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A Symposium on the Death Penalty

The Association of the Bar of the City of New York

Leon Friedman

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A SYMPOSIUM ON THE DEATH PENALTY

The Association of the Bar of the City of New York

I. ELEANOR JACKSON PIEL: INTRODUCTION

On May 4, 1994, the Association of the Bar of the City of New York presented a symposium on the Death Penalty. The purpose of organizing this symposium was to highlight the immediate issues raised in pending legal thinking about the death penalty and to mobilize lawyer volunteers to take on death penalty cases in collateral relief proceedings after conviction in states which impose the penalty. Today, close to 3,000 death-sentenced prisoners are in the pool of defendants asking for expert legal representation.¹

Although none of the participants in the symposium anticipated Arkansas’ wholesale threesome execution performed on August 3, 1994,² each of the seven speakers addressed the issues involved in this draconian ritual. The fact that the United States is alone among Western developed nations in maintaining this punishment in thirty-eight states and as a federal punishment³ is a phenomenon with which each speaker was concerned. Yet each speaker—five lawyers and two lay-persons—brought a unique perspective to the subject.

Norman Redlich, former dean of the New York University Law School, dean of death penalty opposition in the State of New York, and veteran of many a battle in the New York State Legislature, analyzed the real motivation behind death penalty advocacy to be vengeance and revenge.⁴ Taking heart from Justice Blackmun’s dissent from denial of a petition for writ of certiorari in Callins v. Collins⁵ as heralding a new era in judicial reasoning, Mr. Redlich looked

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3. Federal Government Set to Resume Executions, N.Y. TIMES, Mar. 14, 1995, at A26; see also Scott Shane, Execution Puts Md. with 22 Other States, BALTIMORE SUN, May 18, 1994, at 10A.
4. See infra text accompanying note 28.

627
forward to a more general judicial recognition in the future that "death . . . is different" and accordingly, that the penalty can never be imposed on a rational basis by the state or federal government.  

Leon Friedman, a Professor of Constitutional Law at the Hofstra University School of Law, and Ring Lardner, a writer and non-lawyer, both raised the issue of the innocent defendant charged and sentenced to death. He contrasted the Canadian and British approach to a claim of error in the judicial process leading up to a murder conviction. He noted that the American emphasis on the process minimizes the fact of innocence or guilt. This emphasis was incomprehensible to the Canadians and British who were concerned with whether the conviction was based on substantiated facts. Lardner, who exhaustively investigated one death penalty case where defendants were wrongly accused yet sentenced to death nonetheless, analyzed the kinds of motivation that frequently lead to unjust prosecution where the concern is political gain rather than truth-seeking.

Barry Scheck, Clinical Law Professor at Cardozo Law School, illuminated the innocence factor even further with his discussion of new scientific DNA testing techniques. He described how the acceptance of these techniques can establish innocence in a court proceeding years after conviction, as long as the defendant is still alive.

Ronald Tabak, head of the Death Penalty Committee of the American Bar Association's Section of Individual Rights and Responsibilities, discussed aspects of the federal crime bill, at the time of this writing still not enacted into law. This bill, as passed by both houses of Congress, has greatly expanded the number of federal crimes that can result in a sentence of death; these crimes include murders resulting from drive-by shootings and carjackings, murders resulting from use of a firearm during a violent crime or drug-related

6. Id. at 1132; see infra text accompanying note 46.
7. See infra text accompanying notes 34-36; see also Callins, 114 S. Ct. at 1134-35.
8. See infra text accompanying notes 49-65.
9. See infra text accompanying notes 49-53.
10. See infra text accompanying note 49.
11. See id.
13. See infra text accompanying notes 66-79.
14. See infra text accompanying notes 84-86.
offense, and murders resulting from attacks, using firearms, on federal facilities. Tabak also discussed the deplorable state of federal habeas corpus, which should be a vehicle for correcting injustice but instead has piled technicality upon technicality to defeat the formerly perceived purpose of the Great Writ. He further addressed the possibility of passage of the Racial Justice Act, which would permit an inference that race is the basis for the death sentence where statistics can support the inference.

The concluding speaker, Sister Helen Prejean, author of the book *Dead Man Walking*, challenged public thinking on the issue as being uninformed. She emphasized that the penalty is mainly imposed on poor people and is a further hazard for poverty in our society. The inability of the poor to finance their defense when charged with capital crimes is also an obstacle to effective legal representation of defendants at trial. Although the courts will appoint counsel, such counsel is often inexperienced, unmotivated, and inadequate. Sister Prejean appealed to the Bar to volunteer and to take on death penalty cases. Adequate legal representation will make it just that much more difficult for prosecutors and the courts to succeed in imposing the ultimate penalty of death.

II. NORMAN REDLICH: REVENGE AND VENGEANCE AS RATIONALES FOR THE DEATH PENALTY

The death penalty can be analyzed in terms of the past, the present, and the future. Regarding the past, which includes such milestones as the New York Committee to Abolish Capital Punishment and the successful effort to halt executions in the State of New York, the current debate, or non-debate, on the death penalty is
different from the real debate of the past. Perhaps one reason the
death penalty was abolished in 1965 in the State of New York was that the issue was debated on the merits. It was debated in terms of
deterrence, recidivism, and cost. The one factor that was not debated was vengeance. The idea that it was legitimate to execute people for revenge was simply not a legitimate argument. Revenge was not regarded as an acceptable instrument of governmental policy.

All that has changed. Perhaps one reason why rational debates on the death penalty do not exist is that revenge is undebatable for those who believe that anger, or getting even, is enough to justify state-sanctioned murder. Revenge is a justification that is not a matter of logic or of reason, but one of emotion—an area that many politicians who play to emotion can dominate. As the crime rate and the murder rate have risen, all elements of rational discussion—deterrence, recidivism, and the possibility that the innocent can be convicted—get pushed aside. As one listens to the debates today or talks to people who are in the legislature, it is clear that rational debate on the death penalty issue no longer exists.

The situation in New York at the present time is perilous. During the Carey and Cuomo administrations, bills reimposing the death penalty were passed and repeatedly vetoed by the Governors. Efforts were made to override the vetoes. In March of 1994, the vote in the New York State Senate was only one vote short of the two-thirds vote required to override Governor Cuomo's veto. The following month, a similar vote in the New York State Assembly was eleven votes short of an override margin. Thus, the reimposition of the death penalty in New York depends on two things—a Governor who will veto the bill and sufficient votes to prevent the two-thirds vote needed to override.

31. The death penalty was reimposed in New York State subsequent to this live symposium. Governor George Pataki signed a death penalty bill on March 7, 1995 and the death
DEATH PENALTY SYMPOSIUM

The political process in connection with the death penalty has been an interesting one. In 1990, Barbara Shack and I organized Justice-PAC, a political action committee designed to raise money for one purpose—to support those candidates for the New York State Legislature who are opposed to the death penalty. The committee has been a remarkable success. It has demonstrated that opposition to the death penalty is not the equivalent of political suicide. For example, after the primary four years ago, the Albany daily newspaper ran a headline which said, “Support for Death Penalty Fatal to Two Candidates.” It was fatal because the Assembly candidates were in favor of the death penalty and they lost to candidates who were opposed—the death penalty was an issue.

Part of our job must be to persuade political figures that the death penalty is not an issue on which people win or lose elections. The reason we find ourselves in a difficult situation in the Legislature is not so much with regard to the incumbents, for they have learned that they will not be voted out of office because of their opposition to the death penalty. Rather, the difficulty arises because candidates by open slate in the Legislature believe that it is important to run on a pro-death penalty program. That can gradually tip the balance. Indeed, that is what is happening and that is why the presence of a Governor is so very important.

In New York State, I predict it would take one execution, one all-night vigil or one prayer vigil, for the people to realize how fortunate we have been that New York State is not in the murder business. This is happening in other parts of the country, and the courage and conviction of a handful of people is all that prevents it from happening in New York State now.

For those opposed to the death penalty, it is terribly important to revert to the political process because, ultimately, only through the political process will reimposition of the death penalty be prevented.


gratitude, not just for *Roe v. Wade*, but also for his dissenting opinion from a denial of certiorari in *Callins v. Collins*.

I have believed for the longest time that the death penalty issue will eventually disappear; this scar on the face of justice will be removed in the United States. I have felt this way because, since 1976 when *Gregg v. Georgia* was decided, the judicial system has been on an impossible mission to rationalize the death penalty. Anyone who has litigated with regard to the death penalty knows that it is impossible to rationalize the death penalty. Too many variables exist. One simply can not say that out of the 10,000 to 20,000 non-negligent homicides committed each year, the 250 or so persons who are sentenced to death are the ones “deserving” to die—that they are the most heinous, the most premeditated, killers. The process simply cannot produce such a degree of rationality. We have embarked on this mission that was doomed from the outset to fail.

Justice Blackmun pointed out this fallacy. He revealed in his dissenting opinion in *Callins v. Collins* why he could no longer be part of “the machinery of death.” He pointed out that our system tries to achieve rationality and yet still ends up killing people on the basis of race. The system tries to achieve individual justice in each case. However, at the same time the system decides that in federal habeas corpus cases, guilt or innocence in an individual case is not a relevant factor in determining whether a person is going to be executed. Justice Blackmun concluded that there is simply no way that the death penalty, any more than any other penalty, can be rationalized so that the punishment of a small number of people can somehow be rationally related to the large pool from which that small number is drawn. Justice Blackmun reached the crossroad, and he stated it passionately and brilliantly. He pointed out that this country must decide whether it will abandon the effort to rationalize the death penalty and treat death like any other penalty, thereby proceeding.

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34. 114 S. Ct. 1127 (1994).
36. See *With Death Penalty*, supra note 1, at 2.
37. See *Callins*, 114 S. Ct. at 1132.
38. Id. at 1130.
39. See id. at 1135.
40. See id. at 1137-38.
41. Id. at 1134-35 & n.4.
42. See id. at 1131-32, 1138.
to execute hundreds, perhaps the majority, of the approximately 3,000 prisoners on death row. Or, if the effort to make the penalty rational is not abandoned, then the death penalty must be abandoned because with the recognition that death is different and that the death penalty cannot be rationalized, the only alternative is to abandon the penalty. So we either have to abandon the effort to rationalize the penalty and continue to kill people, or we have to abandon the penalty and recognize that death is different.

Harry Blackmun worked his way to that crossroad. He is the only Justice I know of who started from the position of not opposing the death penalty as a matter of constitutional law. Rather, he came to the crossroad and decided that “death . . . is different.” Justice Blackmun realized that he could no longer be part of “the machinery of death,” and the only solution in his mind, after recognizing that “death . . . is different,” is to abolish the death penalty. Harry Blackmun traveled that road alone, and he is the first person in his position to have decided which path to follow. It is my belief and my hope that as time goes on, more Justices of the Supreme Court will follow the path that Harry Blackmun did, and the day will come, sooner rather than later, when the death penalty is relegated to the dustbin of history.

III. LEON FRIEDMAN: THE PROBLEM OF WRONGFUL CONVICTION OF INNOCENT PEOPLE

I am going to discuss innocence and the death penalty. The reason why I was inspired to discuss it is that two months ago I went up to Canada, and they had some notable cases in that country where two people who had been convicted of murder some twenty years before were discovered to have been erroneously convicted. The Canadian government then came forward and in the procedure that they had available, released the two of them, and there was quite a bit of publicity about it. About the same time, of course, In the Name of

43. With Death Penalty, supra note 1, at 2.
44. Callins, 114 S. Ct. at 1131-32, 1138.
45. Id.
46. See id. at 1132.
47. Id.
48. Id. at 1130.
49. Id. at 1138.
the Father appeared in various movie theaters around here, and the problem about the Guilford Four and the McGuire Seven also got a lot of attention. The British government appointed a Royal Commission to look into this problem.

Canada and the United Kingdom do not have the death penalty. So, even though a very long period of time had elapsed between the original convictions and the discovery that these people were innocent, some redress was available, and they were released, and indeed got some compensation for it.

There was an international conference up in Canada about what to do about wrongly convicted people. I came up from the United States, since I had represented Rubin Carter, who is now living in Canada. I said: "We have a very interesting system in the United States. We have a double system where most of the murder trials occur in the state system and then we have the federal courts which overlook what happens. So we have this parallel system for checking up and making sure that an improper conviction did not occur. But in the United States, we do not care about innocence. That is the last thing that we care about. If the prosecutor did not hand over a piece of paper when the prosecutor should have, then we will give you a new trial. But if five witnesses go forward and say you did not do it, we do not care about that." The Canadians and English sort of looked at me [as if to say] "Oh, gee, what a peculiar system you have down there."

So what I thought I would offer to you is how the Canadians and the British deal with the problem of innocence. As a result of the two cases featured in In the Name of the Father and Conlan and the McGuires, a Royal Commission was appointed. The Royal Commission has issued a report just two weeks ago, called "Criminal Appeals and the Establishment of a Criminal Case Review Authority." Without going through all the details, what it proposed (and the government went along with this) is that there should be established something called a Criminal Case Review Authority—a non-governmental body that would examine whether there was fresh evidence that the person had not committed a crime. The way the British have done it, the Authority should admit fresh evidence, and the test should be whether the evidence is "capable of belief." If evidence

51. Id. ¶ 15.
capable of belief leads a court to believe that under all the circum-
stances of the case the conviction was "unsafe or unsatisfactory." a new trial should be ordered. So, they set up a new system under which some independent Authority views new evidence, and if it is capable of belief, the Authority decides whether to present the entire case to a court of appeal; the court of appeal will decide to order a new trial if under all the circumstances of the case, the conviction was "unsafe." Indeed, the Commission recommended a broader rule: that the conviction is or may be unsafe.

The Canadians have a similar system. Let me remind you, there is only a unitary system in both the British criminal procedure and the Canadian procedure, so that they do not have a separate set of habeas corpus courts examining them. An independent body in Canada has made the same recommendation: that a Criminal Courts Review Authority look into fresh evidence after a conviction is final, and refer the case to a court of appeal if there are reasons to suppose that a miscarriage of justice might have occurred.

What is the rule in the United States, the civilized country with the Bill of Rights, if fresh evidence is produced that a person may be innocent? The Supreme Court tells us in Herrera v. Collins. A new trial can be ordered as a matter of constitutional law only if "no rational trier of fact could find proof of guilt beyond a reasonable doubt." What we have done—and it is always nice to take a half a step backward on some of this—is that we have a death penalty where if we make a mistake, the consequences are horrendous. Let me refer you to Hugo Bedau and Michael Radelet's article, Miscarriages of Justice in Potentially Capital Cases. They studied how many innocent people have been either executed or sentenced to death and they came up with 135 cases. Stephen Markman and Paul Cassell challenged some of their cases, they rejoined it, and

52. Id. ¶ 7.
53. Id.
54. Id. ¶ 9.
55. 113 S. Ct. 853 (1993).
56. Id. at 873 (White, J., concurring) (quoting Jackson v. Virginia, 443 U.S. 307, 324 (1979)).
there is a lot of fuss, so maybe it is 135, 129—give or take a couple of innocent people here or there. So, we have a very funny inverted system where we are extremely sensitive to any procedural defect, and there is nothing wrong with that, but the minute there is no procedural defect, but some doubt or new evidence that perhaps the person is innocent, our system does not care about that.

The irony is that we have a death penalty, where the consequences of making a mistake are even more serious. The British and the Canadians certainly have crimes and are certainly interested in sending people away and are certainly interested in not keeping the system open forever for people to make new claims. Yet, the governments in both of those countries have recommended systems under very broad standards to allow a fresh inquiry into cases where there is some evidence "capable of belief"\(^60\) that leads a court to believe that the conviction is unsafe or may be unsafe or may be unsatisfactory.

I think we should ask ourselves: why this passion for the death penalty over the last thirty years, and why has it become such a contentious issue? Sister Helen Prejean said something on television a little while ago when someone asked her why she is ministering to these "terrible, horrible creatures" that kill people and destroy them in such a sadistic way. She said: "A man is more than the worst thing he has ever done." That really struck me. The whole point of the death penalty and what it does is to distance ourselves, to dehumanize everybody, and we perpetuate that whole dehumanizing process by saying to a convicted killer: "You are not worthy of life and let's kill you as quickly as possible." Something has happened, and I cannot quite put my finger on it, to add to that sense of tension or malaise under which we continue this dehumanizing process. I think the death penalty simply adds to it and continues a process that we have to face up to and do something about.

IV. RING LARDNER, JR.: CAN THE DEATH PENALTY BE MORALLY JUSTIFIED?

One of the points of contention on this issue of the death penalty is whether or not it can be morally justified. Strangely enough,

when we look at the list of nations that lead the world in executions, all but one are either officially Islamic or officially anti-religion.  

The United States alone among the leading practitioners of the death penalty is what could be called a predominantly Christian country, in which the moral justification for capital punishment is frequently based on Christian principles.  

But even if we grant, for the sake of the argument, the premise of “a life for a life”—that the person who kills has forfeited his own right to live—we have to postulate a supreme, almost Godlike, moral authority, free of any taint of bias or self-interest, that can exercise completely impartial judgment on who deserves to live or die.  

A few years ago, after Eleanor Jackson Piel told me about her case of Earnest Miller and William Jent and their eight years on death row in Florida and how she and her associates had freed them, I undertook to write a screenplay based on the case. We have been unsuccessful so far in persuading anyone to finance the movie, but the case was a classic example of how far from the ideal of impartiality the organs of government can be at every level of law enforcement. The local police in this case arrested men against whom they had personal antagonisms on very slim evidence. The police and prosecutors worked together to intimidate witnesses into utterly contrived testimony. The Attorney General’s office which argued the appeals and the judges who decided them were so ready to accept flimsy evidence that I found it hard at first to grasp the motives behind such corruption and lack of reason.  

I gradually learned from the record and from many interviews with the individuals in the case, the importance, the prestige and the political gains these people attached to a death penalty case or a death penalty conviction. In central Florida at least, these cases, these convictions could be deciding factors in promotions and election

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victories. What was even more shocking was the stubbornness with which all of these people clung to their fictional version of the case in the face of clear proof of the identity of the murder victim and of her actual murderer. Still refusing to admit any of its egregious errors in the case, the Florida State Attorney's office threatened to re-indict and re-try the defendants. Faced with the prospect of remaining in confinement indefinitely and the possibility of new perjury, Miller and Jent agreed to a palpably absurd plea bargain which set them free immediately and saved face for the prosecutors.

The moral and rational level of many people in public office on whom, literally, questions of life and death could depend was further illustrated to me by a newspaper story a couple of weeks ago about the anti-crime bill which the previous speaker mentioned. That bill greatly increases the number of federal offenses subject to capital punishment. During the House debate on the bill, speaking of the death penalty, Representative Bill McCollum from, of all states, Florida, said that while statistics might not indicate that it deters crime, it is common sense that it does. He then proceeded to vote in favor of "crime-stopping" amendments providing that flags be flown at half-mast on Peace Officers' Day and that the penalty be increased for selling a Congressional medal of honor.

I do not agree that capital punishment can be morally justified, but I concede that it is a debatable issue. What is not debatable, is the impossibility in any human political system, of applying an irreversible punishment with the impartiality which would have to be part of a moral justification.


65. See 1994 Crime Act, supra note 15; see also infra text accompanying notes 104-34.

66. Statistically it is impossible for us to be able to demonstrate that [the death penalty is a deterrence] in every case because the people who do not commit the crimes . . . are not around on death row or in jail somewhere to interview. But it is just common sense, and I think it has been proven by many, many studies that the death penalty indeed does deter a substantial amount of crime when it is carried out properly.

V. Barry Scheck: The Use of DNA Evidence in Death Penalty Cases

Timothy Spencer was executed in Virginia on April 27, 1994 based on DNA evidence. The DNA evidence in the Spencer case was tested through a technique referred to as a restriction fragment length polymorphism test ("RFLP"), which is performed by Lifecodes Corporation. Unfortunately, by the time lawyers who were adequately funded had an opportunity to look at the evidence in the Spencer case, many of the defects that were found in some of the early cases involving DNA evidence were also found to be present in this one. If the case had been litigated earlier, on the issue of ineffective assistance of counsel, there is a good chance that Timothy Spencer, who was executed solely on the basis of DNA evidence, would not have been executed.

This describes one of the problems with DNA testing that has existed from the beginning. Not only is DNA testing complex, but it also takes time, effort, and money to litigate. One of the most interesting aspects of DNA testing, scientifically speaking, is that when one attempts to match the DNA profile which is extracted from the DNA found in a blood stain, a piece of hair, sperm from a vaginal swab, saliva on a cigarette, or saliva from an envelope, scientific problems arise due to difficulties in calculating the statistical significance of the match. What does it mean that the DNA profiles match? Is it a coincidence? Is the statistical significance placed at one in a million or one in a hundred? These are complicated issues, and a large number of these issues are still open for litigation.

One aspect of DNA testing, an exclusion, has never been at

67. *In a First, Man Convicted on DNA is Executed*, N.Y. TIMES, Apr. 29, 1994, at A18.
70. Hoeffel, supra note 68, at 468; Brownlee et al., supra note 68, at 29.
73. *Id.*
issue scientifically. An exclusion is the conclusion from a DNA test that the DNA found at a crime scene does not come from a particular individual, in many instances the defendant. In People v. Castro, the prosecution's claim that blood found on the watch of the defendant came from the murder victim was defeated. On the other hand, the prosecution's claim that the blood did not come from the defendant—an exclusion—was never disputed.

Another form of DNA testing is through a technique called polymerase chain reaction, or PCR-based testing. The inventor of this form of DNA testing, Kary Mullis, received the Nobel Prize in Chemistry. PCR-based testing is a technique whereby small amounts of DNA can be amplified. As a result, one can look at cases that are over a decade old, and if a cigarette butt, a hair with a root, a vaginal swab from a rape victim, or a blood stain on a piece of clothing can be found, the case can be reinvestigated to produce persuasive evidence of innocence. Even under Herrera v. Collins, the case from the United States Supreme Court which limits the right to go into court and litigate the issue of innocence, there is room for truly persuasive evidence of innocence. Interestingly, at oral argument in Herrera, Justice Kennedy at one point noted, "Well, you are not saying, Mr. Prosecutor, that if there were a videotape or a DNA test that you couldn't come into court with it." This is significant since we are in courts all over the country with DNA tests.

If any inmate in the United States says he or she is innocent and that this can be proven through DNA testing, faculty and students at Cardozo Law School, as part of the school's criminal law clinic, will make an effort to track down the defendant's evidence and arrange for a test to validate or not validate the claim. Lawyers are also

75. 545 N.Y.S.2d 985 (Sup. Ct. 1989).
76. Id. at 998.
79. Thompson, supra note 77, at 28.
82. Id. at 861.
84. See Jim Dwyer, They Use DNA to Tell the Truth, NEWSDAY, Sept. 23, 1994, at A2;
helped in this effort. Eric Freedman, Associate Professor at Hofstra University School of Law, was one of the lawyers to whom some modest help was provided. Thanks to DNA testing, his client, Earl Washington, a man on death row in Virginia, had his death sentence removed in January of 1994. In November of 1993, Kirk Bloodsworth, an individual on death row in Maryland, was also exonerated through DNA testing. So far, at least fifteen people have been cleared of guilt through post-conviction DNA testing.

DNA testing is a complicated process for many reasons. The most basic reason is that the factual innocence model of criminal justice is not in place in this country. We have a due process model. Factual innocence often takes a back seat to the due process model.

DNA testing is different because people can really be proven innocent through use of this technology. Herrera v. Collins can be interpreted in a number of ways which would be beneficial in terms of using DNA evidence. For a post-1989 case in which the lawyer could have used DNA evidence to exonerate a client and some evidence is available to prove this, a claim of ineffective assistance of counsel should be made. Such action may be harsh on the lawyer in some respects, but it is the kind of professional failure which can make a huge difference and can create a probability of a different verdict. At this point in time, in cases where DNA testing could be dispositive, a lawyer has an ethical obligation to obtain a waiver from his or her client stating that the client does not want the DNA testing. Without such a waiver, the failure to perform such testing can not be considered a strategic decision. Rather, it can be an ineffective decision by counsel.

In a case where the failure to perform DNA testing was a strategic decision, or if the case is in a jurisdiction where there are stringent time limits on the right to bring a claim of newly discovered innocence, Diane Struzzi, They Answer Last Prayers of Innocent, ROANOKE TIMES & WORLD NEWS, Nov. 6, 1994, at A1.
87. Brownlee et al., supra note 68, at 29.
90. 113 S. Ct. 853 (1993).
91. See generally Neufeld, supra note 71, at 199.
evidence and such time limits have expired,\textsuperscript{92} can one still proceed to get access to the evidence and try to present proof that a client is innocent through DNA testing? I believe this can be done, on a number of different grounds. First, \textit{Herrera} provides room to introduce the evidence if truly persuasive evidence of innocence exists.\textsuperscript{93} Second, \textit{Herrera} is predicated on the notion that even if a defendant will not be given a hearing on the claim of innocence in the federal courts, the defendant can still go to a state court and receive a pardon or a commutation of his or her sentence. The defendant should have a right to access the DNA evidence to perform a test, if only to get a pardon or a commutation.\textsuperscript{94}

Another problem is a practical but difficult one—who pays for the DNA testing? These tests typically cost between $2000 and $3000 in a complicated case. Defendants are really encouraged to pay for these tests. We even provide free lawyering, and somehow they come up with the money. However, a very interesting case decided by the United States Supreme Court, \textit{Little v. Streeter},\textsuperscript{95} involves the right of an inmate who is accused of being the father of a child in a paternity case to have the State pay for a genetic test. \textit{Streeter} leaves some room to argue that if the defendant, or even the convicted person, is indigent, but there is a strong possibility that a DNA test would prove innocence, perhaps in these instances the State should be required to pay for the test.

The most difficult issue being confronted is that sometimes the evidence is not saved or the prosecutor is unwilling to find it. I can make a comment about Virginia based on personal experience, since we have proven three people innocent in Virginia now, although one person was recently executed on what I would consider poor DNA evidence.\textsuperscript{96} The crime lab people in Virginia are at least consistent; they have been very helpful in trying to get the evidence and perform the tests to prove a person innocent. Not every jurisdiction has been so helpful, and there are serious problems.

A final problem is the issue of third parties. Mr. Catterson was

\begin{itemize}
\item \textsuperscript{92} See Neufeld, supra note 71, at 198.
\item \textsuperscript{93} Cf. \textit{Herrera v. Collins}, 113 S. Ct. 853, 869 (1993).
\item \textsuperscript{95} 452 U.S. 1 (1981).
\item \textsuperscript{96} See Peter Baker, \textit{DNA Test to Free Man Imprisoned in Virginia Rape}, WASH. POST, Oct. 21, 1994, at A1; Neufeld, supra note 71, at 197-98; supra text accompanying notes 67, 85.
\end{itemize}
the prosecutor in the Suffolk County, Long Island case of Kerry Kotler, who had been convicted of rape.\textsuperscript{97} There was a great deal of evidence of prosecutorial misconduct, and non-DNA evidence showed that Kotler was an innocent man.\textsuperscript{98} A DNA test revealed that Kotler could not have been the contributor of the sperm found in the underwear of the victim; the prosecution had contended that this sperm had come from the rapist.\textsuperscript{99} When the defense\textsuperscript{100} put forth this motion and introduced the DNA test, the prosecution asserted that perhaps the sperm did not come from Kotler, but rather came from the victim's husband.\textsuperscript{101} The prosecution refused to allow the husband to be tested, but a court order was produced requiring that the husband be tested.\textsuperscript{102} The tests on the husband did not reveal a match either, so the charges against Kotler were eventually dropped.\textsuperscript{103}

Problems are being encountered all across the country as a result of the emergence of what one of the scientists I work with calls post-conviction ejaculators who are donators of blood stains or hairs. We are forced to run around, trying to get court orders to get samples from them, and there is very little law that authorizes us to do so. Also, some distinct privacy problems exist. But such are my tribulations these days.


Lest you think I got too swelled a head when the American Lawyer gave me the individual lawyer pro bono award that year, I noticed that its law firm pro bono award that year was given to the firm of McKenzie & Brackman, the fictitious law firm of L.A. Law. I do not know what that meant about my work.

What I am here to talk about tonight are aspects of the federal crime bill of which you may not be aware, and how Congress' ac-
tions reflect the impact of politics on the death penalty. We are, regardless of Governor Cuomo's vetoes and re-election prospects, going to have a substantial expansion of the death penalty in this state because of this crime bill. Those of you not already representing death row inmates may wish to get practice in doing cases in other states and thereby get ready for handling cases here.

Among the things that without any controversy passed both houses of Congress is a provision whereby all murders through the use of guns in the course of drug trafficking crimes are subject to the federal death penalty. When you consider how many firearm murders occur during crimes involving drugs, you will recognize that this is a major expansion of the federal courts' jurisdiction over capital punishment cases. This may clog the federal courts. Yet, I have heard no members of the federal judiciary complaining about this in the way they did about Senator D'Amato's amendment (which got into the Senate bill), which would have provided that any murder involving a gun that crossed interstate lines is subject to the federal death penalty. The latter provision was dropped from the bill which emerged from the conference committee, but there ought to have been similar concern expressed about the former provision.

There is also a provision authorizing the death penalty for any robbery of a federally insured bank in which death results. That obviously could significantly expand the federal death penalty. The bill also authorizes the death penalty for any killing at a civil international airport (such as Kennedy Airport), murder in aid of racketeering activity, murder for hire, carjacking where death results, a drive-by shooting where death results, murder on any federal land (such as a federal park), a kidnapping where death results, major drug felonies committed by drug kingpins involving large quantities of drugs or large quantities of money, even if nobody has been killed, and major drug felonies committed by drug kingpins who, in proceeding to try to obstruct the investigation or the

104. 1994 Crime Act, supra note 15, § 60013 (to be codified at 18 U.S.C. § 924(i)(1)).
105. Id. § 60003(9) (to be codified at 18 U.S.C. § 2113(e)).
106. Id. § 60021(c) (to be codified at 18 U.S.C. § 37).
107. Id. § 60003(a)(12) (to be codified at 18 U.S.C. § 1959(a)(1)).
109. Id. § 60003(a)(14) (to be codified at 18 U.S.C. § 2119(3)).
110. Id. § 60008 (to be codified at 18 U.S.C. § 36).
111. Id. § 60003(a)(4) (to be codified at 18 U.S.C. § 111(b)).
112. Id. § 60003(a)(6) (to be codified at 18 U.S.C. § 1201(a)).
113. Id. § 60002(a) (to be codified at 18 U.S.C. § 3591(b)(1)).
prosecution, attempt to kill or direct or assist somebody to kill a person involved in the investigation; you do not even actually have to succeed in killing anyone.\textsuperscript{114} The Supreme Court has up to now held that somebody has to have actually been killed in order for the death penalty to apply.\textsuperscript{115} It remains to be seen how the Supreme Court will deal with these latter two provisions, which provide for capital punishment even if no one has been killed.

These provisions were all passed overwhelmingly. The reason they have been enacted into law is that George Bush was defeated for re-election. You may wonder how that could be, since George Bush favored all of these things. When Bush (and before him, Reagan) was President, we had a form of political gridlock between Congress and the President on crime bills for twelve years. There was always something about what the Democrats were willing to pass that the Republican President threatened to veto, so most provisions in those bills were not enacted.

Bill Clinton came to office fresh from his experience in Arkansas, to which he flew back during the 1992 New Hampshire primary in order to deny clemency to Ricky Rector; a man who had shot himself in the head after committing a murder and who thought that after being executed he was going to get to go back to his prison cell to finish eating his dessert and later vote for Clinton.\textsuperscript{116} Bill Clinton ran on a platform saying he supported the death penalty. He has been true to his word.

Even some Democrats who always (or almost always) voted against the death penalty have voted for the death penalty provisions in 1994. Other Democrats, such as Charles Schumer (who, when in the New York Assembly, fought hard against death penalty legislation) have evolved over the years into legislators who vote for the death penalty. When I met with Congressman Schumer (a law school classmate of mine) to discuss habeas corpus in the autumn of 1993, he said, among other things, that he felt that by supporting gun control he was going to save more lives than I would ever save by opposing the death penalty and trying to save habeas corpus. My answer was, "Chuck, you may very well be correct, but why does that mean that you should not oppose the death penalty or do more to

\begin{itemize}
\item \textsuperscript{114} Id. § 60002(a) (to be codified at 18 U.S.C. § 3591(b)(2)).
\item \textsuperscript{116} See George E. Jordan, Lawyer: Execution a Disgrace, N.Y. NEWSDAY, May 4, 1992, at 19.
\end{itemize}
save habeas corpus?” Many people, such as Chuck Schumer, who do understand these issues, apparently feel that for their political advancement or to give them credibility on other things they want to enact, like gun control, they must support the death penalty. I do not believe it really is politically necessary for such legislators to vote for the death penalty, but they do vote for it.

This same view of political reality is also why legislation to try to bring some life back into habeas corpus, which the Supreme Court has been wrecking over the years,117 was unable to pass in 1994. Basically, the view that prevailed was, “Let’s do nothing.” That is what the Clinton Administration really wanted. What the House Judiciary Committee proposed, but was removed on the House floor, would have attempted (a) to provide for good counsel for people in trial and in state post-conviction proceedings in death penalty cases; (b) to change the unfortunate judicially legislated rules about retroactivity, harmless error and evidence of innocence; (c) to once again require federal evidentiary hearings when material facts are not developed in state courts; and (d) to deal with the pernicious procedural default doctrine, under which you can be executed because your lawyer failed to object to what a federal court unanimously holds is unconstitutionality in sentencing which is not harmless error.118 (In Dugger v. Adams,119 in which I argued unsuccessfully for Mr. Adams, the Supreme Court effectively held by a 5-4 vote that we cannot let the federal courts consider the merits of meritorious constitutional claims where juries have been fundamentally misinstructed about their role in imposing the death penalty; otherwise, horror of horrors, all too many of these people who were sentenced to death in violation of the Constitution in what was not harmless error would have to have their meritorious claims heard by the federal courts.) I guess Congress considers it better to have the federal courts devote their time to drive-by shootings and bank robberies where the federal death penalty is sought than to correct egregious constitutional errors which were not harmless.


118. The habeas corpus proposal of the House Committee on the Judiciary was removed from the bill by a vote of 270-159. See 140 CONG. REC. H2420-21 (daily ed. Apr. 19, 1994). A weaker version of the proposal was also defeated by a vote of 256-171. See 140 CONG. REC. H2426-27 (daily ed. Apr. 19, 1994).

The rubric behind many of the Supreme Court's restrictions on habeas corpus is that the trial is supposed to be "the main event." But what if the trial was a "fixed fight" because you had no decent lawyer, you had no DNA testing, you had racial discrimination with an all-white jury, and defense counsel did not know of evidence bearing on the defendant's guilt or innocence that the prosecution hid from the defense? Under the Supreme Court's recent habeas jurisprudence, you cannot get relief under these circumstances.

When this comes up in Congress, the key questions in many members' minds are which proposal is asserted to be "tough on crime" and are my state attorney general and local district attorneys going to say that I am weak on crime if I do not vote in a particular way? Most members are afraid to be put in the position of being accused, no matter how fallaciously, of being soft on crime.

The crime bill enacted in 1994 might have, but ultimately did not, include one positive proposal: the Racial Justice Act. This passed by what was effectively a tie vote in the House of Representatives, but was then removed in the conference committee and not included in the bill which was enacted into law. It would have provided that an inference that race was the basis of the death sentence is established if valid evidence demonstrates that at the time the death sentence was imposed, race was a statistically significant factor in decisions to seek or impose the death sentence in that jurisdiction. In the McCleskey case in 1987, evidence that the General Accounting Office (which has no position on the death penalty) later said was statistically valid showed that a defendant in Georgia was several times more likely to get the death penalty if his victim was white then if his victim was black, even after taking into account
account the nature of the crime, who the defendant was, and what else the defendant had done. This is far more substantial evidence than the evidence that cigarette smoking causes heart disease. The Supreme Court held that this did not violate the Constitution. The Court said it was a matter that ought to be left for legislative bodies. So, among other groups, the American Bar Association (which has no position on the death penalty) said, in effect, "Fine, legislative bodies, please do something about this; please pass the Racial Justice Act."

What will happen if the Racial Justice Act is enacted is that a defendant could get relief in certain cases. There could, under the proposed Act, be rebuttal by the State if an inference of racial discrimination is created. For those of you who read the New York Post editorial last Wednesday, entitled "Lies about the Racial Justice Act", please understand that the only lies connected with that editorial were the lies of the editorial in distorting the Racial Justice Act beyond recognition. A simple disparity, such as there being a lower percentage of blacks in the population than on death row, would, without more, not be sufficient for relief to be granted under the Racial Justice Act, and no rebuttal thereof would be required. Moreover, if anyone tried to impose quotas, that would violate, not comply with, the Racial Justice Act. The only way to get relief using statistical evidence under the Racial Justice Act would be to look at similar cases and establish that under similar circumstances there is a pattern of racial discrimination. The Act would not mean an end to the death penalty, because the study in the McCleskey case itself showed that in the most heinous cases, such as that of someone like John Gacy (if he had been in Georgia), there is no pattern of discrimination, so such people would still get executed.

In order for the Racial Justice Act to get enough votes to be passed by the House, its supporters had to agree that they would not make the Act retroactive. So, people who have already been the victim of this kind of discrimination could still have gotten executed even if the Racial Justice Act had been enacted in 1994. If the Racial

131. See McCleskey, 481 U.S. at 319.
134. See Tabak, supra note 130, at 801-04.
Justice Act had been enacted into law in 1994, it would have been a modest, halfway decent provision. What occurred instead is that a law replete with disastrous capital punishment provisions was enacted without enacting the Racial Justice Act.

VII. SISTER HELEN PREJEAN, CSJ: POVERTY AND THE DEATH PENALTY

The book *Dead Man Walking* was published last June. I thought that what happened when you wrote a book was that you did a little book tour and then you went home and your life was normal; but I have been on the road ever since with that book. In it, I tell the story of my journey and what happened to me. People say to me, “What are you, a Catholic nun, doing, getting involved with death row inmates?” And my direct, simple answer is, “Because I got involved with poor people.”

I moved into the St. Thomas housing project on June 1, 1981, because my religious community, the Sisters of St. Joseph of Medaille, had made a decision to become involved there, along with other religious groups. There are some really healthy good bubbles coming up in the Catholic Church causing people to become involved in issues of justice and with the poor, which has really come out of liberation theology in Latin America. I was working in the St. Thomas project when, one day, a friend who was working in the Louisiana Prison Coalition office asked me if I would be a pen pal with a death row inmate. I said, “Sure.” I did not know much about the person on death row except I knew that if he was sitting on death row he was poor, and I was right.

In *Dead Man Walking*, the whole story just unfolds. I tell the story, knowing that while there is tremendous rhetoric about the death penalty, most people do not think about this issue very much. But once you lift the rock up on this issue, you see there are a lot of ants crawling underneath it, and in fact many people feel ambivalent about the death penalty and do not have any true information about it. Thurgood Marshall, in both in his *Furman* opinion and his *Gregg* dissent, said there is public opinion about the death penalty but it is not informed public opinion.

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As I got involved with this man, Patrick Sonnier, on death row, the first shock to me was the abysmal nature of the defense that he had gotten. My father had been an attorney, and I was working with the naive assumption that while people on death row may not have had a perfect defense, I really thought that they had adequate defense. I soon found out why, and it is no secret, over seventy percent of all United States executions go on in five Southern states. Louisiana is one of them. The lawyer who had defended Pat Sonnier at his trial had never before handled a capital case and visited with Pat for just two half-hour periods to prepare his defense. One was on the morning of the trial itself. It was so abysmal.

I did not know anything about the law. All of this was just unfolding for me. I was just accompanying this man and I did not look into the law. I just presumed the lawyers knew what they were doing, but the volunteer attorney who took Pat's case on appeal did not know what he was doing either. I sat in the Fifth Circuit when he did his oral argument, and he was sweating profusely. I knew nothing about the law but I knew we were in deep trouble when the conservative Fifth Circuit at one point said to him that it would have been helpful if he had done a variety of things which they proceeded to list. I felt, "Gee, are we in deep trouble here!" I did not know that all of this time, legal gates were shutting in terms of the possibility of saving Pat's life.

Listening to that Fifth Circuit argument led me to phone a man named Millard Farmer in Atlanta. I hit the poor man like a firehose. I said, "Mr. Farmer, I know you do not know me. I am a Catholic nun. I have been visiting this man on death row. I think we are in deep trouble. I was just in the Fifth Circuit. I think, in fact I know Mr. Farmer, that he really needs an attorney. Would you please do something?" Over the phone I heard a gravelly Georgian voice say, "Sister, we are going to 'hep' you. We are going to 'hep' you." That very day, I mailed him the court transcripts of Pat Sonnier's legal proceedings.

Thereafter, as I tell in Dead Man Walking and as the story unfolded, unbelievably to me, I watched Pat Sonnier die. Millard Farmer was there, too. He held my hand. We sat next to each other as witnesses. Pat Sonnier and I had talked and at first he had said, "Oh no, Sister, you can't be there because it's too horrible a thing to see and it could scar you for life." But I just absolutely knew down in the roots of my soul that there was no way that this man was going to die without a loving face to see. I said, "Pat, you just look at my
face, look at my face, and I will be the face of Christ for you.’’ This is not what God wants us to do to each other. And in the end, I was the last face he looked at before he died. I walked out of the execution chamber with Millard Farmer in the middle of the night, April 5, 1984, and it was for me like a second baptism in my faith. I have been talking about the death penalty ever since and working to abolish it.

I am before you tonight, flying in from Washington from a meeting to be with you even for a few short minutes and having to go back to Washington early in the morning because I know there may be some of you sitting in these chairs that possibly may be able to take one of these post-conviction cases, and you might be able to save someone’s life. My appeal to you is simple, and it is direct: if there is any way that you can take a case, I beg of you to do that.

Prior to Pat’s execution, we had no legal resources organized in Louisiana. The Louisiana Prison Office was trying to monitor all prisoners in Louisiana. Just shortly before I began getting involved with the poor, two young black men had been placed in “hot houses” (as they call them) in country jails, where they had smothered to death. These were very small steel boxes where prisoners were confined, and the heat was so bad that they had died in them. Things were so bad.

After Pat’s execution, we sat down at a kitchen table at Hope House in the St. Thomas project where I was working. Millard Farmer was sitting at the table. I said, “We’ve got to start a legal office just to represent death row inmates, because in Louisiana a man leaves the parish jail after he’s condemned to death; he goes to death row at Angola, a Louisiana state penitentiary, and he usually has two letters: one gives the date of his execution, in six weeks, and the other is a letter from his trial attorney terminating his services, saying that he has done all that he is required to do; then, the death row inmate has no one to represent him, and he faces death. So, without a volunteer attorney for the post-conviction phase, he will die.”

We founded an office on $26,000. Millard said, “Call up some attorney graduating from law school and ask him to give a year of service in Louisiana.” We did, and Marcia Blum responded. She had graduated from (I think) Northeastern University, we paid her a salary of $12,000, and she had no help. She was the first to grab that rope. She would get on the phone and it would take twenty calls calling lawyers all over the country to get one case handled. But then we got
the federal funds and now we have the Loyola Death Penalty Resource Center. So, at least we are beginning to cover post-conviction proceedings. Now we can begin to go to the trial level. But in Texas, there are over seventy human beings on death row without lawyers who are going to die unless somebody takes their cases.

When I was growing up, I guess the first thing I learned was the importance of a good doctor if you got sick. If you have a brain tumor, you need a brain surgeon; you do not need a family physician. With Pat Sonnier, I learned the difference a good attorney makes; the difference between life and death. I have spoken in a lot of law schools, such as Yale Law School, Notre Dame Law School, Santa Clara, and Iowa. When I sign a law student’s copy of my book, I write, “To one of the true heroes of our times” because I am looking to the future, to what the student is going to do for poor and oppressed people and for justice.

There is a story I love about a lawyer. He finished law school, but he was not sure what he wanted to do with his life. He had a rich uncle who had sent him to law school because he obviously was floundering around and did not know what he wanted to do. He came out of law school and was unimpassioned. He took a man’s case, the first case he took, for a very small amount of money. He was very shy and inept. When he stood up in the courtroom to make his defense argument, he was so overcome with his own ineptness and shyness that he actually went mute. He stood up and could not say any words. He sat down, and everybody laughed him out of court. Later, a man who was very poor and who had no one else to defend him came to him and said, “I’d really like you to take my case.” The young lawyer said, “I’m a terrible lawyer, don’t you know my reputation?” The man replied, “I have got nobody else; you’re all I’ve got.” So he started researching this man’s case and went in and won it. The young lawyer that I am describing to you is Gandhi. That is the way Gandhi began.

Gandhi met a passion in his life and it made him who he was. I want to appeal to that same passion in you and ask of you, if you are not yet taking any of these cases, if you would consider doing that.

It is a pleasure to be with you. I know we have a limited amount of time. I hope you will read my book. The book is doing really well. It is now in paperback, published by Vintage and it’s going to be a film with Susan Sarandon and Tim Robbins.

Thank you for what you already are doing. When I hear stories
DEATH PENALTY SYMPOSIUM

of New York and I hear stories of Louisiana, sometimes I think we are on a different planet. But then there are other stories that remind me we are on the same planet and it is the same struggle.