid this is a world which thinks if the United States is a human rights leader, if anybody can get it right, well, certainly we could. And I would also like to talk a little bit about what is going on around the world, and what the trends are in exerting the death penalty.

Amnesty International, as you may all know, is a grass roots movement of over a million people. We work on behalf of human rights. We work to promote human rights. We work to identify human rights violations and stop them. We also work on behalf of individuals whose human rights have been violated. It's fair to say that the members of Amnesty International, like many others who oppose the death penalty, do care about Polly Klaas and do care about Jeanine Nicarico. We fight, however, exercising the death penalty because we believe it is an exercise of a form of torture. In many ways Amnesty International is sort of a torture expert. We were certainly one of the first organizations out there promoting the human rights language and identifying acts of torture and trying to move people to act against that torture.

We did not start out as an organization which was opposed to the death penalty. That kind of came to us as we started thinking about the work that we do. You know, it dawned on us that if we felt that a woman who was being hung by her arms in order to sustain excruciating pain, if that act was an act of torture, then hanging someone by their neck until they die is also a form of torture. Amnesty International believes that the application of 500 volts of electricity to somebody to get them to behave or get them to alter their behavior in some way or just to do it for fun, we believe that is an act of torture.

So how could we not believe that the application of 2000 volts into somebody's body until they die is not an act of torture? In the

former Soviet Union, the USSR, we understood that the prison officials there administered truth serums and psychotropic drugs and other forms of injections into people in order to get them to change their behavior, to change their way of thinking, to change, period. We believe that was an act of torture just as right now we believe the use of lethal injection as a form of capital punishment is a form of torture. No matter which way we look at this, the death penalty is an exercise of torture.

People who are tortured experience excruciating pain and suffering. First, of course, we know there is a very long wait here in the United States before the exercise of punishment for their behavior, as we determined, the death penalty, is carried out. In the case of electrocution, what happens is that the organs get paralyzed in a person's body. And, of course, there are currents of electricity going through one body. And oftentimes flames shoot out from a person's body. Asphyxiation is often what occurs in the gas chambers as well as with lethal injections. And by hanging there is also asphyxiation as well as a tearing of the spinal cord, which contributes to the source of death.

The move in this country is to use lethal injection, which has been declared to be a humane one. There have been at least twenty-four instances where the documentation of the use of lethal injection has basically been screwed up and has not been administered in the humane way in which its proponents have argued it occurs. Just this past year, Thomas Smith was executed in Indiana. His execution by lethal injection took one hour and twenty minutes. At first they were unable to find a suitable vein, so the technician administered a local anesthetic and had to insert a catheter into Tommy Smith's leg. Tommy Smith was conscious the entire time. It was only after they finally were able to find the vein, that they were able to then administer the dose of the lethal drugs.

Why is it that you think we put a hood over somebody's head when we execute them? There is a horror involved in killing someone. And certainly the horror of the deaths of Polly Klaas and others is something that we condemn. But we also condemn that the deliberate use of the death penalty is a form of execution by a government. The death penalty is a violation of human rights.

I would like to tell you just a little bit about where it is and how it is that international instruments address the death penalty. But I also want to sort of reflect a moment on why it is that we have experienced such great celebration with the release of Dennis Williams and Joe Burrows and Rolando Cruz and three other men who have been released from death row here in Illinois this year after the State finally acknowledged that they were innocent of the crimes for which they had been convicted. We sponsored a reception for these guys. And, you know, they got up. And they talked

to us in the crowd. They talked about what their experience was, what it was like to be released.

I sat there and listened to them. I was terribly moved by what they had to say. And so I asked myself why. They really didn't do anything. They were unjustly locked up. But, you know, somehow or another what it is they were saying was very moving. I think it was moving because they survived.

They talked about their survival. And that survival, that very survival is a celebration of life. We were there to say that life goes on. They were there to say that there is a way of redeeming our humanity by acknowledging what has happened here and by sharing this story and by trying to make sure that this didn't happen again.

I think that that feeling, that notion of what our humanity is and what life is and what it is we celebrate in one another is actually the basis for the Universal Declaration of Human Rights (U.D.H.R.). The two underlying principles of that universal declaration, the U.D.H.R., are that people should be free from fear and that people should be free from want. To be free from fear is a concept that is a pretty incredible concept. It deals not only with a relationship of the state to individuals, but with individuals to individuals.

When we talk about the governmental role, however, when we talk about how it is that we punish behaviors of members of our society, we talk about the government's role, that is the government's relationship to individuals. The U.D.H.R. talks about a right to life. And it is based on that principle, I think, that begins to anticipate an abolition of the death penalty. The U.D.H.R. is a political document. Certainly the United States has quite a heavy hand in the language of it and in its adoption.

The U.D.H.R., however, is not the only international instrument which addresses issues of capital punishment. We also have an international covenant of political rights. What that covenant does is it starts to declare and formalize through the language, which is adopted in sort of a treaty form, that there are circumstances in which exercise of the death penalty must not be allowed. We will not execute pregnant women. We will not execute juveniles. And the countries which have signed on to that covenant, which I believe number over 168, have indicated that they have started to understand the argument, started to understand the international principle which says that the death penalty is violation of human rights.

We then go on to protocols which have been created to amend that international covenant. And one of them very much specifically seeks to abolish the death penalty. So for those countries who have signed on to this standard of international human rights, they agree to abide by that protocol. The standard is there for all

to see. The standard in the international community is that the death penalty must be abolished.

I am going to get back to what is going on in the international community. But I just want to refresh ourselves a little bit about the experience in the United States. In 1993, Amnesty International sponsored what we call a "Commission of Inquiry" into the death penalty as a practice in the United States. Representatives from around the world came to the United States to provide testimony about what it is that we're dealing with. And what these international legal scholars, human rights scholars and real folks indicated is that the United States Constitution and the Bill of Rights provided a model of civil and political rights which governments look to all around the world with only one exception: the use and application of the death penalty in the United States.

Henry Schartzchild, who was with the American Civil Liberties Union but who recently passed away, in his testimony characterized this phenomenon which occurs in the United States as something where we use homicide as an instrument to social policy. With the sanction of the Supreme Court, we in the United States kill innocent people. We in the United States kill juveniles. We in the United States, with the sanction of the United States Supreme Court, kill mentally ill and mentally retarded people as a form of punishment.

We know that the United States is more likely to exercise and seek out the application of the death penalty if the victim is white and the perpetrator is a person of color. We also have seen, certainly in our community, that there is a taint of politics which comes into play as we figure out who it is that we are going to determine is subject to a capital case and who is not. This is not the trend around the world, though. In the world today, one hundred countries have abolished the use of the death penalty. Ninety-four countries still retain use of the death penalty. But one-hundred have abolished it.

I find it somewhat ironically amusing that when Trinidad and Tobago abolished the use of the death penalty, they said it firmly. They were so convinced by *Furman* that they decided they would move within their country to abolish the death penalty. Europe itself is basically an abolitionist continent. When Croatia sought entry, and when other countries seek entry into the European Council in Strasbourg, they do so under the condition that they ratify the second option of the protocol, the death penalty. That is, that they agree to abolish the death penalty and agree never to seek its reinstatement.

When the International War Crime Tribunals in the former Yugoslavia were convened, and those criminal courts are convened in order to identify and punish the most egregious behaviors, they are prohibited from seeking application of the death penalty as a

form of punishment. There are countries around the world which experience high crime rates like us in the United States. Brazil is one example. All of those countries have abolished the death penalty.

Since I have a list of countries which have abolished the death penalty since 1990, I don't want to belabor this. But we certainly have found that Hungary, Ireland, countries all around the world have abolished the death penalty. The trend in the world is away from using the death penalty. And the United States is the world leader, which is moving closer toward and expanding the death penalty. My conclusion is that, well, the world is right.

The United States may need to understand and may need to apply and may need to bring into its rhetoric what it is that is going on in the world at large, what it is that international human rights standards are, and how it is that those human rights standards are being developed. I think if we do so and I think if we respond to some of the other factual information which our panelists would be offering today, we will see as a country that the death penalty should no longer used, as it is a form of torture. Thank you.

MR. BOWERS: I want to begin with a statement of the principal conclusions of recent research I have conducted on the death penalty in the United States. I have asked our chairman, Mr. Beschle, to read this statement for me because I am visually impaired and I can't read it to you myself. It will serve as an overview of points I am going to talk about in more detail. With your permission, why don't we begin this way.

MR. BESCHLE: I am reading now from Professor Bowers' outline. It says I have researched capital punishment for the past twenty-five years and found it to be an instrument of symbolic boundary maintenance that fails the test of deterrence and cannot be purged of racial and social class bias. Since the Supreme Court's failure in the *McCleskey* decision to enforce the dictates of *Furman*, I have turned my research attention to people's attitudes toward capital punishment and their behavior as capital jurors who are called upon to decide which murderers should die. My remarks report the principal conclusions I have drawn from this recent research.

First, deep-seated public support for capital punishment is an illusion. The public would prefer an alternative to the death penalty that incorporates life without parole combined with restitution to murder victim families. People recognize that the use of the death penalty is too arbitrary, and that its application is racially and economically biased. They place top priority on punishment policy that requires offenders to work for restitution to their victims survivors as a missing element of criminal responsibility in our punishment policy.

Second, politicians and the media are propping up the illusion of strong public support for capital punishment. Selective media coverage of crime and punishment emphasizes the lurid offenses and vengeful responses of murder victim survivors. Politicians misread their constituents' punishment preferences. They wrongly imagine that advocating an alternative to capital punishment would hurt their re-election chances. Voters say they would be more likely to vote for a candidate who advocates such an alternative.

Third, the public grossly underestimates the time convicted first degree murderers usually spend in prison if not given the death penalty. Most people strongly agree that such offenders will be out of prison far too soon. Their estimates of the time such offenders will usually serve fall well below the mandatory minimum for parole eligibility in their states. This misperception accounts for some residual death penalty support.

Fourth, the illusion of early release of murderers not given the death penalty is having the pernicious effect of causing people who serve as capital jurors to vote for the death penalty quite apart from the consideration of aggravating and mitigating factors supposed by law to guide their sentencing decisions.

Fifth, many capital jurors take a stand on what the defendant's punishment should be and even become absolutely convinced on the matter of punishment before the sentencing phase of the trial begins, in violation of the constitutional precept that jurors' sentencing discretion must be guided at a separate sentencing phase of the bifurcated capital trial.

Six, many capital jurors misunderstand the judge's sentencing instructions in a way that tilts their decision-making in favor of a death sentence. They typically fail to appreciate the altered standards of proof and need for agreement among jurors that apply to mitigation as opposed to aggravation.

Seven, capital jurors deny personal moral responsibility for the life or death sentencing decision they make. They see the law or even the defendant himself as primarily responsible for his punishment. They are reluctant to accept responsibility for the dirty work that capital punishment entails.

Eight, Illinois is conspicuous by its absence from the Capital Jury Project. I conclude with an invitation to your state to join our ranks in this effort to understand how capital jurors make their life or death sentencing decisions.

MR. BOWERS: Thank you Mr. Beschle. I will now fill in some details of the research which has led me to these conclusions. Please ask me whatever further questions you may have about this research during the discussion period at the end of the session. So let's begin.

Two projects, two sets of studies, are the bases for these con-



clusions. One is a series of representative state-wide surveys I conducted in New York and Nebraska in 1991, and in Kansas and Massachusetts in 1994. The other is the work of the Capital Jury Project, CJP for short, which is now underway in fifteen states. I'll come back to the CJP later in my comments. The state-wide surveys were inspired by a study commissioned in Florida in 1985 by Amnesty International that revealed a remarkable insight about public attitudes toward the death penalty, best summarized perhaps in the aphorism, "public support for capital punishment is a mile wide but only an inch deep."

Working with focus groups and a pilot survey of Florida citizens, the Amnesty-supported investigators found that if the public could be sure that offenders would not get out of prison and would do something meaningful for victims' survivors while in prison, they would prefer this kind of punishment to the death penalty. The Florida investigators fashioned a question that read "if convicted first degree murderers in this state could be sentenced to life in prison with no chance of parole, and required to work in prison industries for money that would go to the families of murder victims, would you prefer this as an alternative to the death penalty." In response to this question, Florida citizens abandoned the death penalty in droves. This same finding was subsequently replicated in more than a half dozen other states. But these surveys hadn't revealed why people were so willing to abandon capital punishment in favor of life without parole plus a requirement of work for restitution. This is what I determined to find out with my surveys in these four states.

We often hear the claim that about seventy to eighty percent of the public want the death penalty. It is true that when you ask people what I call "the standard death penalty polling question," which has been used over and over again in literally hundreds of polls since 1936, seventy to eighty percent of the public now say they "generally favor [rather than oppose] capital punishment for first degree murderers." This was true in the four states I surveyed. When, however, we asked people about the alternative of life without parole plus restitution, specifically whether they would prefer the death penalty or this alternative for convicted first degree murderers, the claim of overwhelming death penalty support evaporated. Only nineteen percent of the people in New York State stuck with the death penalty; in Nebraska it was twenty-six percent; in Kansas, thirty percent; and in Massachusetts, twenty-three percent. In other words, while three out of four people said they favored the death penalty, only one out of four would stick with it if the alternative was life without parole plus restitution. People will accept it because it expresses their fear and anger about criminal violence, but they actually prefer the alternative.

When we investigated why people preferred the alternative we found two distinct reasons: one having to do with apprehension about capital punishment and the other with attraction to the alternative. On the one hand, we found considerable misgivings about the death penalty. People are aware that its application is economically and racially biased, that its imposition is arbitrary. For example, roughly four out of five people agree that "defendants who can afford a good lawyer almost never get the death penalty." About the same lopsided percentage agree that "the death penalty is too arbitrary because some people are executed while others go to prison for the very same crimes."

The other side of this is the attractiveness to people of the alternative that includes work for restitution, the idea that something more meaningful than killing the offender ought to be part of our response to murder. And for many people that would be to have murderers work for money that would go to their victims' families or survivors. For instance, working eight hours a day for thirty years at the minimum wage, an offender might make \$400,000, enough to pay for the education of a victim's children.

This suggests that we have come to think of criminal responsibility too narrowly. When we see it as simply a matter of matching the defendant with the right crime, of establishing what crime to charge and to prosecute, we are deciding what he is responsible for. But isn't there another side to criminal responsibility, the offender's responsibility to those he has victimized? His crime has created a debt or obligation; it has caused injury and suffering for which he is responsible. Shouldn't paying for his crime mean making amends, providing reparations, doing recompense, seeking atonement? Shouldn't his punishment incorporate this element of responsibility to his victims and impose on him the obligation of repaying the debt his crime has created? The wisdom of an offender's responsibility to his victims is unmistakable in ancient law, as it is in our surveys of people's preference for a true life sentence plus restitution over the death penalty.

In conjunction with the citizens surveys, in New York and Massachusetts we also conducted surveys of state legislators. Thus, in two states we could compare the punishment perceptions and preferences of citizens and their elected representatives. We asked legislators, as we had citizens, whether they would prefer the death penalty or a true life sentence with a restitution requirement for convicted first degree murderers. Legislators were considerably less receptive than their constituents to this death penalty alternative. We then asked both citizens and legislators what punishment they thought the other group would prefer. Most legislators imagined that their constituents were unalterably committed to the death penalty. They believed that it would hurt their re-election chances if they came out for this death penalty al-

ternative, while, for their part, citizens in these two states said they would be more likely to vote for a legislative candidate who advocated the alternative of life without parole plus restitution.

In a word, legislators are out of touch with their constituents' receptivity to this death penalty alternative. Why, you may ask, is there such pluralistic ignorance, such a gap between citizens' punishment preferences and their legislators' perceptions of these preferences? Well, I think the answer lies in an illusion of deep-seated death penalty support perpetrated by pollsters' use of the standard death penalty polling question and the wholesale adoption of this perspective in the media. While the polling data simply show widespread acceptance, the media embellished the polling results by speaking of "support" and applying adjectives such as "strong," "firm," "deep-seated." In this way, the media has fostered an impression of unyielding public commitment to capital punishment rooted in people's fear of criminal violence, and their mistrust of the criminal justice system's ability to keep violent offenders off of the streets.

This brings me to the issue of early release, the fear of killers getting out of prison to kill again. One question we asked citizens in these four states is how long a person convicted of first degree murder will usually spend in prison before returning to society. New York State had fifteen years before parole eligibility and usually murderers were not out for twenty years. In Kansas, at the time, it was a hard forty before parole eligibility. In both Nebraska and Massachusetts it was a life sentence without parole. Most citizens, however, said the first degree murderer will be out in less than ten years, in three of these four states. In Nebraska it was fifteen years or less. Clearly there is a prevailing illusion of early release. Citizens typically imagine that such offenders will usually be out even before they become eligible for parole consideration. This exaggerated impression of early release is surely tied up with the way the media handles crime and presents it to the public. It must, I think, reflect the selective nature of media crime coverage, especially the media's obsession with stories of murderers who kill again. No doubt, there is also a tendency for news readers to blur the distinction between first and other degrees of murder and even to think of murderers who were previously incarcerated as "released murderers" when, in fact, they were imprisoned for some other crime and hence, for example, "released robbers" prior to the murder they committed.

This issue of perceived early release provides a transition to my other major research effort, the Capital Jury Project, a study of what citizens think and do as capital jurors who must make the life or death sentencing decision. This is a project we have underway with funding from the National Science Foundation. It began with eight states, including those most prominent in the use of the

death penalty such as Texas, Georgia, Florida, and California. And it has since grown to include fifteen states. We are conducting interviews with 80 to 120 jurors drawn from twenty to thirty capital cases in each state. The interviews last about three and a half hours and are tape recorded, with the juror's permission. At latest count, we have interviewed more than a thousand jurors from 279 capital trials.

In every one of the ten states for which the CJP data are now available for analysis, most jurors believe that defendants tried for and convicted of capital murder but not sentenced to death would usually be out of prison even before serving the mandatory minimum for parole eligibility in their state. That is to say, just as a majority of citizens underestimate the punishment for first degree murderers in every state we have examined, so too, a majority of the jurors who have actually made the life or death sentencing decision underestimate the death penalty alternative in every CJP state. What is more, the CJP data show that the more capital jurors underestimate the death penalty alternative, the more likely they are to cast a final sentencing vote for death. The latest tabulation based on 962 jurors shows that of those who believe the alternative is usually less than ten years, seventy-one percent voted for death, as compared to forty-four percent for death among those who thought the defendant would usually be in prison for at least twenty years. In effect, their punishment decisions are substantially a product of their mistaken notions of the alternative. Their decision-making reflects the arbitrary influence of misperception and misunderstanding.

We have also learned from the CJP data that, contrary to judges' instructions, at least four out of ten capital jurors discuss what the defendant's punishment should be during their guilt deliberations. Furthermore, perhaps in light of these discussions, fully half of the jurors said they thought they knew what the punishment should be before the sentencing stage of the trial even began, and most of these premature decision-makers, specifically three out of ten jurors in our sample, said they were "absolutely convinced" about the punishment before the sentencing stage of the trial. All this is, of course, before jurors were subjected to the sentencing guidelines that the Supreme Court declared were what distinguishes current capital statutes from those the Court ruled unconstitutional in *Furman*. Well, I must skip ahead because time is short.

On the final matter of who is responsible for the defendant's punishment, let me tell you this much. We asked the jurors to rank the following in order of responsibility for the defendant's punishment: the defendant who committed the crime, the law that provides for the punishment, the jury that makes the punishment decision, the individual juror because the jury depends on the vote

of each juror, or the judge who imposes the sentence. The jury as a group or the individual juror were seen as most responsible by only fifteen percent of the capital jurors. The defendant or the law were ranked first in responsibility for the punishment by eight out of ten jurors. To be sure, the convicted defendant is responsible for the crime. That's what guilt means. I would add that he is also responsible to the victim's survivors for the harm and injury he has done them. And, the law surely does provide for the possibility of death as punishment. Yet, responsibility for what the defendant's punishment will be lies first and foremost with the capital jury. But the jurors wishfully transfer their responsibility to the law or to the defendant himself. Apparently the decision-makers do not want to take responsibility for their decisions. Should we tolerate this?

In a concluding word, people want an alternative to the death penalty but their law-makers don't realize it. So, they have laws that provide for capital punishment and make them responsible for deciding who should live or die, but they apply these laws before hearing the instructions, without understanding the instructions once they are given, and even acting on considerations they are explicitly instructed not to consider. And, perhaps most troubling, they are unwilling, as capital jurors, to accept primary responsibility for the life or death decisions they make. I leave you with these two critical questions. Is this morally tenable? Is it constitutionally acceptable?

MR. DIETER: Good afternoon. I am going to present some overhead projections. So we're going to bring down the screen and darken the room. My approach on this subject is to deal with some of the facts about the death penalty. We're here today to talk about the theological and philosophical perspective on capital punishment. I think on this issue, as with many other issues, moral decisions are going to be made on the basis of where things are factually. What is the basis for our making this decision? There are some issues like genocide, slavery, torture on which we do not need to know the facts. We just say they're wrong. And it very well may be that capital punishment is one of those things for many people. But for others, they want to know who is it applied to and how is it applied and what is the reasoning behind it. Finally, is it doing any good?

These are the questions which I would like to quickly address. And by no means are we going to resolve these issues. These are some of the fundamental questions that have come up in some of the other speakers' remarks this morning. Hopefully, we will be able to discuss them more and be able to do more research. The first issue which I am going to look at is the question of deterrence. Oddly enough, deterrence is not an issue which is primary anymore in the death penalty debate.

Twenty years ago people in America were asked what their primary justification for the death penalty was, among those that supported it. And the majority said it is a deterrent to future crime. That is no longer true. Only thirteen percent of the American public which supports the death penalty give deterrence as their primary rationale. I think one of the basic reasons for that is deterrence has not been proven. That's not to say it can't be proven or that perhaps if executions were quicker or more frequent people would react the same way.

The deterrent argument, however, just hasn't seemed to work. Recently, there was a survey of the nation's top criminologists. Eighty percent of the top criminologists in the country said that the existing research on this issue does not show a justification for the death penalty based on deterrence. What I show you here is simply the results of the last twenty years.

You might note that the executions have been varying widely year to year. Mostly they've been going up. And we expect that trend to continue. The murder rate on the other hand has been fairly stable, fairly flat, seemingly unaffected by the death penalty.

There is, however, some good news. This past year the murder rate has gone down. But it should be added that has been true of most types of crimes. Almost every area of crime went down last year, not just those punishable by the death penalty. Other crimes not punishable by the death penalty have also been going down. We'll see whether that trend continues.

As far as the question of deterrence, the past twenty years has not been a convincing reason for supporting the death penalty. I would like to turn quickly to the second issue, which is still very hotly debated and relevant. That is the question of race. We heard talk about the fact that there are actually more white people on death row than blacks. And that's certainly true. I think the most important research in the area of race and the death penalty has to do with race of the victim. I thought if we graphically looked at some of these issues, it might help explain what people are talking about.

It turns out that in the United States today, if we look at victims of murders, about twenty-two thousand murders per year, the victims are about evenly divided. About fifty percent of the victims are black. Therefore, you might expect that in death penalty cases about half of the cases would involve black victims. But that's nowhere near the case, as this chart shows. This is a breakdown of who the victims are in the cases where executions have been carried out. Eighty-two percent have been white victim cases. And this disparity has been supported by numerous studies.

David Baldus conducted such a study which was brought to the Supreme Court. It has been widely accepted that there is a much higher statistical likelihood that if you kill a white person in

this country you will get the death penalty than if you kill a black person. In the Baldus study, the numbers showed that if you kill a white person you're about 4.3 times more likely to get the death penalty than if you kill a black person. I believe this was referred to this morning.

In other areas, we take that kind of correlation very seriously. When it was discovered that people who smoke are 1.7 times more likely to die of heart disease than those who don't smoke, that had a great affect on our public policy. This is a 4.3 times greater likelihood. Something is going on. Something is wrong. Legislation has been proposed in the U.S. Congress and in various states to remedy this, to do something about this problem.

The basic response has been that if we adopt this legislation, this "racial fairness" act, this "racial justice" act, then we will be doing away with the death penalty. It will have the effect of stopping executions. It will stop the death penalty as we know it. So that legislation has not been passed by the U.S. Senate and has never been passed by a single state in the United States. A recent example of how bad this situation is arose in the State of Kentucky. They had 1000 African-Americans killed, victims of murder, in the State of Kentucky since the death penalty was reinstated. There is not one person, zero percent, not one person on Kentucky's death row there for killing a black person.

If you look at the next chart, you can see also why the death penalty is becoming an affront, an embarrassment regardless of whether there might be reasons why we have such a racial difference. The death penalty is a slap in the face, I think, to the African-American community because of statistics like this. It shows the difference since the death penalty was reinstated. If you take white murders of black people, that's how many people have been executed, four cases. If you look at black defendants who have killed white victims, it's eighty-five cases.

There are various symbols which show or aggravate the divisiveness of racism in this country. When we discovered that Policeman Mark Fuhrman used the "N word," that became a focus of the whole country's discussion of race. This is that kind of symbol. It's symbolic and very divisive. Regardless of whether the death penalty is theoretically justified, it is certainly a divisive issue on the area of race.

I would like to go on to another issue again. I am not trying to exhaust the discussion of these various issues. I just raise them to illustrate what the numbers are. And that is the subject of innocence. That, too, has been referred to again and again as a disturbing aspect of the death penalty. This chart shows how often innocent people have been released from death row in the past twenty years.

I am not trying to show a pattern with this. Don't take any

significance in the fact that it was eight one year and none another year. Rather, this is just to show the overwhelming accumulation of cases. Sixty-seven people who were wrongly convicted, who could have been executed, many of whom were scheduled for execution, have been released. We list them here because they're out, they're free. So they can tell their story. These are just numbers. But the numbers begin to tell a certain pattern. And they begin to tell a certain story themselves.

We have had 346 executions since the death penalty was reinstated. We have had sixty-seven people released. These are retrials where the people are acquitted or the charges are dropped, where DNA evidence proved they were not involved with the crime. These are not what some refer to as cases reversed on technicalities, but what others refer to as violations of the Bill of Rights. These are mostly cases of the wrong person convicted. So for every five people executed, there is an innocent person who remains and hopefully will be released from death row.

That's not to say that the chances of executing a person are that great. I think it was referred to earlier that the chances of executing an innocent person might be somewhere in the realm of 1 in 100. And that's not just a number out of thin air. There is some basis for that. We have had, as the chart shows, sixty-seven people released because they were innocent over these past twenty years. We have had about 6000 people sentenced to death. So without doing sophisticated math, it is about one percent. That is about 1 in 100 of the people sentenced to death have been released, a little over one percent.

Another basis for this 1 in 100 number is a *Vanderbilt Law Review* study which found about one percent of murder convictions in general are wrongful convictions. So let's take that as our basis. It may be much larger. The problem is that only a few cases are so thoroughly investigated that the prosecution drops the charge or a new trial is given. So there may be many more than 1 in 100. Let's assume it's 1 in 100. And, again, I think you have to look at that number in comparison to something else to see whether that's more of a significant number.

Let's assume, for example, there was a car manufacturer. And that 1 out of 100 cars this manufacturer produced caused a fatal collision. The car itself was so defective that it resulted in a death 1 out of 100 times. Of course, that car would be taken off the market. We wouldn't allow that.

We're not talking about accidental deaths here. We're talking about preventable deaths. The death penalty is a preventable kind of death. Similarly, if there's a kind of food where 1 out of 100 times that you use this brand of tomato sauce it causes botulism and kills, we would take that off the market. That's what the death penalty is. I think there is an assumption that 1 out of 100



may be okay. But I don't believe that's true in other areas. I think that should be part of our weighing, our moral discussion. Certainly this should have been brought home in Illinois where there have been so many recent cases of subsequent innocence. Some of these cases this year included Verneal Jimerson, Dennis Williams, Rolando Cruz and Alejandro Hernandez just in the past six months. The wrong people could have been executed on death row for many years. It hasn't stopped.

Illinois has gone ahead with more executions. And you would think there would be some stopping, some moral judgment to say wait a minute--our system for finding, convicting and sentencing people to death is flawed to the extent that we have found all these mistakes. Maybe we should stop and reevaluate. I don't put a lot of blame on Illinois. I think Illinois deserves some credit for finding these cases, for admitting mistakes in some of these cases by the state. And even that's not going on in some states. These cases are simply never discovered. New evidence is not allowed to be introduced because twenty-one days have passed since the trial. So it's not a problem unique to one state.

These cases, these sixty-seven cases, are spread around the country. But I think it is one of the more glaring problems that we have to look at when deciding the morality of the death penalty. Another issue, which I don't have in graphical form, but I think should weigh into our consideration, is the cost of all of this. We have seen that it hasn't done a lot of good. We have seen the possibility that it's divisive with respect to race. We have seen a strong possibility that innocent people are being sentenced to death, and that innocent people may be executed.

What does all this cost us? That is sort of a crass question when you look at the morality of an issue. But I think it's the same kind of analysis when we look at welfare or other questions. When we're trying to decide whether something is good or bad, we have to say: how much does it cost? And not just "how much does it cost," but, "what else could that money be used for?" A very careful analysis of the cost of the death penalty was done at Duke University. Their conclusion was that the death penalty cost about two million dollars per execution more than if a case was handled as a typical murder case with a life sentence. About two million dollars for an execution. There have been about 350 executions. That's 700 million dollars. That could buy a lot more police officers on the streets, a lot more educational programs.

It's not just a question of money. It's a question of what would do society the most good. The last two charts I will just put on very briefly. I am only going to hint at it because I don't have any strong conclusions here. But it may be related to the issue of cost. And this is a pattern which we noticed in a few of the key death penalty states, Florida and Georgia. At one point they were

the death penalty capitals of the country. And they had a lot of executions. Now that has died down to one or two per year. This is happening in a few states.

The next graphic shows it is also happening in Louisiana. At one point they had eight executions in two months in Louisiana. After considerable media focus, that rate dropped to the point of barely one or two a year. I don't think this pattern is necessarily going to continue. But, I think it raises the possibility that the death penalty is so burdensome, so expensive, so divisive that at times the public which supports it is still ambivalent about it and still not ready to go forward.

The last example here is Texas. Their executions dropped this year. All predictions are that this is very temporary. But maybe we're seeing a drop even there. I will just leave that with you as perhaps a reflection on the fact that the death penalty doesn't have to be what it has been in the past. In some states, it may be getting a second look. Thank you.

MR. LAND: The symposium schedule says that this afternoon our panelists are supposed to deal with the death penalty from a philosophical and theological perspective. I am assuming I'm one of the theological perspectives. At least I am willing to operate under that assumption. I am a theologian by professional training and by interest and inclination.

I do want to emphasize at the outset a couple of things. First, it is a theological perspective. I am a Southern Baptist. I am the head of the Ethics Agency for Southern Baptists. For those of you who may not know, Southern Baptists are the largest Protestant denomination in the United States with about sixteen million members in 40,000 congregations nationwide. I guess one way to introduce us is to say that Bill Clinton, Al Gore, Newt Gingrich, Strom Thurmond and Trent Lott are all Southern Baptists. Jessie Helms and Jimmy Carter are as well. Now, that says two things about us: number one, we're a rather diverse lot; and number two, that we certainly are not marginalized in society since the President, Vice-President, the third person in line of succession, the fourth person in line of succession and former presidents are all Southern Baptists.

Southern Baptists are Protestants. We are overwhelmingly evangelical Protestants. And my theological perspective on capital punishment will be delivered consciously from that perspective. Let me also say that I have been appalled by much of what I heard this morning and some of what I heard this afternoon. What I heard is giving quantitative weight to what I intuitively felt is the case, that there is outrageous injustice related to capital punishment as it has been exercised in the United States. Injustice both to people who are poor and people of color, as well as individuals who are far more likely to be executed than people of wealth, peo-

ple who are not minorities and people who aren't male.

There is also a capriciousness of it from state to state. I am sad to say I was outraged by what Dr. Bessette had to say about California. If you want to kill somebody, obviously you want to leave Georgia and go to California to do it. You're much less likely to have to pay a significant price for having taken another human being's life. I am not here to defend or to answer the critics of capital punishment as it is practiced in the United States today. I am here to provide a theological perspective as to why many people in the Protestant evangelical community—and clearly I have quantitative evidence for this, four out of five or better of people who identify themselves as Southern Baptists—believe at least in the attraction of a theoretical capital punishment being an option for the civil magistrate. Most evangelical Protestants, certainly most Southern Baptists, believe there is a role for retributive justice in society.

One of the responsibilities of the state, mandated by Scripture, is to punish those who do the wrong thing. Vengeance and retribution are not identical. In classical Protestant theology, this distinction has always been maintained. In the New Testament when Jesus talked about not taking vengeance, he was talking about personal ethics. When the Apostle Paul, in *Romans* chapter 13, is dealing with the duty of the civil magistrate in the New Testament covenant, the main reason for the civil magistrate is to punish those who do evil and to reward those who do that which is right.

That leads us to some key questions, it seems to me. The key question that I want to raise this afternoon is: whose morality is the basis for determining what is right and what is wrong? I think a lot of the confusion that we face on this issue and a lot of other issues in the United States and in society today, is that there is no preponderant or even consensus answer to that question. There have been at times in our past, but that is no longer the case.

Another key question is that once we determine whose morality is to be the basis for societal law, and once the civil magistrate rewards those who do that which is perceived to be right and punish those who do that which is perceived to be wrong, how does one know the punishment envisioned is fair for the crime? I believe, and I am speaking now from the theological perspective of a Southern Baptist, on behalf of the majority of Southern Baptists, and the majority of evangelical Protestants, when I say that it must be based upon Scripture. For it to be seen as fair and just, it must be based upon our understanding of the Scripture. If we cannot justify it from Scripture, then we cannot justify it. I am not saying that should be your standard. I am not saying that should be the nation's standard. I am saying for those of us who consciously claim the label of Southern Baptist or evangelical Protes-

tant, that for us it must meet that standard for us to support it.

We believe, based primarily upon *Genesis* chapter 9 and *Romans* chapter 13, that capital punishment is an option that is and should be available to the civil magistrate to punish those who take the life of another human being. And this, in fact, is a testament to society's outrage at a person who would presume the prerogative to take another human being's life. In our opinion, one's decision about the moral rectitude of capital punishment depends on his or her understanding of the passage in *Genesis* and the passage in *Romans:13*.

I want to focus on *Romans:13*. The *Genesis* passage is a passage in which God declares that those that take human life, that their lives will be forfeited. But the passage that is most determinative for Baptists and most determinative for most evangelical Protestants, is a New Testament passage. It is *Romans:13*. First, it states that all governments, even bad ones, are divinely ordained and all people must be subject to them. Those who disobey the government ultimately disobey God's ordinance.

Verses three and four are seen by us to be critical. All assert government as God's ministers or divinely authorized to reward those who do good and to punish evil doers. Verse four states that government is the minister of God and avenger of wrath. I understand that to mean if someone kills my family, I do not have the right to exercise vengeance and take their life. I do have the right to expect the state, if they are found guilty beyond reasonable doubt, to cause their life to be forfeited for wantonly and premeditatedly taking the life of my family. Biblical commentators agree that the word "sword" in verse four is a symbol of authority given to government to execute criminal justice up to and including capital punishment at the time in which it was written within the Roman Empire.

Why use the word "sword?" There are other symbols for the state that could have been used. But the Apostle Paul states that government is divinely empowered to dispense retribution. And for retributive justice, the punishment must equal the crime. Whether one takes a human life or whether one acts in a way callously and with forethought that causes other people to lose their lives, whether you take their lives or not.

I have in mind one of the people that hasn't been mentioned. Richard Alan Davis has been mentioned. We heard John Wayne Gacy mentioned. We heard Ted Bundy mentioned. We heard others mentioned. But I want to add the name Mr. Ames to the list. Mr. Ames sold secrets of the United States to a foreign power. At best we can tell between twenty-five and thirty people as a result of his betrayal and his treason, were tortured and died violent deaths in the countries in which they resided. I think that he should be executed, not given life in prison without parole for such

a heinous crime. This is probably why I have been rejected for jury duty twice. Defense lawyers see me coming. The majority of Southern Baptists, I would say a large majority of Southern Baptists and evangelical Protestants would argue that *Romans:13* and *Genesis:9* not only permit, but mandate capital punishment as an option that is available in cases where there has been a taking of human life.

I venture now into the next part of my statement, going where angels fear to tread, but no one has ever accused me of being an angel. There is a very strong bias against theological perspectives being given any weight in our civil society. And that has worked its way into the judicial system. When writing the decision for the 9th Circuit Court of Appeals in *Companion and Dine v. Washington*, which overturned the state ban on euthanasia, Judge Reinhardt stated, "people with strong moral or religious convictions," I assume he was talking about me as well as some others, "are not free to force their views, their religious convictions or their philosophy on all other members of a democratic society."

I am not sure what he means by force. If he means by force of arms, I agree. If he means by something other than the legal and judicial process by which we determine what is made into law and what does not get made into law, I agree. But is he effectively seeking to censor people such as myself who come to our decisions based upon our understanding of the scripture from participation in public policy? Is he saying that anyone who argues for transcendent values to be brought to bear on the nation's public policy or whatever, capital punishment or otherwise, assisted suicide, that somehow we are to be segregated from public policy and that our opinion, which are the opinions of American citizens, will be disqualified from participation in the process? That this is somehow abandonment of the American way? It reminds me of a comment made by Lord Melbourne to a parliament struggling to curtail the slave trade in the 18th century led by non-conformists, "things have come to a pretty pass when religion is allowed to invade public life."

Well, I am glad that religion did invade public life, stopping the slave trade. I am glad that the Baptist minister Martin Luther King, Jr. stood up and brought his religious convictions to bear. And we intend to continue bringing ours. And if we convince the majority of citizens that we're right, whether they agree with the reason why, we will continue to insist that as American citizens we have a right to participate and have a voice and—dare we say—even enact what we believe to be right and what we believe to be wrong into law. If the Supreme Court agrees with Judge Reinhardt, then I will say to the judicial system: you need to get your house in order because the patience of the American electorate is not limitless and believes that abandonment and a conscious deci-

sion to reject it would be a very dangerous thing for our society.

MR. LUND: Good afternoon. I don't know if it's because the seventh game of the National League Championship Series is tonight or because of other allusions today. But I can't help thinking of some baseball related points as I start my remarks today. The first one is that I am getting pretty low in this line-up. It's been a long time. You heard about eleven speakers. And that is a tremendous advantage.

MR. SARAT: What does that mean for me?

MR. LUND: When I finish my story, you will know. In baseball games, you know, eight or nine batters come, expectations are very low. So, therefore, I hope I can meet them. And I think probably your greatest expectation right now is that I get it done in even less than fifteen minutes, even without knowing what I might say. The second thing is I would just like to refer to Dr. Berns' comments about some of the minor leaguers who are against the death penalty. I just wanted to put Pope John Paul II in there. Let me begin my prepared remarks. Since the reinstatement of the death penalty in the United States, the teachings of the Roman Catholic Church has evolved to a position of firm opposition. The United States Catholic bishops first went on record against the death penalty in 1974. Six years later, the National Conference of Catholic Bishops adopted the position urging abolition. Over the next decade and a half, Roman Catholic bishops throughout the United States became and continue to be consistent and outspoken foes of capital punishment. Their stance is reinforced by the publication, *The Catechism of the Catholic Church*, in 1994, and in Pope John Paul II's encyclical letter, *The Gospel of Life*, in 1995.

This position roots itself in fundamental Catholic teaching on the dignity of the human person and on the essence of the Christian message. Pope John XXIII spelled out the teaching of the dignity of the human person in his 1963 encyclical, *Peace On Earth*. He wrote that the rights every person possesses are "universal and inviolable, so that they cannot in any way be surrendered." And in the 1994 statement, *Death is Not the Answer*, the Catholic bishops in New York State summarized the teachings on human dignity. They wrote, "as teachers and pastors, we are called to proclaim a set of moral principles known as Catholic social teaching. At the heart of this teaching is the knowledge that the human person is central, the clearest reflection of God among us. Every person possesses a basic dignity that comes from God, not from any human quality or accomplishment, not from race or gender or economic status. Human life is inherently precious." They continue to say, "those who commit crimes do not give up their human dignity, and those who administer justice must not deny this God-given dignity."

Echoing throughout the condemnations of capital punishment is this acknowledgment of the sacredness of human life. It is this teaching that has overridden previous acquiescence in the Catholic Church to capital punishment. No longer would the "forfeiture theory," in which one who takes a life would forfeit his own right to life, have currency in the Catholic tradition.

The second major rationale for opposition is the death penalty's categorical incompatibility with essential Christian teachings. The Kansas bishops articulated this point in their 1994 statement in which they asked, "Can the death penalty be reconciled with the teachings and examples of Jesus Christ? He teaches us that His Father's greatest gift to us is life and, next to life, is love, mercy and forgiveness. The Creator gives to us this life. Next to life is love, mercy and forgiveness."

"We believe firmly that the death penalty takes us down the wrong road of life. It fuels vengeance, diverts from forgiveness and greatly diminishes respect for all human life. At the same time," they go on, "we affirm strongly that the life of every person, and the breath of every person, regardless of status or the condition of that person, is in the hands of God."

Earlier this year the Catholic bishops of Illinois firmly amplified this basic conflict between Christian teaching and the death penalty. In February of 1996 they wrote, "people legitimately desire justice. However, justice cannot be achieved through vengeance. Vengeance is never a worthy motive. Our Scriptures direct us to a different ethic. The often-quoted proverb, they continue, 'an eye for an eye, a tooth for a tooth,' is not a prescription for revenge or a goad for further bloodshed, but a guideline to keep people from going beyond the original offense and escalating the violence." Jesus further clarified this position when He insisted that, rather than retaliate on any level, we should offer the other cheek and extend our hand in blessing and healing.

There is a third plank in most of the bishops' statements opposing capital punishment, although I would say it's secondary in importance to the first two that I mentioned. It concerns the people who are sentenced to death. William Rentschler said, "the death penalty is reserved exclusively for society's little people, its powerless." The bishops' statements inevitably point to the widely disproportionate numbers of poor people and people of color filling in the more than 3000 death row cells in our country. The evolution of this strong Catholic opposition to the death penalty has coincided with the pontificate of Pope John Paul II. He spoke out with increasing clarity and conviction in opposition to capital punishment. He has made numerous personal appeals for clemency on behalf of condemned felons, many times to governors of states in our country. Most significantly, he issued an encyclical letter, which was one of the Roman Catholic Church's most

authoritative forms that articulated the evolution of teaching on capital punishment. This 1995 encyclical is entitled *Gospel of Life*.

John Paul II states very clearly that the state has the responsibility to impose adequate punishment on criminals. The purposes of such punishment are threefold, he says: to defend public order; the protection of people's safety; and rehabilitation of the offenders. John Paul II draws his conclusion on the death penalty in this way: "It is clear that for the purposes to be achieved, the nature and extent of the punishment must be carefully evaluated and decided upon. It ought not go to the extreme of executing the offender except in cases of absolute necessity. In other words, when it would not be possible to otherwise defend society."

Today, however, he adds, "as a result of steady improvement in the organization of the penal system, such cases are very rare, if not practically non-existent." With this teaching, John Paul II clarified the Roman Catholic position on this issue. The evolution has been underway for over three decades, since the Second Vatican Council. It has resulted in clear repudiation of the death penalty. It is morally acceptable only when no other means would defend society. While casuistry can attempt to expand this peephole of possibility for justifiable capital punishment, the meaning is very clear.

The Pope's articulation of his teachings in the *Gospel of Life* made plain that those who seek to defend this deplorable punishment on the basis of Catholic Church teachings have no ground upon which to stand. The position of John Paul II and various groups of Roman Catholic bishops roots itself in the principle of moral theology. It would be a mistake, however, to conclude that this perspective does not have a practical application. The opposition to the death penalty contains a great deal of practical wisdom.

United States Court of Appeals Judge Richard L. Nygaard accents the bishops' view on the ineffectiveness of vengeance. He wrote, in *American Magazine*, "by exacting revenge upon criminals, society drops to the social stratum of its dregs . . . Leaders know, and have known for centuries, that civilization requires restraint and that open personal revenge is socially destructive . . . Official revenge is no better, and the results are no less odious. By using revenge, by catering to the passions of society, government tells its citizens that vengeance is acceptable behavior—it is just that you, the individual cannot exact it." Judge Nygaard's statements about the efficacy and the cultural and deleterious effects of vengeance points to our law having given a prominent place to something that the Illinois bishops declare is "never a worthy human motive."

To some extent, our culture accepts getting even as a justifiable motive in matters both trivial and profound. I would say to



the extent religious traditions accept capital punishment today, it is a capitulation to this culture. The Roman Catholic position is, indeed, at odds with current U.S. laws as well as culture. The temptation is to be acculturated, that is, to conform to the prevailing cultural values, and to baptize the practice of imposing the death penalty. Proudly, I can say that the Roman Catholic teaching has moved steadily and purposefully in a direction that aligns it with its firmest principles and highest virtues. To prevail, which I do believe that abolitionist movement ultimately will do, our culture must be transformed. Roman Catholic teaching can be a major resource in this ongoing process.

MR. SARAT: I would like to give you the baseball metaphor, but that has been taken from me. So let me use several metaphors. First, let me remind you of Admiral Stockdale, was that his name? Ross Perot's vice presidential running mate, who said on the occasion of the vice presidential debate in 1992, "Who am I and why am I here?" If that doesn't do it for you, then let me conjure for you the image of what it's like to be the seventh speaker, actually fourteenth speaker today, by reminding you of the image of the sixth wife of Henry VIII on her wedding night. She was confident that someone would show up. She was just not sure how interested he would be. And I have that sense, although I am grateful that you all stayed.

I want to talk about a group that hasn't been much talked about. And that is the victims and the families of the victims. I want to talk about the desire of people like Mark Klaas, the father of Polly Klaas, to participate in the process through which her killer was brought to justice. We were all appalled at the image of Polly Klaas' killer making scurrilous accusations against her father. But the news media barely covered what Mark Klaas said beforehand. Mark Klaas participated in a ritual which is constitutionally kosher.

Another reason why I'm here is because you heard from the Protestants. You heard from the Catholics, with whom I think it may be possible to build an alliance. And now, one Jewish professor from a small college in western Massachusetts. As near as I can tell, none of our people are in Congress.

I am going to talk about revenge and retribution and the way in which the participation of victims in capital sentencing scrambles these categories, the way in which it brings neither consolation to them nor justice to the legal system. Why not murder the murderer? It would be justice. More to the point, it would be automatic and identical. And it would alleviate us of the responsibility for a decision, "an eye for an eye and a tooth for a tooth." But why not rape the rapist or torture the torturer? In this morning's presentation, you heard the comparison to rape used. I find it difficult to listen to that. Politically it's effective for those of

us with progressive political tendencies. After all, if we were to deal seriously with rape, shouldn't we deal seriously with murder?

We don't rape the rapist or torture the torturer because we wish, and it is always difficult, we wish to be different from them, to retain our humanity and our decency and our dignity. It is not about their decency and dignity. Not to allow them to make us instruments of the kind of evil that they have done. Now, in my own western Massachusetts way, I believe that the central teaching of the Supreme Court of the United States, a teaching which is not yet abandoned, is that at the heart of the decision as to whether or not someone is to be executed, is human judgment and responsibility. No positive law, and I say this with all due respect, no natural law can remove our responsibility to judge.

Professor Berns, while disclaiming his legal credentials, made, I thought, a brilliant, although very traditional, lawyer's argument with the citations of a string of strong authorities. I can't add the Pope. He is not on my team. So let me add two others who certainly don't belong in the company of either Professor Berns or the Pope.

First, and unfortunately he was on my team, Michael Dukakis. You all remember that telling moment in the 1988 Presidential debate when the anchorman, Bernard Shaw, asked Michael Dukakis, "What would you do if Kitty Dukakis were raped and murdered?" And all of us in Massachusetts at that moment said: if ever Michael Dukakis had a chance to be elected president of the United States--and, of course, he didn't-- what he would say next would end it. And sure enough, Michael didn't disappoint us. Do you remember his response?

His response was to deliver a lecture on drug education. So let me conjure up Michael Dukakis' right response. It would have been this: "Well, of course, if someone did that to my wife, I would want to kill them with my own bare hands. I would want to cut their head off and display it as if I was a character in *Macbeth*. But the aspiration of political and legal leadership is to ensure that my basest, though most understandable human instincts, are never translated into public policy."

With that response, he would not have been elected president. But he would have been more popular in my household. Well, I gave you Dukakis. And he is not much help. As a lead into my prepared remarks, I would like to give you someone who is really big. And that is Clint Eastwood. If you're a serious student of capital punishment and a serious person who wishes to engage in the subject of vengeance and retribution, you must see the film, *Unforgiven*. Clint Eastwood is a model for all of us. The older he gets, the wiser he gets. The older he gets, the better his films.

So let me take you to the last scene in *Unforgiven*. Remember the last scene in *Unforgiven*? Eastwood confronts the sheriff, Bill,

who Eastwood brilliantly cast as the former Eastwood. Remember Dirty Harry? Bill, in the film *Unforgiven*, plays Dirty Harry, the rogue cop. He confronts Ned, the sheriff, the Dirty Harry of sheriffs, who put to death Ned.

Now, you might ask why did Ned have to die? Well, if you all read *Tison v. Arizona*, well, I believe in close reading of film, then you know that Ned had demonstrated reckless disregard. Though he hadn't actually killed, he demonstrated reckless disregard. So Bill had the authority of the Supreme Court behind him. He didn't know it when he killed Ned.

In that confrontation, when Eastwood is about to shoot Bill, Bill says, "I don't deserve to die! I don't deserve to die!" Eastwood responds that "deserving" has got nothing to do with it. Now, we have been over this false choice. It's a false choice. Let me say that again. It's a false choice.

The false choice is either the world of the profound moralism of *Macbeth* or the existentialism of Camus. You put that choice to the American people. And most American people would say, "Who?" My challenge to those who are interested in public opinion on this issue is to frame the question for the citizens of California in the following way: "If you believe that there was significant chance that people who were factually innocent of crimes of which they're accused would be executed, would you be in favor of the death penalty?" My suspicion, my hope, is that even in California people would say no. Until that question is asked, until the question is asked, "Would you be in favor of the death penalty if you knew that the victims of the crime, that the race of the victims of crime is the best predictor of whether you get the death penalty?" then I don't think any of us should be listening to anything about public opinion. That's what I didn't have to say.

Now let me say what I came here to say. I am concerned with something called victim impact statements. I am concerned with them because I am concerned with the distinction between revenge and retribution. You see, I am a legal conservative. Harry Blackmun had it right. It took him a long time to get it right, but Harry Blackmun had it right.

Harry Blackmun said if you love the American legal system, you must hate capital punishment. Notice, Harry, who had whined for poor Joshua in *Deshaney v. Winnebago*, did not whine for the victims of capital punishment. He mourned for capital punishment. In the United States and Europe, a high tide of resentment is rising against the system of public justice. Victims are demanding that their voices be heard. In place after place, the demands have been met. In *Payne*, as you know, the United States Supreme Court approved statements by survivors concerning emotional trauma and personal distress caused by the loss of a loved one.

MR. BESCHLE: It's time for questions. If you were here in the morning session, you know that we have these handy microphones conveniently arranged. So if you would like, go to the microphone to ask your question. Perhaps, as a courtesy to the panel, I should ask if any of them have questions for each other, to get us going while people think and make their way to the microphone.

MR. BERNS: As a matter of fact, I have one for James Lund. Does the Pope say that the Commandment is: "Thou shall not kill?"

MR. SARAT: Don't answer that question. Are there any lawyers present in the room?

MR. LUND: I take my counsel's advice.

MR. BERNS: The Commandment is: "Thou shall not murder or commit murder." There is a difference.

MR. LUND: I guess it depends on your translation.

AUDIENCE MEMBER: I have a question for Reverend Land. My Biblical references aren't going to be complete, but how do you square your position on capital punishment with a couple things that Jesus said in the New Testament? The first is when He said about stoning the adulterer, "Let those among us who are without sin cast the first stone," which I interpret to be an anti-capital punishment position. Secondly, when He discussed in the Old Testament "an eye for an eye and a tooth for a tooth," He replaced that with a new law, which is "turn the other cheek" type thing, which I also interpret as being, you know, non-judgmental and anti-capital punishment.

MR. LAND: First of all, it doesn't really matter what I think. I'll give you the Protestant orthodox response, which is mine. But the fact is mine is pretty irrelevant. First of all, she was an adulteress. They weren't too serious about bringing adulterers to justice, unfortunately, in the first century. The classic understandings of that is the commentary that you can go read from Luther, Calvin, right on up to the present is that they are violating the Levitical Law by mob violence. You apparently looked at the Levitical Law reason, and I went to *Genesis*. And *Genesis* predates Levitical Law and supersedes Levitical Law, that there had to be eyewitnesses to the adultery.

Jesus evidently was saying they weren't there. He said, "Which of you, which of you is going to violate Levitical Law and do this," would be my understanding of that. And when He talked about rejecting the idea of "an eye for an eye and a tooth for a tooth," and this is very important for you to understand, as far as I am concerned and as far as most evangelical Protestants are concerned, let me be very careful here because there may be Protestants who disagree with me. If I try to speak about Protestant theology in the last decade of the 20th century, that might kind of

nail me to the evangelical tree because Protestant theology is all over the place with nearly as many opinions as there are Protestants. So I am talking about a specific segment, which is the only way one can speak about artfully, which is mine. That when He talks about mercy and “turning the other cheek” and rejecting vengeance, He is talking about the fact that we do not have the right to respond by taking peoples’ lives when they have done injury to us or harm us.

As Martin Luther King put it, he said, “I myself am dubious about whether or not I have the right to use lethal force to defend myself. I am certain that I have an obligation to use lethal force to defend you.” There is that tension involved in terms of the use of violence. The answer that I think Michael Dukakis should have given was, of course, “I am a human being. And I would be outraged. My immediate response would be to try to kill this person myself for doing this terrible thing to my wife. That’s why I am excluding myself from serving on the jury. That’s why we have government, to dispassionately attempt to determine what happened and why, and to have a jury of peers who are not subjective, as I would be. A jury who could separate themselves from a family member’s killing.” I think Jesus is saying that we have a responsibility not to exact vengeance. But we do have the right to expect the state to punish those who do evil.

As an evangelical Protestant, I do not see one scintilla of difference in authority between the teaching of Jesus and the Gospel and the writings of the Apostle Paul in *Romans:13* where he lays out the New Testament standard for the reason that God ordained, which is to punish those who do evil up to and including the use of the sword and reward those that do right.

AUDIENCE MEMBER: In terms of the argument that it’s the state’s responsibility and it’s the state exacting this punishment, perhaps what you were talking about earlier. But the state is necessarily made up of people. And we have certainly learned that human fallibility is present in everything we do. I mean, it seems there is no way you can put it off on the state because the state is made up of people and graphic stories of, you know . . .

MR. LAND: Let me say to you I cannot sit on a jury in capital cases. They probably won’t let me in our system. Last Christmas my wife gave me a copy of the *Life* magazine which was published the week that I was born. It advertises these catalogues. And it happened to be the first week in November of 1946. As I was thumbing through this, I saw a double page picture of a list of pictures. And it just so happens that the list of pictures were the Nazi war criminals who had been condemned and hung in Nuremberg. I long for a society that can still make that kind of justice distinction. Surely if people ever deserved to die for their crimes, it was those people. I am glad that the Orthodox jury and those

who influence such things were able to convince the State of Israel to execute.

MR. LUND: I would like to say a couple of things. One is that my reading, Catholic reading, of *Genesis:9* is different. It's not a pretext, in our view, to justify capital punishment. But it's a sad commentary and a reality as a result of human sin. We are called on to respect human life first and foremost. And the other thing I can say is the heinous incident of the Nazi crimes cannot be understated. It's dangerous to compare by any analogy. But I would say that most major governments in the 20th century have got pieces of a Holocaust that they have perpetrated themselves. So many more could possibly be done in a civil way.

MR. SARAT: This is dangerous talk. And it's really important to observe that it's talk and to notice the examples that are used. I must say that if you don't work with college sophomores, they don't. The sophomores pick up very quickly that every example has a child killer or a Nazi in it. Now, I'm sure this is true for all you, it certainly is true for me, that part of participating in these events, is that they are ritual events. And I give great credit to John Marshall for bringing together the north pole and the south pole. But it's really important to notice the language and the examples that you've offered.

The Nazis. What do you do about the Nazis? And then to suggest that you can move easily from a society that can distinguish the Nazis from Jefferson. Right? That's the example that we were offered earlier. If you don't execute the Nazi, then you cannot make a rational distinction between a Nazi and a hero. I think that's not an accurate argument. Now, I also don't think it is helpful in the debate of capital punishment in the United States to say, well, I want to live in a society that could execute the Nazi. I want to live in a society that can prevent the mentality of the Nazi. I want to live in a society that teaches the lesson that evil-doers should not have power over all of us by compelling us to do to them what they have done to us.

So my question is: would the appropriate punishment for Hitler or Eichmann not to have been executed, but actually to have been tortured, to have been gassed? I think the answer to that question is no. Why? Because decent people don't do indecent things. So the Nazi trump card is rhetorically designed to get us into a debate in which the progressives are alive with people who are sympathetic to the Nazis. I refuse to participate in that conversation.

MR. LAND: That's outrageous. That's outrageous.

MR. SARAT: Thank you.

AUDIENCE MEMBER: What I find astonishing is that really I don't find you all that far apart. I think what is being acknowledged here is that we are learning something about capital pun-

ishment. We are learning something about victimhood. We are learning something about perpetratorhood. And I remember the Catholic Church's position that was very akin to "an eye for an eye." What I am wondering is, whether or not we're getting someplace here.

The other thing that is very fascinating is that all the countries in Europe without a single exception, all of them went through the Holocaust, all of them went through horrors of civil war in which the death penalty was used as a political tool. And none of them had the death penalty. If the last exercise of the death penalty was the killing of the Nazis, there is something that happened with that execution that ultimately ended executions. And I don't know why that was. And that's what I was wondering, if perhaps that could be something that is coming out of this. They were killed.

There was a story in yesterday's *Sun Times* about a man who literally tossed them off. They were all hanging. And I wonder whether or not there was something that, when that happened, something that said we acted like they were such that it ended. Something that actually ended. All European countries ended the death penalty shortly afterwards.

MR. LAND: Well, my response to that would be that's not the case. My understanding of that history, and I will stand corrected by those who perhaps know it better, is that it was the American government that was insistent upon both the Nuremberg trials and the trials of Japanese war criminals. And, of course, our opinion about capital punishment was, as you can still see here today, somewhat ambivalent.

AUDIENCE MEMBER: I do know about the Nuremberg trial. And you're absolutely correct. There were four parties: England, France, Russia and the United States. The problem is that only England and the United States had "innocent until proven guilty." Russia and France had "guilty until proven innocent." They couldn't get that going. Next it was discovered that England said: "We really don't care. Frankly, we just want to kill them. We won." And it was discovered that Russia was doing everything that they were accusing the Germans of doing. So ultimately America did take on that goal. And yes, it remained a completely American process except in the minor trials which then involved the other states. There is something that happened effectively after that war and after those deaths that permanently stopped the death penalty in most European countries and in a very short order. I was wondering how that happened, why that happened. And I wonder whether or not it had something to do with acknowledging, perhaps, that we had become like them. And perhaps we discovered that now in Israel too.

MR. BERNIS: May I introduce something here? You're quite

right. Everything you mentioned is quite right with other countries and particularly European countries that have abolished the death penalty. There was specific reference made earlier to the fact that Croatia has abolished the death penalty. Do you think Croatia is a model for us? They may not execute. But they send their army in and kill, kill, kill. So Croatia is a model for us? Now, as to this Nazi business that so offends Professor Sarat . . . .

AUDIENCE MEMBER: And the rest of us.

MR. BERNS: All right. You all applauded his remarks, or most of you did. In the preface to my book *For Capital Punishment*, I mention the fact that I was not involved in this question of capital punishment and got involved in it only because of the Supreme Court. And I was teaching constitutional law. And I didn't know what my position on it would be. But my position hardened almost simultaneously when I encountered the example of this person who directly after World War II began and continued throughout his life the task of hunting down these Nazis who escaped into the world at the end of World War II.

I found myself admiring that singular activity. How could a man devote his entire time to hunting down the likes of Adolph Eichmann, these monsters who had done what they did? I won't risk offending the sensitivities of Professor Sarat getting into the question of what they did. But here is a person who devoted his life to it. And I found myself admiring that person. And I suspect that most of us admire that person for what he was doing. Why was he doing it? To bring these people to justice. I raised the question for myself. When we catch them, what are we going to do to them? What would be the appropriate punishment for them?

If we go into the criminology books and look at the question of punishments and its purpose, it is deterrence. Do we punish Adolph Eichmann in the hope that we might deter others? For example, those Serbs today and those Croats today or those Palestinians today. Surely, that's altogether vain, isn't it? There is no prospect whatever that we're going to deter these others by executing or punishing in some other fashion Adolph Eichmann. Now, what about rehabilitation? The criminology texts are filled with talk about rehabilitation, rehabilitate the criminals. Would anybody in his right mind think that you're going to rehabilitate Adolph Eichmann? Why then do we bring or why do we think it's right to bring the likes of Adolph Eichmann to justice? To punish him. Why? To pay his debt under the due process of law, not by torture, of course.

I take offense as much as Mr. Land would. But under the due process of law. And I think I am right in saying that Adolph Eichmann is the only man they have executed, to pay him back. What else would you do?

AUDIENCE MEMBER: I just want to make this comment. I



am a black Catholic law professor abolitionist, who also is a survivor. My sister was murdered. My roots are California. I lived there a long time. I am presently living in Kentucky. So I'm kind of a little bit of everything. I am really kind of offended by Dr. Berns. Maybe I am not hearing correctly. But Dr. Berns' and Dr. Land's suggestions that I am not admirable and that also because abolitionists oppose the death penalty, therefore, we don't feel for Polly Klaas. I feel for my sister who was murdered. I never once wanted the death penalty for her murderer. And your suggestion that I am not seeking justice done, therefore, I am not admirable. No to punishment, yes to maybe life without parole. But to kill her murderer, I don't see what it accomplishes. I don't see that that makes a grandiose notion of justice. And I really resent the notion.

Richard Davis is a very severely disturbed man. I abhor what he did to Polly Klaas. I would not want to see that done to anybody. I didn't like seeing my sister murdered. But I would not want that person executed. Richard Davis, life without parole. He is a danger and should never have been let out of prison in the first place. But that is here and done. And the thing with Dr. Land saying something about capital punishment and *The Bible*. I understand it's a Southern Baptist position because the scripture allows it, therefore, the state should have it. And it should be there. And this notion that maybe there is something immoral or amoral about me because I just don't believe in it and I don't want it.

I was ready to go testify on his behalf for sentencing. And that kind of leads me to your talking about victim impact statements. I know that prosecutors do not want this. They do not want the victim's family members getting up there and saying please do not give this person the death penalty, life without parole, life and forty, life and ten. I don't care. But don't give him the death penalty. The prosecutor in my sister's case wouldn't indict, which goes back to Richard Dieter's point about the race. The murderer was white. She was black. She was drowned in mud. The prosecutor refused to indict because my position was no death penalty. He also said, "Well, I am not going to get a conviction anyway because she is black." I have a lot of statements out there.

MR. LAND: First, let me express my condolences to you for your loss.

AUDIENCE MEMBER: I am not concerned . . . .

MR. LAND: Let me say, first of all, in response to your question about the Southern Baptist position, you shouldn't have to accept capital punishment unless the majority of America decides that way and unless the courts decide that way. That's how we decide things in the United States. You and I have a profound disagreement philosophically. As to the question of not being admirable, I certainly have not said that. In fact, I would not have

said that during the course of this entire day. One of most insufferable things that I have had to endure, as Dr. Berns has had to endure, is the assumption of the mantle of moral superiority of those who oppose my position. I mean it oozes from every pore. I am used to it. I'm not really offended by it. But it is insufferable.

It is the people who are against capital punishment under any circumstance, under any circumstances that are assuming moral superiority. As far as I am concerned, what happened in Nuremberg was not vengeance. And we didn't do to them what they did to us.

AUDIENCE MEMBER: I am talking about my sister, an average, normal murder in the United States, not genocide. And people accuse me. They say, Roberta, you're taking a position of superiority, moral superiority because you are against capital punishment and your sister was murdered. So you think you're better than everybody. Maybe I do. What is wrong with that?

MR. LAND: I just think I have a position . . . .

AUDIENCE MEMBER: People like you, I am saying, people like you use that argument.

MR. LAND: Which argument?

AUDIENCE MEMBER: That we think we're superior in some way.

MR. LAND: I think any panel of objective observers that watch this today would come to the same assumption.

MR. BERNs: May I respond. I think you heard me say things that I didn't say. I certainly did not mean to imply that anyone like you who holds your position is not to be admired or is not admirable. My concern is that the United States is made up of citizens who are angry at crime. And one knows that one can express anger in various ways. I assume that with the murder of your sister, you think that he or she should be punished in some way.

AUDIENCE MEMBER: I already said that.

MR. BERNs: And the basis of that judgment is, I think, your anger and your grief. But your anger, too, at this person. And I repeat. I did not say what you heard.

AUDIENCE MEMBER: I also said I am Catholic. And I am not a good Catholic anymore. But I am stuck with that. I believe in forgiveness. And I have forgiven this person. That doesn't mean I don't want to punch him. Those are two very separate issues.

MR. LAND: Then we agree.

MR. BERNs: In my remarks earlier, I referred to Abraham Lincoln. And I said he executed or allowed the execution of 257 persons. And I said he did with whatever reluctance. And one can understand the reluctance of something. Lincoln said one time when he had a petition in front of him, a death warrant to sign, he said you can't understand how hard it is for me to allow someone to die when I know at the stroke of my pen I can save him. I can

appreciate that. I am sure, knowing myself, that I would feel the same sort of thing if I was in his position. One reason I don't run for public office, I suppose, is I don't want that position.

MS. BOTHNE: We have ten minutes left and two or three people who want to offer questions. Perhaps we as panelists can limit our comments. Thank you.

AUDIENCE MEMBER: I'm not sure this question is appropriate. But let me address Professor Sarat. You talked about victim impact statements as though that might be a factor in your mind in determining whether or not capital punishment is acceptable or not. How the victim felt before they made their statement then after the execution, that is one question. And the follow-up would be if there was a substantial difference, if the people felt better, thought there was closure, would that change anybody's mind relative to whether or not capital punishment is valid?

Then if I can follow-up with Mr. Lund, he seems to be an authority on Catholic bishops. I there believe this is the same group of Catholic bishops who came out, as Pope John Paul did, against birth control. About ninety-two percent of Catholics don't pay attention to that. And they also came out against abortion. And most people do not follow that. So why that citation of authority?

MR. LUND: You put the thing out there. I believe it's true. And if you believe it's true, you work on them. If you don't believe they're true . . . .

MR. SARAT: The question isn't the victim impact statements. For me it's an important indication of the idea that retribution plays in that capital punishment system. So I don't know the answer to the first question about what would the empirical data show about healing, consolation, relief. And over what period of time we would want to have looked at. I just don't know.

AUDIENCE MEMBER: I would like to ask a question to Dr. Land and Dr. Berns, if I may. I heard from both of you on various points. And there were certain comments where you wanted abolitionists to be cognizant of the long-term effect of their positions for making decisions down the road. Well, I certainly agree with Professor Sarat. Hopefully we can prevent that necessity. But I haven't heard either one of you address the responsibility that you can't really get out of speaking for capital punishment in this country. Once you're handed the statistics that over a period of about twenty years, it has stayed stable, if I understand the statistics correctly, that the chance of being put to death is multiplied in the United States four times if you kill a white rather than a person of color. Now, what I would like you to say clearly to yourselves and, therefore, to us, is how can you—especially Dr. Land, a theologian—justify not taking responsibility for the outcomes of your position, knowing that the real choice in the United States—

even Justice Blackmun, who I also think is quite right, finally came to, and very reluctantly on his part—might be all right in theory to have a death penalty, but we can't seem to fix the way we're doing it. And, therefore, we'd better stop.

MR. LAND: Let me answer first, mine is shorter than Dr. Berns. I do accept responsibility for racism in the United States as an American, as a white American. And I am the person who led the campaign for Southern Baptists to apologize for slavery and to apology for racism and to ask for forgiveness of the African-Americans and to seek reconciliation. Doing away with capital punishment, how is that going to end racism? It's whites reaching out and transforming other whites.

AUDIENCE MEMBER: Excuse me, Dr. Land. You're talking around my question.

MR. LAND: I am trying to answer your question. This is the United States. Unless I'm on a stand, I get to answer the question the way I want to answer it. And I also said at the outset of my remarks, you can check the recorder, that I was not defending capital punishment as it is practiced in the United States. I was asked to give a theological perspective on the question of capital punishment. And from my theological perspective, it is an option open to the civil magistrate. And I have said publicly on prior occasions, and I will say it here, if we are going to advocate the use of capital punishment when a murder has taken place, then we must be as committed to an equitable and just application as we are to its application. In my own head and my own mind and my own career, that is true. I can only take responsibility for my career, my heart and my efforts.

MR. BERNs: My answer to that question is very simple. At the end of my book, it's possibly the last chapter, I am on record saying that if we cannot administer the death penalty in fair fashion, it should be abolished.

AUDIENCE MEMBER: Isn't twenty years enough of a proof that it can't?

MR. BERNs: I am sorry. I didn't hear.

AUDIENCE MEMBER: The question is now it's been twenty years we've been trying. And as we say, we cannot do this. Everything we've done for twenty years, the Supreme Court has supposedly tried to make it equitable. And you end up with Justice Blackmun coming out with, "I have tried for twenty years." You cannot make this work equitably. Therefore, we must stop doing it. Twenty years is enough.

MR. BERNs: That's a position that I can respect. Before passing judgment on it myself, I will look in greater detail at what it is, in fact, how it's been administered. I am not persuaded by some of the statements made from the panel here. For example, there have been studies by the Rand Corporation that undermine

some of the statements made here about the races involved in the administration of the death penalty. But I repeat, I said it in my book and I mean it, we cannot do this. It's not a question of cruel and unusual punishment. It's a question of equal protection of the laws.

MR. BESCHLE: Last question.

AUDIENCE MEMBER: Wait a minute. I just want to make sure. I come from a traditional mainline Protestant tradition where we just recently, along with about seventy-five percent of all Christians, Protestant Christians in the United States, put together a statement against the death penalty. And I want to be very clear about something before I go back to work and before I continue this work so I have a better understanding. The civil authority that you claim Christians are to give deference to, would you not agree, sir, that the civil authority of the German government was the same civil authority that killed its own citizens and killed so many people around the world? Would you not agree that was civil authority, sir?

MR. LAND: Sure. I would. And I would respond by saying that the Christians should do what the Confessing Church did.

AUDIENCE MEMBER: Professor Bowers, I have worked with jurors over the last several years. I sat in courtrooms where the judge will begin the colloquy with the jurors saying how many here are opposed to the death penalty, how many are in support. But opposed to the death penalty, and on the average there are about thirty, forty jurors, every single time, whoever raises their hand, the judge will very politely and very judicially say, "Thank you, have a good day." These people are dismissed from that jury room, from that courthouse and into the street as if they had done something wrong. I want to know what kind of theological or psychological study of jurors have been conducted in a country who has decided that they should impose the death penalty? We know there are going to be victims who continue to suffer even after their loved ones have been executed. But what is happening to the jurors in this country? What is happening to the judges in this country and the people in the streets as we continue to execute people?

Finally, as a theologian, I can tell you according to Scripture, I want to be very careful around that little phrase "an eye for an eye" or "a life for a life." Because if you notice, we don't put a verb in front of that little phrase. And we don't do that for a very good reason. The verb is not take. If you read *The Bible*, you will see that the word is "give": "give an eye for an eye," "give a life for a life." It is very clear that the death penalty was only to be used in most rare and most extreme circumstances and not as a matter of course, especially against the poor.

MR. BOWERS: Our interviews with capital jurors contain a wealth of answers. But they are yet to be fully examined. I can

say a couple of things, though, in response to your question.

Your question about what happens when the judge dismisses people who say "yes, I am opposed to the death penalty" in the presence of other prospective jurors is a good one. There is research showing that this experience of seeing other jurors dismissed for being opposed to the death penalty at the very beginning stage of the trial makes the remaining jurors more likely to think that the death penalty is the appropriate punishment in the case they are going to hear.

In this connection, when we asked jurors "Do you think that the death penalty is required under the laws of [your] state if the defendant is proven to be a danger to society, or if the crime is heinous, atrocious, or depraved?" Under each of these circumstances, thirty to forty percent of the jurors say that they believe the law requires the death penalty. Well, one of the things we know from this morning's session is that the Supreme Court absolutely forbade the mandatory imposition of the death penalty at the time of the *Gregg* decision in its *Woodson* and *Roberts* rulings. The Court held that under no circumstances could the law require the death penalty to be imposed automatically, without the consideration of mitigating factors because so doing would violate the constitutional requirement of individualized treatment in capital sentencing. Many capital jurors obviously fail to learn this fundamental constitutional principle along the way. There will be much more to say on this and related matters of juror decision-making as our work proceeds.

MR. BESCHLE: Unfortunately, we have really got to stop. You can continue this, however, informally with your favorite or least favorite panelist at the reception.