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Symposium on the Death Penalty: Reforming a Process Fraught with Error: Foreword

Eric M. Freedman
Maurice A. Deane School of Law at Hofstra University

SYMPOSIUM ON THE DEATH PENALTY: REFORMING A PROCESS FRAUGHT WITH ERROR

FOREWORD

Eric M. Freedman[*]

There is less due process and more error in death penalty trials than in any others we conduct.[1] No one defends this state of affairs; the debate is over how to improve it.

There are those who believe that this quest is foredoomed—that the death penalty, whatever its theoretical merits—"cannot be administered in accord with our Constitution."[2] Others suggest that the system might yet be saved if it is substantially reformed.[3] And still others, while supporting ultimate abolition, also support ameliorative interim steps.[4]

This Symposium provides a forum for those taking the latter two viewpoints, exploring a number of suggestions for addressing some of the most salient flaws in the capital punishment system in contemporary America.

In the initial article, *Earl Washington's Ordeal*, I describe the saga of one of my capital clients, a mentally retarded black man who came

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* Professor of Law, Hofstra University School of Law (LAWEMF@hofstra.edu). B.A. 1975, Yale University; M.A. 1977, Victoria University of Wellington (New Zealand); J.D. 1979, Yale University. Professor Freedman has been an active capital defense litigator for many years. The *Hofstra Law Review* gratefully acknowledges Professor Freedman's invaluable contributions to the planning and development of this Symposium.

1. *See generally* Brief of Amici Curiae, People v. Harris (N.Y. Dec. 19, 2000) (No. 1399), *to be reprinted in* 27 N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2002); ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 147-49 (2001); JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995, at 2-3 (rev. ed. 2000).

2. Callins v. Collins, 510 U.S. 1141, 1157 (1994) (Blackmun, J. dissenting from denial of certiorari).

3. *See, e.g.*, James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2156 (2000).

4. I count myself among these.

within days of execution in Virginia but was—after nearly eighteen years of imprisonment—ultimately released after the volunteer efforts of a multi-disciplinary team of professionals was finally able to convince the authorities that, as DNA testing showed, he was simply innocent. Because I believe this story encapsulates many of the most serious issues that confront the death penalty system today, I offer it as a helpful framework within which to view the specific ideas that follow.

The next three articles focus on the ultimate nightmare of any justice system: the execution of an innocent person. To deal with this chilling spectre, Senator Patrick Leahy has introduced pathbreaking legislation, reprinted in this Symposium, that would both require the states to provide DNA testing where it might show innocence in capital cases, and begin to move them down the path towards improving defense counsel and ending the barbaric practice of executing juveniles.[5] In *Preventing the Execution of the Innocent*, Peter Neufeld and Barry C. Scheck, who are certainly the most active lawyers in America focusing on the problem, each lay out the dimensions of the challenge and discuss legislative solutions. Significantly, both of them emphasize that the recent spate of exonerations through DNA testing should not mislead reformers into believing that the provision of such testing will solve the underlying problems. Since only ten of the ninety-eight death row exonerations recorded since 1976 involved DNA testing,[6] nine-tenths of the solution must lie elsewhere, beginning with the provision of competent defense counsel.[7]

In light of the Supreme Court's current disposition to narrow congressional authority under Section 5 of the Fourteenth Amendment and to protect the states from congressional mandates altogether,[8] is this legislation within the powers of Congress? Professor Larry Yackle, a leading scholar on the role of the federal courts in protecting individual

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5. *See generally* Innocence Protection Act of 2001, S. 486, 107th Cong. (2001), *reprinted in* 29 HOFSTRA L. REV. 1113 (2001).

6. *See* Death Penalty Information Center, *Cases of Innocence: 1973-Present*, *at* http://www.deathpenaltyinfo.org/innoccases.html (last visited Oct. 29, 2001).

7. *See, e.g.*, LIEBMAN ET AL., *supra* note 1, at ii.

8. These developments have been fully documented and analyzed in a series of scholarly reports by the Association of the Bar of the City of New York. *See generally* COMM. ON CIVIL RIGHTS, ASS'N OF THE BAR OF THE CITY OF N.Y., SALVAGING CIVIL RIGHTS UNDERMINED BY THE SUPREME COURT: EXTENDING THE PROTECTION OF FEDERAL CIVIL RIGHTS LAWS IN LIGHT OF RECENT RESTRICTIVE SUPREME COURT DECISIONS (2001); COMM. ON CIVIL RIGHTS, ASS'N OF THE BAR OF THE CITY OF N.Y., CONGRESS' CONTINUING AUTHORITY TO OVERRIDE ELEVENTH AMENDMENT IMMUNITY IN THE WAKE OF *SEMINOLE TRIBE V. FLORIDA* (1997); COMM. ON FED. LEGISLATION, ASS'N OF THE BAR OF THE CITY OF N.Y., THE NEW FEDERALISM (1999). *See also* Leon Friedman, *Supreme Court Federalism Decisions*, 16 TOURO L. REV. 243, 244 (2000).

liberty, addresses this question in his contribution, *Congressional Power to Require DNA Testing*. After setting forth the pertinent text of the proposed statute, Professor Yackle presents a comprehensive demonstration that—even under the Court's current restrictive tests—Congress has the authority to enact it.

Moving away from the innocence issue, *Probing "Life Qualification" Through Expanded Voir Dire*, by John H. Blume, Sheri Lynn Johnson, and A. Brian Threlkeld, also illuminates an issue whose obscurity is out of all proportion to its practical significance. The authors, whose empirical work on capital juries has been a continuing source of new insights for scholars and litigators alike, present a richly-documented case that the current system of voir dire is ineffective in weeding out jurors who cannot give mitigating evidence the weight to which it is constitutionally entitled, and then set forth a series of practical measures to help improve the situation.

In the final contribution to the Symposium, Professor Penny J. White presents *Errors and Ethics: Dilemmas in Death*. Professor White—who was Justice White of the Supreme Court of Tennessee until she was hounded from the bench by a disgraceful political campaign accusing her of being "soft" on the death penalty[9]—presents a broad survey of many of the sources of error in the current system, together with suggestions for reform. Shedding light on problems that are too often overlooked, she emphasizes the importance of creating effective mechanisms to ensure that prosecutors and judges, as well as defense lawyers, meet their professional obligations.

Regardless of one's ultimate views on the death penalty, all citizens who believe in the aspirations of our justice system should be grateful to this Symposium's contributors for the candles they have lit.

9. *See* Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397, 456 (1999); *see also* John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 471 (1999); Stephen B. Bright, *Casualties of the War on Crime: Fairness, Reliability and the Credibility of Criminal Justice Systems*, 51 U. MIAMI L. REV. 413, 416-17 (1997).

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