SYMPOSIUM: THE DEATH PENALTY, RELIGION, & THE LAW: IS OUR LEGAL SYSTEM'S IMPLEMENTATION OF CAPITAL PUNISHMENT CONSISTENT WITH JUDAISM OR CHRISTIANITY?

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I. RONALD J. TABAK*: OVERVIEW OF THE SYMPOSIUM'S BACKGROUND & PURPOSE

[1] The full-day Sabbath symposium on capital punishment, held at Central Synagogue in Manhattan on March 31, 2001, was organized by the Synagogue's Social Action Committee

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("SAC"), of which I am a member. I was one of three co-chairs of the symposium, along with Lynne Breslaw Farber and Jean Seltzer.

[2] The SAC decided to hold this symposium in light of the following:

[3] As members of Central Synagogue, we were proud that its Senior Rabbi, Peter J. Rubinstein, had delivered a sermon opposing capital punishment in September 1999 on the most sacred evening of the Jewish religious year, at the Kol Nidre service on Yom Kippur, the Day of Atonement.[1] The service was held in a state armory because the sanctuary of Central Synagogue had been almost completely destroyed by a fire a year earlier and was under reconstruction. It was particularly remarkable that Rabbi Rubinstein gave a sermon on such a controversial subject, given that the congregation needed millions of dollars in donations from congregants for its reconstruction effort.

[4] Yet, we also knew that one sermon alone, no matter how effectively prepared and masterfully delivered, was insufficient to educate congregants about Jewish-based reasons for opposing capital punishment. Indeed, in talking with other congregants, I found that many insisted that Rabbi Rubinstein had advocated forgiving murderers – something entirely *absent* from his sermon. Accordingly, we felt that a more comprehensive presentation was needed.

[5] We believed that the rest of the community, which had not been fortunate enough to hear Rabbi Rubinstein's sermon, might also appreciate the opportunity for a symposium on religious-based considerations of capital punishment. Moreover, despite the positions taken by many religious groups against the death penalty, there was much more that had to be done. Thus, while the Union of American Hebrew Congregations (Reform) and the Rabbinical

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[1] Rabbi Peter J. Rubinstein, *On Punishment: A Sermon for Kol Nidrei Evening, Yom Kippur 5760*, *at* http://www.centralsynagogue.org/sermon_view.php?article_id=50 (Sept. 19, 1999).

Assembly (Conservative) had passed resolutions against the death penalty[2] and the Union of Orthodox Jewish Congregations had passed a resolution calling for a moratorium on executions,[3] little had been done in the Jewish community to alert Jews to these positions or to educate the community about the reasons for them.

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[2] *See* Resolutions Adopted by the UAHC, *Race and the Criminal Justice System*, Union of American Hebrew Congregations, *at* http://www.uahc.org/cgi-bin/resodisp.pl?file=justice&year=1999 (last visited Sept. 22, 2002) [hereinafter *Race and the Criminal Justice System*]; *The Rabbinical Assembly: Resolution on Capital Punishment*, Religious Organizing Against the Death Penalty Project, *at* http://www.deathpenaltyreligious.org/education/statements/rabinicalassembly.html (last visited Sept. 22, 2002) [hereinafter *The Rabbinical Assembly*].

[3] *See Union of Orthodox Jewish Congregations Endorses Death Penalty Moratorium*, *at* http://www.ou.org/public/statements/2000/nate19.htm (June 13, 2000). The resolution states:

> Today, the Union of Orthodox Jewish Congregations of America – the nation's largest Orthodox Jewish umbrella organization representing nearly 1,000 synagogues nationwide, announced its support for efforts to impose a nationwide moratorium on executions of death row inmates while a comprehensive review of how the death penalty is administered in America's courts is undertaken.
>
> In explaining last night's decision by the Union's senior officers and directors, the organization's president, Mandell I. Ganchrow, and public policy director, Nathan Diament, issued the following statement: While traditional Judaism clearly contemplates and condones the death penalty as the ultimate sanction within a legitimate legal system, Judaism simultaneously insists that capital punishment be administered by a process that ensures accuracy as well as justice; our valuing of human life as infinite demands no less. In recent months, too many questions have been raised as to whether in America's courts the demand for accuracy is being met. These questions must be answered and appropriate corrective measures must be put in place before we can proceed with additional executions in this country. Thus, [] we support putting an execution moratorium in place and the creation of a commission to review America's death penalty procedures and any reforms needed to ensure that our justice system lives up to that name.

Id.

[6] A similar situation appeared to exist in the Christian community as well. While the Catholic Church and many Protestant denominations opposed the death penalty, too few adherents knew these positions or felt sufficiently informed to engage in discussions concerning this important matter.

[7] Furthermore, many Christian clergy and lay people who *did* publicly oppose the death penalty proceeded from an apologetic explanation about what they call the Old Testament (which Jews refer to as the Torah). They said, in effect, that it is too bad that God sought vengeance and called for the death penalty by saying "an eye for an eye, a tooth for a tooth," and "Whoever sheds the blood of man, by man shall his blood be shed," in the Old Testament, but that this was superseded by Jesus' teachings, which one can find in the New Testament.

[8] The SAC felt that it was important to provide Jews, Catholics, and Protestants, and anyone else who might come, with information about the religious bases for opposition to the death penalty. In particular, it was vital to show Christians (as well as Jews) that they need not be defensive about Old Testament passages that are often quoted by death penalty supporters. While, as Talmudic scholar Dr. S. David Sperling stated at the symposium, the Torah and pre-Jesus Jewish teachings are not unequivocally anti-death penalty, the frequently quoted passages are *not*, when properly understood, supportive of the death penalty, and the clear trend in Judaism was against any executions.

[9] The SAC also felt it important to include Conservative Jewish, Catholic, and Protestant perspectives in the symposium. Accordingly, Rabbi Julie Schonfeld, Sister Helen Prejean, and Reverend James Forbes were featured speakers. In addition, Albert Vorspan provided an overview of Reform Judaism's social activism, and sometimes deliberate inactivity, with regard to the death penalty.

[10] The SAC also recognized that, in order to consider a religious-based position on capital punishment, one must have information about how capital punishment cases are actually handled by our criminal justice system. This is important, for two reasons.

[11] First, while one might be uncomfortable with the idea of the government executing a person, whether one opposes the death penalty may depend on what the alternative to the death penalty is for those who commit heinous crimes. If, as commonly believed, the alternative is freeing such people on parole within a decade or less, the death penalty might seem to be a necessary evil, or just plain necessary. But if, as in New York and most other states, the alternative punishment for capital murder is life imprisonment with no possibility of parole, the death penalty might be viewed as just plain evil. Indeed, a major factor in the Catholic Church's change in position, from accepting (pre-Pope John Paul II) the state's right to execute to opposing capital punishment entirely, was the Church's recognition that there is now an alternative to the death penalty that can incapacitate murderers from murdering again.

[12] Second, in deciding whether capital punishment is religiously acceptable *in practice*, and not merely *in the abstract*, it is important to know whether the criminal justice system's implementation of the death penalty is accurate and fair. Yet, many clergy and other people of faith are extremely uninformed about the real life manner in which capital punishment cases are handled, or mishandled. Indeed, when I participated in an educational program for Catholic clergy in the Rochester, New York area in early 2001, many of those who attended told me that the main reason why they had refrained from discussing the Church's opposition to capital punishment was that they were afraid of their own ignorance. They lacked knowledge sufficient to answer congregants' questions about the real life, not theoretical, death penalty.

[13] Accordingly, the SAC invited Barry Scheck to discuss several aspects of death

penalty administration, and asked Sister Helen to describe her experiences in dealing with both death row inmates who were executed and the survivors of murder victims.

[14] Clearly, a single symposium, even one lasting an entire day, could not be "the last word" on this subject. Nevertheless, through its publication in this journal, it can provide insights to a large number of people. This, in turn, can lead to greater attention to how this country is implementing the death penalty, and to religious-based reasons for seeking abolition of capital punishment.

II. SERMON BY REVEREND DOCTOR JAMES FORBES, RIVERSIDE CHURCH: DOES THE DEATH PENALTY MEET GOD'S REQUIREMENTS?

A. Introduction by Rabbi Peter J. Rubinstein

[15] From his arrival as the fifth Senior Minister of the Riverside Church, Reverend Forbes has been the conscience and soul of the church. He has called elected officials to task throughout his tenure in New York. He has raised his voice on behalf of those who have been silenced. And he has, above all, courageously ventured into conversations that have enlightened us. Indeed, Reverend Forbes has become a clergyperson's counselor and a model of prophetic purpose and vision. It is no wonder that Newsweek magazine recognized him as one of the twelve most effective preachers in the English-speaking world.

[16] Today, Reverend Forbes will speak about a topic that is of special interest to all of us. We appropriately begin the Shabbat Symposium by inviting him to this pulpit so that he can teach us why the death penalty fails to meet God's promise.

B. Remarks of Reverend Doctor James Forbes

[17] How good and pleasant it is for brothers and sisters to dwell together in unity. I rejoice that it is my privilege to be here to worship with you at Central Synagogue, and to be associated in actual ministry with my colleague, Rabbi Peter J. Rubinstein, who has proven to be a bridge between diverse religious groups in this community. He has preached from many pulpits in the city, including the pulpit of the Riverside Church. He stands as a person of deep faith and commitment, rooted in his own tradition so deeply that he is able to find a basis of respect and affirmation for others as well. It is a joy to be here with him and with my other colleagues in ministry.

[18] I want to talk today with a sense of deep commitment to our sharing as congregations. The clergy of Central Synagogue and Riverside Church are united in our desire to see the end of capital punishment. We would like to have a moratorium on the implementation of capital punishment, primarily to marshal the evidence for the basic elimination of the death penalty. Members of my congregation are here today. They have been vigorous in this effort, and I want to thank them for their ongoing efforts.

[19] I think that perhaps there are people at Riverside who may not necessarily share the views that I preach, or maybe there are those here in Central Synagogue who are not affirming everything that the Rabbi preaches. But we are here together to engage in the discussion, so we are the choir.

[20] I want to share with you a growing sense of urgency about this issue. I am very much concerned about the fact that the spirit of our nation seems to be drifting in the direction of the greater use of muscle rather than mind in dealing with international problems. It disturbs me that the President of South Korea, Kim Dae Jung, recently left the United States disappointed in regard to the prospect of unification between North and South Korea. The resumption of the

bombing in the Middle East and the erosion of the peace process disturb me. I am disturbed that a child in Florida has faced a life sentence without the possibility of parole.

[21] But more importantly, I am disturbed by what I read in Eric Frome's work on being human, in which he says that human beings, and animals in general, move to identify the source when they experience a sense of diminishment. They distance themselves from the diminishing agent and, if necessary, they lash out to reduce its effectiveness. Let me explain why this notion disturbs me in the context of this conference.

[22] I had the feeling just before the last presidential election that with the prediction that demographics would bring about a diminishing presence of whites in this nation, deep down, probably on a subliminal level, this issue was raised: How can we, who have been the majority in both number and power, sustain ourselves or preserve our power and influence in the face of our diminishing numbers in the nation? I do not know whether anyone ever met to discuss how white people can preserve the strength, power, and prerogatives that we have enjoyed in light of this creeping demographic shift that brings about a diminishment of our numbers and, perhaps eventually, our power.

[23] I worried about it because I believe Frome is correct when he tells us that people wonder about what caused the change when they see their power diminishing. Rene Girard speaks about how violence is a means used to set things right when they seem to be out of kilter, how scapegoats are identified so as to allow the continuation of well-being. And when these factors are taken into consideration, I understand better the significance of the death penalty in America.

[24] If we are not careful, a spirit of punishment and retribution will serve the goal of holding at bay a creeping agent of diminishment. If there is evidence of injustice on a grand

scale in regards to meting out punishment in our criminal justice system during good times, when we are in good jobs, what will happen when there is an unarticulated, subliminal belief that we had better circle the wagons, close the ranks, and hope that we can stave off the advancing adversaries?

[25] One of the most heart wrenching conversations a pastor can have is with a husband or wife who comes in and says, "I have been married for lo these many years and I was just served papers for a divorce. I had no idea that things were not okay. In fact, I thought that we had worked through the problems of our earlier years and that we were settling into the maturation of our relationship. Our children raised, educations complete, out on their own, this was our opportunity to get to know each other all over again. I had thanked God for having allowed us to see ourselves through the rougher days and I thought we were both looking forward to the crowning moments of our relationship. And then I got this legal paper saying it is all over. I never knew there was a problem." That is a sad, sad moment for both the pastor and the parishioner.

[26] This story introduces the following remarks because it is an example of a covenant relationship before God going awry in much the same way the death penalty fails to meet God's requirements. In Micah, the prophet, wrote,

> Hear what the Lord says: Arise, plead your case before the mountains, and let the hills hear your voice. Hear, you mountains, the controversy of the Lord, and you enduring foundations of the earth; for the Lord has a controversy with His people, and He will contend with Israel. 'O my people, what have I done to you? In what have I wearied you? Answer me! For I brought you up from the land of Egypt, and redeemed you from the house of bondage; and I sent before you Moses, Aaron, and Miriam. O my people, remember what Balak King of Moab devised, and what Balaam son Be'or answered him, and what happened from Shittim to Gilgal, that you may know the saving acts of the Lord.' 'With what shall I come before the Lord, and bow myself before God on

> high? Shall I come before Him with burnt offerings, with calves a year old? Will the Lord be pleased with thousands of rams, with ten thousands rivers of oil? Shall I give my first-born for my transgression, the fruit of my body for the sin of my soul?' He has showed you, O man, what is good; and what does the Lord require of you but to do justice, and to love kindness, and to walk humbly with your God?[4]

The dramatic way that the prophet goes about his work leads to a court scene threatening in some way either to dissolve the relationship or to discover the basis on which the covenant may be sustained.

[27] This is God saying, "Religious people! Those who claim to have a covenant relationship with Me. Do you understand that our relationship is in trouble? You there, sitting idly by, thinking everything is alright. Do you assume that I like what you are doing?" This is what the prophet seems to make clear: there are some problems between God and his people; action must be taken in order to rectify the problems, thereby returning the relationship to a strong, vibrant, mature, and productive status.

[28] What will this require of us? It is going to require that we do what is just. Any aspect of life that is not characterized by justice and righteousness is not going to be satisfactory. It will strain this relationship we claim to have. Any relationship or activity that does not reveal a love of mercy and kindness will put us into trouble. Any relationship that finds us not walking humbly before God, with God, is a cause for real, serious concern. That is the basic framework.

[29] But let me now go all the way back to Genesis, chapter 4, because we are talking about the death penalty. The text provides insight that helps prepare us to meet the requirements of God. It is about murder and the right way to deal with murder from God's point of view. Here is what it says.

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[4] *Micah* 6:1-8 (New Revised Standard Version).

> Now the man knew his wife Eve, and she conceived and bore Cain, saying, 'I have produced a man with the help of the Lord.' Next she bore his brother Abel. Now Abel was a keeper of sheep, and Cain a tiller of the ground. In the course of time Cain brought to the Lord an offering of the fruit of the ground, and Abel for his part brought of the firstlings of his flock, their fat portions. And the Lord had regard for Abel and his offering, but for Cain and his offering he had no regard. So Cain was very angry, and his countenance fell. The Lord said to Cain, 'Why are you angry, and why has your countenance fallen? If you do well, will you not be accepted? And if you do not do well, sin is lurking at the door, its desire is for you, but you must master it.' Cain said to his brother Abel, 'Let us go out to the field.' And when they were in the field, Cain rose up against his brother Abel, and killed him. Then the Lord said to Cain, 'Where is your brother Abel?' He said, 'I do not know, am I my brother's keeper?' And the Lord said, 'What have you done? Listen; your brother's blood is crying out to Me from the ground! And now you are cursed from the ground, which has opened its mouth to receive your brother's blood from your hand. When you till the ground, it will no longer yield to you its strength; you will be a fugitive and a wanderer on the earth.' Cain said to the Lord, 'My punishment is greater than I can bear! Today you have driven me away from the soil, and I shall be hidden from your face. I shall be a fugitive and a wanderer on the earth and anyone who meets me may kill me!' Then the Lord said to him, 'Not so! Whoever kills Cain will suffer a sevenfold vengeance.' And the Lord put a mark on Cain, so that no one that came upon him would kill him. Then Cain went away from the presence of the Lord, and settled in the land of Nod, east of Eden.[5]

[30] Let us spend some time looking at the impulse to murder. Why did Cain kill Abel? Cain killed Abel, I suspect, because Cain was expecting an A and got an F, while Abel got the A. I often ask those who are winners, "are there ways in which to celebrate the victory that will not rub it in for the loser?" I am sure Abel said, "Yay! My sacrifice was accepted by God." But I am not sure whether he said "and yours was not."

[31] The truth of the matter is that one got the A and the other got the F. That stirs something up inside. There is a certain tendency, even from elementary school when the papers

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[5] *Genesis* 4:1-16 (New Revised Standard Version).

are being redistributed, that you can hardly see the grade on your paper for trying to see what is on the other person's. Is it not true that people like to believe that they appear in the best light before God? Is it not also an impulse to assume that God's favor will be visited in the light of God's affirmation and acceptance of what you do?

[32] That is what Girard was talking about. I always want to appear in the best light myself. I am always nervous when somebody else gets a commendation that I do not get. When new books come out, I look at the bibliography to see if my name is there along with Cornell West, Jim Washington, and Jeff Halls. I have a tendency to assume that I am in some way threatened if I do not get the highest commendation. I think we are all that way.

[33] There is a notion that our well-being is based on how we are rewarded, and that there is a zero sum such that if he gets the A, clearly I am doomed forever. Or we act like the first semester is the whole four-year college career, so that if the first year does not go well for us then it will be that way forever.

[34] The idea that one must make sure to protect one's well-being against the advances that others are making creates a sore. If it festers and we get the impression that we can never survive unless we are ourselves protected against any ascendancy of the other, then we are already in a murderous context. Oh, not yet fully the deed, but it will surely come. Sin crouches at the door surrounding this envy, this jealously, this sense that if he is doing well then I cannot do well; that God only has a few limited blessings. The deed comes from a full-blown resentment and bitterness and blossoms into murder.

[35] Even add hypocrisy to boot. I can see Cain and Abel walking like my brother David and I used to do; as we traveled the streets of our city, we would whistle together – brother-to-brother. Maybe they whistled together or sang a song together. Yet, when they reach the field,

Cain slays his brother.[6] He is a murderer now. The blood of Abel cries to God from the ground.[7]

[36] What shall we do with Cain? There are consequences. There is no need for the response to be so liberal as to eliminate any consequence. God says to Cain, "'When you till the ground, it will no longer yield to you its strength; you will be a fugitive and a wanderer on the earth.'"[8] Then, according to our normal understanding of "a life for a life," he ought to die. He ought to be executed. From a human jealous, self-protective perspective, he ought to die. Cain took a life; he should give his life in return.

[37] Strangely, God lets Cain go. Cain then cries out, "'My punishment is greater than I can bear.'"[9] God responds, "'Not so! Whoever kills Cain will suffer a sevenfold vengeance.' And the LORD put a mark on Cain, so that no one who came upon him would kill him."[10] I view this as though God is saying to Cain, "people will not kill you because it is not My way. You deserve death, but this is the beginning of creation. This is the first transaction. Is this what My creation is going to be like? No, it will not be like this. What I will do then is to put My mark upon you and I will declare that no one may kill you. For if someone kills you, that person will start a cycle of evil meeting evil, evil multiplying, evil continuing evil. I will place the mark on you so that the world will know that those who want to think My thoughts will not visit death with death. Wrong will not be visited with wrong. The cycle needs to stop right here."

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[6] *Genesis* 4:8 (New Revised Standard Version).

[7] *Genesis* 4:10 (New Revised Standard Version).

[8] *Genesis* 4:12 (New Revised Standard Version).

[9] *Genesis* 4:13 (New Revised Standard Version).

[10] *Genesis* 4:15 (New Revised Standard Version).

[38] With the understanding of what God said to Cain, I return to the court with Micah and sense what is necessary. If we attempt to deal with the problem of capital offenses, crimes for which the offenders deserve death, we have to go back into the court with God, the God who put the mark upon Cain.

[39] I had always thought of the mark as one of punishment, rebuke, and degradation. Instead, it is a mark of grace, which says that death must stop now.

[40] Well, what shall we, you as a Jewish congregation and Riverside as a liberal congregation, do in the courtroom about the death penalty? It seems clear what Micah says we must do. In dealing with the problematic situations in our culture, whatever we do, we must do justly if we want a good relationship with God, if the covenant is to be sustained.

[41] Later today, some people will say that we cannot really guarantee justice when we make use of the death penalty. Indeed, it is difficult to do justly in a climate committed to racial profiling. It is difficult to do justly in a climate where the life of someone belonging to one ethnic group is more valuable than the life of someone belonging to another ethnic group. It is difficult to do justly in a situation when legal services are available to some people and not to others. It is difficult to do justly in a situation, brothers and sisters, when your economic standing determines the quality of counsel you receive and how a jury of your peers will regard you. It is difficult to do justly in a situation when class identification and social location determine the outcome. It is very difficult to do justly in a situation when it is possible under the criminal code that a person who embezzles millions of dollars will receive a slap on the wrist but a person who kills another while stealing a pork chop will receive a death sentence.

[42] So, the death penalty fails the first test. It gets an F. It is clear that there is too much injustice under it, around it, and in the context of it. It is just hard to do it justly.

[43] As for loving mercy or kindness, it is not enough just to love, and to be able to say that I would choose kindness if given a choice between retribution and revenge. There is a natural instinct for revenge, and a natural instinct to say that if I have a chance to even the score then I will not sleep until I get revenge against the one who slew my daughter, raped my daughter, or killed my companion. Therefore, I do not meet God's requirement unless my love of kindness is greater than my natural instinct for revenge.

[44] King David supported justice. But he did not have too strong of a commitment to the promise of kindness because, after taking Bathsheba, he had Uriah killed; thus David became a murderer.[11]

[45] Thereafter, Nathan came to David and said,

> 'There were two men in a certain city, the one rich and the other poor. The rich man had very many flocks and herds; but the poor man had nothing but one little ewe lamb, which he had bought. He brought it up, and it grew up with him and with his children; it used to eat of his meager fare, and drink from his cup, and lie in his bosom, and it was like a daughter to him. Now there came a traveler to the rich man, and he was loath to take one of his own flock or herd to prepare for the wayfarer who had come to him, but he took the poor man's lamb, and prepared that for the guest who had come to him.' Then David's anger was greatly kindled against the man. He said to Nathan, 'As the LORD lives, the man who has done this deserves to die; he shall restore the lamb fourfold, because he did this thing, and because he had no pity.' Nathan said to David, 'You are the man!'[12]

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[11] *2 Samuel* 11:4, 14-17 (New Revised Standard Version).

[12] *2 Samuel* 12:1-7 (New Revised Standard Version).

[46] David later spoke of a world in which you can say, "Have mercy on me, O God, according to your steadfast love; according to your abundant mercy blot out my transgressions."[13]

[47] If people could see themselves for what they are, they would be afraid to live in a world without mercy. They would be afraid to live in a world where they would not be given a second chance, even a third chance, and, for those who need them, a fourth or fifth chance. As for loving mercy, the death penalty does not love mercy. It does not love kindness. Even kindness to the victim or the perpetrator is only a theoretical concept.

[48] Finally, the death penalty does not reflect a willingness to walk humbly with God. To walk humbly with God is to walk with One whose righteousness and whose justice is beyond our imagining. How can I walk with God, for I am frail and fraught with jealousy, so eager to make sure that I am secure that I would harm my brother, and so lacking in steadfastness in my love? I am embarrassed to walk with God holding my hand, for my hands are not clean.

[49] That is a humbling thought: to walk with my human frailty, holding hands with a righteous God. You experience a deeper sense of humility when you understand God's longing for life and love, and when you understand that God has the power to forgive us for our iniquities. The powerful God who could say, "You are done;" but instead, with steadfast love, endures our freedom to choose what is less while hoping that we will one day choose what is best.

[50] I am a father. I remember taking my son, James, who was two years old at the time, to a concert at Howard University. We were sitting in the Fine Arts Center, and James kept rattling paper. I became tired of saying, "Shhhhh, shhhhh, shhhh," so, I confess, I reached over

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[13] *Psalms* 51:1 (New Revised Standard Version).

and grabbed his hand with a motion that conveyed to him, "If you do not stop rattling paper, I am going to break off your hand." Even though I am a good father, I remember having the impulse to actually do something to that effect. But, does having the power to break off his hand and stop the noise mean I should have done that? No. To walk with God is a lovely experience, and God patiently waits for humanity to choose what is in God's mind.

[51] The death penalty fails to meet God's promise because it does not and it cannot do justice. God cannot find an executioner that is worthy of the job. God looks at every person who comes to apply and says, "No. You will not do." The death penalty does not love mercy because it is vengeful. The death penalty does not walk humbly. But, a powerful God indulges humanity until someone acts in accordance with God's will.

[52] I close with a reminder of the mark on Cain, which I used to think was a mark of rejection. The righteous God took the time to provide the mark. And, as I thought about it, I decided that the mark was God's way of saying, "Take it before you dish it out, and be more willing to say the murder stops here." That is also what Christians say.

[53] There are times when I know that I do not deserve to be in the presence of God, a God who actually cares about me. Yet, God allows me to touch Him even in my brokenness, my weakness, and my sinfulness. Every time that I think about the death penalty being imposed on a person, even Timothy McVeigh, I also remember what God has done for me.

[54] "He touched me, oh he touched me, [a]nd oh what a joy that floods my soul. Something happened and now I know He touched me and made me whole."[14]

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[14] WILLIAM J. GAITHER, *He Touch*ed *Me* (1963).

III. ALBERT VORSPAN, DIRECTOR EMERITUS, COMMISSION ON SOCIAL ACTION OF REFORM JUDAISM: THE RECENT SEA CHANGE LEADING TO ACTIVE SUPPORT FOR A MORATORIUM AND ULTIMATE ABOLITION, AFTER YEARS OF STATIC ACCEPTANCE OF EVIL

A. Introduction by Rabbi Peter J. Rubinstein

[55] On Kol Nidre evening, about a year and a half ago, at the beginning of our Day of Atonement, I chose to speak to this congregation about the death penalty.[15] I shared with the congregation my absolute and unqualified abhorrence of the idea that a society thinks it has the right to kill a human being. Even if a society believes that it has arrived at that right as the result of a legal process characterized by forethought and intention, it is ultimately going to kill a human being in cold blood. I said that our society, especially given its prejudices and biases, is unable to act justly while imposing death.

[56] About four days after I gave that sermon, a prominent member of this congregation approached me and said, "A Rabbi should not speak about political matters from the pulpit – especially on Yom Kippur." I was somewhat struck by his argument. It struck me because if a Rabbi should not discuss political matters then any matter that is sufficiently significant in a community to warrant a legislative or judicial decision would be de facto out of bounds for a Rabbi. Of course, that would make whatever a Rabbi did absolutely irrelevant. We have been accused of that type of irrelevancy in the past, which is why I took exception with what he said. Of course clergy *should* speak about issues that are significant enough that they have taken on a political dimension.

[57] The second reason that I disagreed with the member is simpler than the first: I do not see capital punishment as a political issue. Certainly there are political realties that we need to

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[15] Rubinstein, *supra* note 1.

address, but at its very core, at its heart, the death penalty is inherently and absolutely a moral and religious issue. That is why we, Central Synagogue, decided that this is an appropriate discussion to have on the Sabbath. We feel that is it absolutely important when we are dealing with matters of life and death, when we are dealing with a discussion of the death penalty, which is fundamentally a matter of life and death, that we should spend some time learning about and discussing the death penalty. This program is designed to help us gain knowledge and insight. I hope that at the least it will convince those who are not persuaded that capital punishment is bad and should be abolished, that there is a compelling need for a national moratorium.

[58] Albert Vorspan, Director Emeritus of the Commission on Social Action of Reform Judaism, has been on the front line of every battle at the heart of our country. He was on the front lines and was a leading participant in the civil rights movement. He was on the front lines and was a leading participant in the nuclear peace movement and in interfaith activities. He has been honored by every significant national Jewish organization.

[59] Al has often played the role of Shofar, which in our tradition is the ram's horn, used during our High Holidays and on other extraordinary occasions. It is used because the sound of the Shofar is intended to awaken the listener from his or her slumber. The Shofar calls us; it stirs us from our smugness, our satisfaction, our lethargy. Al had the brilliance to know how we should arrange ourselves so that we could effectively fight the dark forces of oppression and hatred within our society. The Jewish community has looked to him to awaken us, to lead us, to instruct us, and, when necessary, to comfort us. It is my great honor, pleasure, and privilege to introduce Albert Vorspan.

B. Remarks of Albert Vorspan

[60] I am very honored to be on this Bimah. All the other speakers here today are experts

on the subject of the death penalty. I am not an expert. Instead, my job is to bunt and get on base for the heavy hitters. You heard one of the experts, Reverend Doctor James Forbes, this morning in an extraordinary sermon, and you will hear other extraordinary experts on capital punishment this afternoon. For me, the subject is close to my heart.

[61] We come together at a time when the political climate is filled with new clichés and mantras, such as "faith-based initiatives" and "faith-based activities." I think a Pandora's box has been opened in which many religious groups will find that faith means getting up to the public trough searching for scraps of public aid and forgetting the prophetic mission of the church, synagogue, and mosque; the mission is to be independent, to be in nobody's pocket, and to speak truth to power.

[62] I am especially honored to be with this congregation, which, despite experiencing the stress and extraordinary trauma of having to rebuild its beautiful sanctuary, has not flinched from facing issues that are not necessarily sexy, popular, or fashionable. This congregation has raised difficult issues about which there is profound controversy. I want to pay tribute to Rabbis Rubinstein, Davidson, and Reines and to the Social Action Committee for organizing this symposium for all of us and for confronting an issue even though it would be easier to ignore it and because it seems painful and politically impossible. Nevertheless, as Reverend Forbes told us in overwhelming and passionate terms, you cannot ignore the death penalty. Your conscience compels that you address it. Your faith and your humanity compel you to address it.

[63] Most of those sitting in this room have endured a long cold winter of discontent. The last presidential election was depressing and disturbing. I am not talking about the travesty in Florida alone, although that was bad enough. Nor am I talking about the loss of innocence in our reverence for the Supreme Court. I am talking about the utter failure of both major candidates to

address several of the most profound crises in American life. Specifically, they failed to address the utter failure of our criminal justice system to administer justice. We are the only civilized industrial society that embraces death through our commitment to capital punishment and in our catastrophic policy towards guns. Both major candidates managed to avoid any real debate on these issues. Neither did President Clinton address these issues; he actually went out of his way during his presidential bid to dramatize his refusal to spare the death penalty, even for a mentally retarded man in Arkansas convicted of murder. Nor did Mr. Bush or Mr. Gore challenge the death penalty, preferring instead to pander to the public's appetite for hatred and vengeance.

[64] The day will come, and well-planned and thoughtful meetings like this will advance it, when this nation will have to reexamine not only the death penalty but also the direction of our entire criminal justice system. It is a system that prefers the rich to the poor, filling our prisons with millions of prisoners. American prisons hold half of the world's prisoners, many of them the victims of a draconian and mindless drug policy that mandates long sentences for insignificant, non-violent offenses and makes fanciful distinctions between powder and crack cocaine. This policy has a devastating impact on black adolescents, with one in four being caught in the spider web of our criminal justice system. It is a system in which only the black and the poor are likely to be executed, the national drug policy emphasizes punishment over treatment, and the amount spent on prisons is greater than that spent on higher education. Thus, the criminal justice system mangles our priorities as a nation.

[65] The aftermath of the last presidential election is even scarier. Not only was John Ashcroft, the candidate of the extreme right, appointed to the position of Attorney General, he was also clearly guilty of character assassination in at least two documented cases. One case involved a gay man in San Francisco and the other involved a black judge in Missouri. Ashcroft

had the temerity to deny that the confirmation process – the judge had been nominated for the federal judiciary – was blocked because of racial bias; instead, he claimed that the judge was blocked because he was "pro-criminal."[16] The judge had opposed application of the death penalty in a handful of cases in which he believed a legal error had been committed.[17] This is being pro-criminal? It is shocking to me that the person who made this statement is supposed to be the guardian of our constitutional liberties. Just imagine the prospects of a judge who agreed with those of us who support the elimination of the death penalty. What would happen to such a judge in the American system?

[66] My organization, the Union of American Hebrew Congregations (UAHC), has opposed the death penalty since 1959.[18] We adopted a resolution at that time, knowing full well that the death penalty was a part of our Jewish religious tradition. We could not make it go away. We knew that the champions of capital punishment frequently pointed to Deuteronomy to justify the death penalty and harsh treatment of offenders. But the reality is, and we will hear this from a real expert, Professor Sperling, this afternoon, that formidable Talmudic restrictions nullified the death penalty prescribed in Deuteronomy and, in effect, made it impossible to apply.[19] In the Mishnah Sanhedrin, a court is branded murderous if it imposes a death penalty

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[16] Anthony Lewis, *Abroad at Home; An Unfit Nominee*, N.Y. TIMES, Dec. 30, 2000, § A, at 15.

[17] *Id.*

[18] Commission on Social Action of Reform Judaism, *UAHC – CCAR: Joint Commission on Social Action – Memorandum*, Union of American Hebrew Congregations, *at* http://uahc.org/cas/justiceresmemo.html (Nov. 30, 1999).

[19] *See id.*

once in seven years.[20] Rabbis Tarfon and Akiba opposed the death penalty nearly two thousand years before Rabbi Rubinstein.[21]

[67] The UAHC resolution states,

> We believe that there is no crime for which the taking of human life by society is justified, and that it is the obligation of society to evolve other methods in dealing with crime . . . . We appeal to our congregants and to our co-religionists and to all who cherish God's mercy and love to join in efforts to eliminate this practice [of capital punishment] which lies as a stain upon civilization and our religious conscience.[22]

[68] More recently, the UAHC and the Rabbinic body of Reform Judaism (the Central Conference of American Rabbis), jointly resolved to challenge the "disparate treatment of those sentenced to death . . . attributable to the race and ethnicity of the defendants or of the victims" and that we must "act to eliminate the disparities where they exist."[23] We had passed the original resolution in 1959 as part of a wider liberal agenda that included civil rights, civil liberties, economic justice, and church-state separation. Our opposition to the death penalty was so firm that it even withstood the ultimate challenge to the Jewish conscience: the Nazis. The ultimate challenge in our time was Adolf Eichmann, whom Israel tried and convicted. I do not know whether anyone else did this, but we wrote a letter, which I prepared, begging Israel not to set aside its deeply held commitment against the death penalty, even in Eichmann's case, which touched the depths of the Jewish conscience.

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[20] *See id.*

[21] *Id.*

[22] *Id.* (alteration in original).

[23] Commission on Social Action of Reform Judaism, *Proposed Resolution on Race and the Criminal Justice System*, Union of American Hebrew Congregations, *at* http://uahc.org/orlando/preso/justice.shtml (Oct. 28, 1999).

[69] In the decades that followed, the death penalty made a powerful comeback in American life. An increase in violent crime created a panic that resulted in a backlash, the death penalty not only embodied the backlash but also became a part of American politics: touch it and you die. Only a few political figures, such as Mario Cuomo, defied mainstream politics, and most of them were overrun and defeated or they disappeared.

[70] I clearly remember that during the 1980's and 1990's, we not only allowed this issue to drift to the back burner of our concerns, but we suspected, in the deepest recesses of our minds, that we had lost this battle even in the Jewish community. While most Jewish groups continued to oppose the death penalty, they increasingly fell silent in the face of the surging pro-death penalty sentiment among Americans. Polls even showed that Jews, the most liberal segment of American life on virtually every other social issue, had shifted drastically on the death penalty. For instance, sixty eight percent of Jewish voters in New York City supported the death penalty.

[71] Along with other social action mavens, I was actually afraid to revisit this issue at the December 1999 biennial assembly of the Union of American Hebrew Congregations. We feared that we would provoke a vote in favor of repudiating our old position, and perhaps even a vote in favor of capital punishment. It turns out that we underestimated our own congregants.[24]

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[24] When the proposed resolution, *see supra* note 23 and accompanying text, was adopted in December 1999, it was amended to reaffirm the UAHC's opposition to the death penalty and to endorse a moratorium on executions. *Race and the Criminal Justice System*, *supra* note 2. It is this resolution, as amended, that demonstrates the underestimation; indeed, the following resolution was approved overwhelmingly:

> THEREFORE, the Union of American Hebrew Congregations resolves to:
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> 1. Reaffirm its strong and long-standing opposition to the death penalty;

2. Call upon all branches of government, at the federal and state levels, until such time as the death penalty is abolished, to:
    (A) Provide for the collection and analysis of data to determine the extent, if any, to which the disparate treatment of those sentenced to death is attributable to the race or ethnicity of the defendants or the victims and act to eliminate the disparities, where they exist.
    (B) Reform the systems for the appointment of counsel for indigent defendants to ensure that all those accused of capital offenses are afforded competent counsel and that they have adequate funding to ensure that their defenses are fully investigated.
3. Speak out against incidents and patterns of police brutality and support action to improve police community relations, for example:
    (A) Increasing outreach to and the recruitment of law enforcement officers from minority communities so that the police will look more like the communities they serve;
    (B) Supporting programs that encourage police officers to develop close ties to the neighborhoods they serve; and
    (C) Appealing to congressional leaders of both parties to follow through and immediately fund the provision of the Crime Control Act of 1994 that provides for the accurate collection of comprehensive national data on the use of excessive force by police. This would also include data on the number of people killed or injured by police shootings or other types of force; and
    (D) Urging communities to create a mechanism for civilian oversight of law enforcement activity and, working with law enforcement agencies, to develop a set of community standards by which police actions would be judged.
4. Support legislation that prohibits discriminatory profiling and requires law enforcement agencies to provide accurate and timely data on such practices by law enforcement officials and to condemn law enforcement profiling;
5. Support legislation to repeal state and federal laws that require mandatory incarceration of first-time drug offenders, and to restore judicial discretion in sentencing first-time offenders;
6. Support legislation to end crack cocaine and powder cocaine sentencing disparities;
7. Call on government officials and especially juvenile correctional systems to treat juveniles at all phases of juvenile proceedings without regard to their race or ethnicity;

But the fact remains that we kept this issue on the back burner in a kind of collusion and conspiracy of fear, waiting for a more hopeful day.

[72] Well, that day has come. That day is now. This is the watershed year, the year that snatched this issue from the fringes and thrust it onto the stage of American life. This issue is no longer part of the liberal-conservative divide separating the American people. It is beyond that. It is now emerging on a different axis: is the death penalty inherently fair or unfair, just or unjust, right or wrong?

[73] The death penalty issue divides all strata of American politics. These divisions became apparent when the Republican Governor of Illinois, George Ryan, proclaimed a moratorium on capital punishment after he learned that thirteen men sentenced to death in his state were found innocent of the crimes for which they received the death penalty.[25] And we were handed a new and promising setting in which to mobilize public opinion when Pat Robertson and Oliver North began to talk about a moratorium on capital punishment.

[74] What happened to bring about this sea of change after years of static and sullen acceptance of an evil? Many things happened, including: the American Bar Association, after

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> 8. Call for the full enforcement of the existing federal mandate that disproportionate minority confinement of juveniles must be analyzed and addressed when found to exist and for the application of the penalties required by law against those systems that fail to fulfill the federal mandate; and
> 9. Call for the moratorium on the death penalty until all of the above matters are properly addressed . . . .

Id.

[25] Bernice Powell Jackson, *Towards a Death Penalty Moratorium*, New Journal & Guide, *at* http://www.njournalg.com/editorial/2000/02/jackson_death_penalty.html (Feb. 25, 2000).

years of study, concluded that there must be a moratorium until further study is completed;[26] Governor Ryan of Illinois said, "until I can be sure with moral certainty that no innocent man or woman is facing a lethal injection, nobody will meet that fate[;]"[27] students in a journalism class at Northwestern University, who did what the press should have been doing all these years, examined a number of capital cases and found mistaken identities and miscarriages of justice in a high proportion of those cases;[28] researchers at Columbia University concluded that most of the capital cases they studied revealed trials conducted in violation of due process, with defense attorneys who used cocaine, fell asleep at the table, or were drunk during the trial;[29] the film *Dead Man Walking*[30] dramatized the human and moral toll of capital punishment; books such as *Actual Innocence*[31] showed the power of DNA in reversing convictions that were considered ironclad; the Pope helped to press this issue on the world's conscience by maintaining a relentless and tireless voice against the death penalty throughout his travels around the world; and the Secretary General of the United Nations, Kofi Annan, issued a call for a worldwide moratorium on the death penalty, asserting that "[t]he forfeiture of life is too absolute, too

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[26] *Report with Recommendations No. 107, from ABA 1997 Mid Year Meeting*, *at* http://www.abanet.org/moratorium/resolution.html (Feb. 3, 1997).

[27] *Illinois to Take Hard Look at Death Penalty*, EVANSVILLE COURIER & PRESS, Mar. 10, 2000, at A1.

[28] *A Constituency for the Innocent*, Northwestern Law: Center on Wrongful Convictions, *at* http://www.law.nwu.edu/depts/clinic/wrongful/History.htm (last modified Jan. 16, 2002).

[29] *See* James S. Liebman et. al, *A Broken System: Error Rates in Capital Cases, 1973-1995*, *at* http://justice.policy.net/jpreport (June 12, 2000).

[30] (Gramercy Pictures 1995).

[31] JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000).

irreversible, for one human being to inflict it on another, even when backed by legal process."[32] I believe that future generations throughout the world will come to agree with the statement made by the Secretary General.

[75] Because of the above examples, and numerous other factors, a Gallup poll revealed in February 2000 that public support for the death penalty had decreased to its lowest level in nineteen years, and decreased fourteen percent from its highest level in 1994.[33] Support sank even more when respondents were allowed to choose life without parole as an alternative to the death penalty. And while the presidential candidate, who is now the President of the United States, assured us that not a single person had been subjected to a miscarriage of justice in carrying out the death penalty in Texas, sixty five percent of those polled believed innocent people have been executed. Furthermore, over sixty five percent believed the poor are more likely to be sentenced to die than those of average or above average income.

[76] For the first time in many years, there are strong, positive developments and opportunities that contribute to the capital punishment debate. Many states are now considering moratoriums. New Hampshire actually voted to abolish the death penalty but the Governor sadly vetoed that measure. In Congress, Senator Leahy introduced an Innocence Protection Act to insure access to DNA and better counsel. Furthermore, Senator Feingold introduced a national death penalty moratorium bill, which he promised to push as soon as the campaign practices reform bill is completed. If a political miracle can happen for that issue, then it can also happen

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[32] *Secretary-General Joins Appeal for Worldwide Moratorium on Executions, as He Accepts "Moratorium 2000 Campaign" Petition at Headquarters*, *at* http://www.un.org/News/Press/docs/2000/20001218.sgsm7666.doc.html (Dec. 18, 2000).

[33] *The Death Penalty in 2000: Year End Report*, Death Penalty Information Center, *at* http://www.deathpenaltyinfo.org/yrendrpt00.html (last visited Sept. 22, 2002).

for the death penalty issue, especially if we can persuade Senator Feingold to convince Senator McCain to support this moral issue, which is as fundamental to what America is or where America is going as cleaning out the sewers of our political campaign system.

[77] Perhaps the time is not yet right to specifically debate whether the death penalty is a true deterrent of crime and the damage it does to the very soul of this nation. But the time is definitely right to address the growing public demand for greater assurances that the death penalty is administered accurately and fairly to all prisoners regardless of race or class; that the right to counsel does not mean a drunk lawyer asleep in the courthouse; that innocent persons are not rushed to the death house in order to advance a ruthless politician's sleazy political career.

[78] "Choose life" is the admonition that echoes through the centuries of Jewish history. I recently watched an extraordinarily powerful and moving documentary on the Holocaust entitled *Into the Arms of Strangers: Stories of the Kindertransport*.[34] As I watched the film, which documented rescue efforts in England that took place nine months prior to the start of World War II and led to the removal of over 10,000 Jewish children from Germany, Austria, and Czechoslovakia, I found myself thinking something that I had never quite considered before – even though it is now so obvious to me – that is, that the children in the film and every other Jew alive during that time were subject to the death penalty and one out of every three Jews were executed as a result of that death penalty. Yet, we are a people who, against all logic and reason, insist upon choosing life. We are an undying people who are enjoined to remember the heart of the stranger, for we were strangers in Egypt. We work with Christians, Muslims, and all other faiths to repair God's fractured world with the tools of compassion, mercy, justice, and human dignity.

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[34] (Warner Brothers Pictures 2000).

[79] I close with the words of an Irish poet, Seamus Heaney, the 1995 Nobel Laureate for literature. He wrote these words for his own country, but they resonate in the yearning of Americans of faith for a more peaceful, non-violent America and a better, more just world. He said, "So, hope for a great sea-change on the far side of revenge. Believe that further shore is reachable from here. Believe in miracles and cures and healing wells."[35] So let us once again be partners with God and miracle workers in our own land, fashioning the moral cures and healing wells of our time. Thank you very much.

IV. PROFESSOR BARRY SCHECK, CO-FOUNDER, INNOCENCE PROJECT, BENJAMIN CARDOZO LAW SCHOOL, YESHIVA UNIVERSITY: WHY SO MANY INNOCENT PEOPLE ARE SENTENCED TO DEATH

A. Introduction by Ronald J. Tabak

[80] In 1992, Barry Scheck and a colleague, Peter Neufield, established the Innocence Project at Benjamin Cardozo Law School at Yeshiva University. The Innocence Project has represented or assisted in the representation of innocent people – the number of whom keeps growing.

[81] Cases undertaken by the Innocence Project are discussed in the book *Actual Innocence*.[36] That book led George Will to say that if conservatives do not trust the government to get anything else right, then why should we trust the government to get the death penalty right?

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[35] SEAMUS HEANEY, THE CURE AT TROY (1991).

[36] DWYER ET AL., *supra* note 31.

[82] Barry is a frequently sought after expert on DNA. He served as counsel on a number of controversial cases, including the Louise Woodward case, which led to the failure to adopt the death penalty in Massachusetts. He has also worked on behalf of Hedda Nussbaum, a victim of domestic violence, O.J. Simpson, and Abner Louima. Barry has won so many awards that I will not take the time to mention them. Without further ado, let me introduce Barry Scheck.

B. Remarks of Professor Barry Scheck

[83] I will give you the latest numbers. We know that there are one hundred and two death row inmates, since the reinstitution of the death penalty, who have been exonerated by new evidence of innocence.[37] These people were convicted and sentenced to death, and they lost their appeals, however, their sentences were vacated after post-conviction motions were entered upon the discovery of new evidence establishing their innocence.[38] By exonerated, I mean that their cases were either dismissed by prosecutors, they were acquitted following a new trial, or they were pardoned by governors on the basis of their innocence.

[84] Of the one hundred and two exonerations, approximately ten percent resulted from post-conviction DNA testing.[39] But, we have only had DNA tests capable of analyzing old evidence and able to produce significant results since around 1992, and in earnest since 1994. Including the twelve death penalty cases, there are altogether one hundred and fourteen people in

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[37] *Cases of Innocence: 1973 – Present*, Death Penalty Information Center, *at* http://www.deathpenaltyinfo.org/innoccases.html (Aug. 5, 2002) [hereinafter *Cases of Innocence*]; National Association of Criminal Defense Lawyers, *The Innocence Protection Act of 2001*, *at* http://www.criminaljustice.org/public.nsf/legislation/CI_01_005?opendocument (last visited Oct. 6, 2002) [hereinafter *The Innocence Protection Act of 2001*].

[38] *See Cases of Innocence*, *supra* note 37.

[39] *The Innocence Protection Act of 2001*, *supra* note 37. DNA has cleared twelve prisoners on death row of guilt. *Id.*

the United States who were initially convicted but their cases were later vacated after DNA evidence established their innocence.[40] These people were charged with rape, homicide, or both, all very serious crimes for which convicted defendants receive long prison sentences.[41] There have been "an additional [seven] post-conviction [DNA] exonerations in Canada,"[42] bringing the total number of exonerations in North America to one hundred and twenty one.

[85] In April 2001, People magazine published the marvelous story of Kenneth Waters ("Kenny"), a young man in the small town of Ayer, Massachusetts who had a minor criminal record, mostly for participating in bar room fights.[43] Following the violent murder of Katerina Broud, who was stabbed to death, the police initially questioned Kenny because he lived next door to the victim. The investigation revealed that he had been working at a diner around the time of the murder, and time cards, which were subsequently "lost," seemed to verify his alibi. After he had left work, Kenny had gone to court to defend a misdemeanor assault charge, which his attorney later verified when questioned by police. While Kenny did not have a scratch on his body when the police interviewed him, blood of both the victim and perpetrator was found all over the crime scene. The police believed, quite correctly, that the location and amount of blood indicated there had been a struggle.

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[40] *Id.*; *Case Profiles*, *at* http://www.innocenceproject.org/moratorium.org/case/index.php (last visited Nov. 2, 2002).

[41] *The Innocence Protection Act of 2001*, *supra* note 37.

[42] Barry C. Scheck, *A Struggle to Correct Priorities: How to Exonerate the Innocent, Identify the Guilty Expeditiously, Solve Old "No Suspect" Cases, Promote Useful Research, and at the Same Time Avoid Sweeping Policies that Will Unnecessarily Offend Citizens or Infringe on Their Civil Liberties*, *at* http://www.criminaljustice.org/public.nsf/testimony/2001july01?OpenDocument (last visited Oct. 5, 2002).

[43] Bill Hewitt & Jennifer Longley, *Sister of Mercy*, PEOPLE, Apr. 9, 2001, at 174.

[86] The case remained unsolved for two years. Then a police officer, determined to solve the crime, began to believe that Kenny was responsible for the murder. The officer obtained statements from two of Kenny's former girlfriends, who claimed that he had confessed his guilt to them. Though we now know those statements were coerced, prosecutors charged Kenny with the murder, despite the somewhat shaky evidence, in part because his blood type matched that of the perpetrator. During his trial, the public defender, known as "do not worry about it Bernie," told Kenny not to worry and that everything would be fine. The crazy thing about innocent people is that they actually think that they will be acquitted no matter how bad their defense because, after all, they are innocent.

[87] Kenny's attorney did not learn until the trial began that the time cards, which established his client's whereabouts at the time of the murder, had "disappeared." The lawyer did not present any of the possible alibi witnesses, including people who worked with Kenny at the diner. Furthermore, even though Kenny was supposed to be in court at 10:00 a.m. on the day of the murder, the attorney who represented him at that time could not quite recall, given that it was now a number of years later, whether Kenny was in fact present in court. This is the same attorney who had told police when he was initially interviewed that Kenny was in court on the day in question. In addition to the attorney's conflicting statements, the judge admitted additional unsound evidence, resulting in Kenny's conviction for first-degree murder with extreme atrocity and a sentence of life without the possibility of parole. It is unquestionable that Kenny would have been sentenced to die if Massachusetts permitted capital punishment in 1983.

[88] Kenny's sister, Betty, a high school dropout who was going through a terrible divorce and had two small children at the time, watched the whole trial. She could not understand why the defense lawyer did not do anything and felt that the prosecution's case did

not make any sense. She vowed that she would one day become a lawyer and prove Kenny's innocence.

[89] Betty kept her promise. She completed her GED, enrolled in college, raised her two children, became licensed as a substitute teacher, and then entered the newly-formed Roger Williams Law School in Rhode Island at the age of forty. She began taking courses and analyzing the evidence used to convict her brother. She also called me and explained her brother's situation. I told her that the evidence that would enable us to conduct a DNA test had either been lost or destroyed in seventy-five percent of the cases where we had determined that such a test could establish guilt or innocence. So the key question in these cases is: Can you find the physical evidence?

[90] After our conversation, Betty went to the Middlesex County courthouse, in Cambridge, Massachusetts. She feared that the evidence used to convict her brother would not be found because Massachusetts permits the destruction of evidence, including exhibits, after ten years. She was also afraid that she would be denied access to the courthouse since she shared the defendant's last name. Believing someone would discover she was Kenny's sister, she asked another person to go to the courthouse for her. Eventually, after weeks of pestering the clerks, she was allowed access to the courthouse basement where she found a large box that held all of the blood stained evidence.

[91] Finding the evidence was merely the beginning of the process. Upon completing law school, Betty was admitted to both the Rhode Island and Massachusetts bars, and after receiving some guidance from me, she made a motion to preserve the evidence. But in Massachusetts, and most other states, there is no statutory right to make a motion based on newly discovered evidence or even to be allowed access to evidence in order to conduct a DNA test.

[92] I informed the District Attorney that Betty had found the evidence and that we would like to perform DNA testing. Though the District Attorney immediately agreed to comply with our request, it nevertheless took two years before the District Attorney's Office followed through and actually permitted the testing to begin. At one point, the office sent us a letter, which said that it would not consent to vacating Kenny's conviction even if the test results were in our favor because of other evidence. Frankly, that was a crazy position.

[93] Once the District Attorney's Office agreed to the testing, a protocol was established, under which our laboratory would first conduct DNA tests and then their laboratory would conduct their own tests. After receiving the result from our tests, which revealed Kenny was plainly innocent, I telephoned the District Attorney, with whom I have a good relationship, and asked that she immediately address Kenny's case. All of a sudden, she issued a press release and immediately made a motion to vacate Kenny's conviction, which was approved.

[94] In America, it does not matter whether the evidence or public policy is in your favor because the public will not take notice of a particular case unless it involves a story of human interest. Kenny's case offered a great window into the issue of criminal justice and frankly, in many ways, the death penalty, because it was a great story of a sister who succeeded in saving her brother.

[95] I have enormous confidence that we will be able to rid this country of the death penalty. There are so many extraordinary stories, just like Kenny's, that are going to touch people's hearts. When Kenny Waters walked out of prison and was asked what it was like to now be free, he analogized being incarcerated to entering a bathroom and then finally leaving it eighteen years later. He also spoke eloquently about the death penalty and his faith.

[96] The same Middlesex County Courthouse was the scene for a case that caught the nation's attention, the Louise Woodward case.[44] Louise was charged with the murder of Matthew Eappen, who died from massive intracranial bleeding.[45] In the Woodward case, I think we proved to a scientific certainty that Matthew had been previously injured and that Louise should not have been convicted for his death. The judge who presided over the Woodward case, Honorable Hiller B. Zobel, now believes that Louise was innocent.

[97] Though we were convinced that the evidence demonstrated Louise was innocent, we also believed that we needed jurors who could render decisions based on their analysis of the scientific evidence. We thought it best to retain those jurors who either held advanced degrees or were used to evaluating different expert opinions because the entire case involved expert testimony. Despite our faith in the evidence, Judge Zobel did not initially share our position and was convinced at the start of the trial that Louise was responsible for Matthew's death.

[98] Judge Zobel earned his undergraduate degree at Harvard University, followed by service in the Marine Corps, after which he entered Harvard Law School. Upon graduating from law school, Judge Zobel taught at Boston College Law School before becoming a judge. His nickname is "Hiller the Killer." He is an extremely smart and demanding judge, and refused to permit Louise to be released on bail because the prosecution insisted that she had committed first-degree murder.

[99] Judge Zobel's opinion first began to change when a prospective juror, Mr. Mangelli, said it was his belief that courts coddle criminals. The judge told Mr. Mangelli that he was an intelligent man, with a Ph.D., but that he would only be deciding between guilt and innocence

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[44] Commonwealth v. Woodward, 1997 Mass. Super. LEXIS 213, at *1 (Nov. 10, 1997). Louise was an Au Pair from England, hired by the Eappen family to care for Matthew.

[45] *Id.* at *2.

and not rendering a decision as to the defendant's punishment. When Mr. Mangelli replied that he still did not believe he could be fair, the judge asked me whether I would like a challenge for cause, meaning that I could request that Mr. Mangelli not be permitted to serve on the jury. After declining the challenge, I was asked by Judge Zobel whether I intended to accept any prospective juror if he or she had an advanced degree, to which I replied that was my intent. Besides Mr. Mangelli, there was a potential juror who held a L.L.M. and a J.D. from Harvard Law School, another prospect was an electrical engineer, and another ran a construction project. Throughout the trial, the judge commented that the jury was comprised of very intelligent people and that I would never find another panel as smart as this jury. Both the judge and I turned white when we learned that these four jurors were chosen as alternates.

[100] The jury deliberated for five days. Seven of the jurors initially voted to acquit Louise, but we eventually lost those seven votes. The result was somewhat predictable given the composition of the jury without the four alternates, who were greatly disturbed by the end result. In fact, Mr. Mangelli was so upset by the decision that he threw a chair through a window. Others were equally appalled, including one particular legislator who had previously voted in favor of capital punishment but changed his position and voted against adoption of the death penalty in Massachusetts because Woodward had been convicted despite her innocence. Therefore, the Woodward case prevented Massachusetts from adopting capital punishment.[46]

[101] Judge Zobel later reduced Louise's sentence to time served following a post-trial motion. Martha Culkley, the current District Attorney and my opposing counsel in the Woodward case, and I have both publicly stated our belief that Judge Zobel thinks Louise

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[46] The death penalty was again defeated, by a larger margin, when a more recent vote was held in Massachusetts.

Woodward was innocent. Instead of ordering a new trial or issuing a judgment notwithstanding the verdict, which we could have appealed, the judge reduced Louise's sentence and sent her home to England, where she is now in law school.

[102] When Louise left for England, I told her that the only good that came out of her ordeal is that her case stopped Massachusetts from adopting the death penalty.

[103] Another recent case did not receive the same national media attention as the Woodward case but, as in that case, it involved an innocent person who was falsely accused of murder. Frank Lee Smith's ordeal began when a man jumped from a window after having raped and murdered a little girl, Shandra Whitehead.

[104] In 1988, Frank Lee Smith was convicted of homicide based on the testimony of a single eyewitness, Chiquita Lowe.[47] Chiquita had seen a man in the vicinity of the crime approximately half an hour before the murder; the description she provided to a detective at the Broward County Sheriff's Office was used to prepare a sketch of the perpetrator. The sketch depicted a large African American male with a droopy eye and no facial scars.

[105] After a few weeks, the detective heard rumors in Frank Lee Smith's neighborhood that perhaps Frank had committed the homicide. Someone indicated that Frank resembled the sketch of the perpetrator even though he did not have a droopy eye and was smaller than the person depicted in the sketch. Frank also had a large scar of his face, whereas the sketch did not show a similar scar on the perpetrator's face. Nevertheless, the detective took Chiquita to the police precinct, where he told her that Frank Lee Smith had been previously convicted of homicide;[48] the detective also told her that the police believed Frank was responsible for the rape

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[47] Smith v. State, 515 So. 2d 182 (Fla. 1987).

[48] Frank was convicted of two homicides as an adolescent but had been released from prison

and murder of Shandra Whitehead and for an additional twenty five rapes and rape-homicides that occurred throughout Broward County and the Fort Lauderdale area. After detectives showed Chiquita a photo line-up, she eventually identified Frank Lee Smith as the perpetrator.

[106] Even though Frank's physical appearance significantly differed from the sketch, he was convicted and sentenced to death and placed on death row in 1988.

[107] As I mentioned, there were twenty-five unsolved rapes and rape-homicides in the area in which a similar *modus operandi* was used. One suspect, Eddie Lee Mosley, had been charged with two or three of the rape charges but was found incompetent to stand trial. Smith's defense attorneys knew about Mosley, as did the police detective who testified under oath in the pre-trial deposition and trial of Frank Lee Smith that he had not shown a photograph of Eddie Lee Mosley to Chiquita.

[108] In 1991, Jeff Walsh, a wonderful investigator for the Capital Collateral Representative office in Florida, CCR (which is always losing its state funding but has very heroic lawyers who continue to fight), realized that Eddie Lee Mosley had a droopy eye; Eddie Lee Mosley did not have a facial scar; in fact, Eddie Lee Mosley was a ringer for the sketch based on Chiquita Lowe's description of the perpetrator. So, Jeff went to see Chiquita and showed her a photograph of Eddie Lee Mosley. She said, "Oh my God. That is the guy. I made a mistake. I felt pressured. I've never felt good about this." She later testified in the post-conviction hearing that Frank Lee Smith was an innocent man.

[109] After Chiquita Lowe testified, the detective took the witness stand and asked that his prior testimony be disregarded. The detective now claimed that he had shown Chiquita a

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because he suffered from schizophrenia.

photograph of Eddie Lee Mosley before the case began and that she had looked at it and said that he was not the perpetrator.

[110] The trial prosecutor, a straight law and order attorney who is now a federal judge, testified for Smith and said that he had no record of a line-up that included a photograph of Mosley; he also stated that he did not know why the detective now claimed there was a photograph. Despite the contradictory testimony, the post-conviction prosecutor had an *ex parte* conversation with the judge and together the two of them wrote a decision denying the application for post-conviction relief.

[111] A wonderful lawyer named Marty McClain found out about this and appealed the decision to the Florida Supreme Court. After six years, the Florida Supreme Court finally remanded the case. On remand, the detective produced the photo array that he claimed he had shown Chiquita Lowe but which he did not have in 1991. That is when Smith's lawyers called Peter Neufeld and me at the Innocence Project and said, "Let's try to get DNA testing." But under Florida law, you cannot present new evidence of innocence if two years have passed since the conviction. You cannot even get a DNA test. Still, we were able to get the prosecutor to agree to DNA testing provided we worked with the FBI and followed other numerous conditions. Finally we said, "OK, anything you want – your lab, your way, your protocol – everything. We'll do it." Although we agreed to the terms, the prosecutor backed out of the agreement and refused to permit a DNA test.

[112] It was around the same time that out agreement fell apart that Frank Lee Smith died of cancer in the X-wing of the Florida jail. It was a horrible death. He was strapped to a gurney with catheters through his penis.

[113] We decided to file a motion on behalf of Frank's aunt, his next of kin, to prevent the State from destroying the DNA samples. Although we have lost such motions in other jurisdictions, this time, however, they agreed to save the samples. Upon our success, we approached the prosecutor and said, "Look. You've got twenty-five unsolved rapes and murders going back ten to fifteen years. You think that Mosley, who's still incompetent to stand trial, did some of them. You think that Frank Lee Smith did at least one – maybe more. It's the same m.o. Or maybe there's a serial offender out there right now. Don't you think you have to test this?"

[114] A reporter from the Miami Herald, Fred Grim, began writing columns about the case, and the prosecution suddenly realized that this was bad press and finally agreed to let us perform the DNA test with the FBI. Besides, they were convinced that Smith was guilty.

[115] Sure enough, the results established that *Mosley* had raped and murdered Shandra Whitehead and that Smith was innocent. He died an innocent man on death row. A man who never understood what happened to him; a man who wrote letters while in jail that demonstrate he was mentally ill and that he did not understand why he spent twelve to thirteen years on death row.

[116] We tried to be nice and offered to have a joint press conference at which we would talk about the need for legislation that would permit post-conviction DNA testing in Florida. What did the prosecution do? They leaked the story on the same day that Al Gore conceded the presidential election. Maybe that is why some of you did not hear about this.

[117] We believed that one of the detectives involved in Frank's case committed perjury so we asked the Governor of Florida to appoint a special prosecutor, which he did. But there are many other cases in Broward County involving the same detectives where, through non-DNA

evidence, convicted defendants were proven innocent. All of a sudden, people are looking at the Broward County Sheriff's office and saying, "We're going to perform DNA tests, where it's possible to do so, in cases where people from that county have been sentenced to death." I think some of the Florida death row inmates for whom we can do DNA testing will be proven innocent.

[118] I have told you the Smith story in some depth because it is amazing that most people outside of Florida do not know about it. It also amazes me that we cannot interest the national media in this story. When I tell this story to the national media, reporters say, "Oh, it's Barry again, he goes on and on about these cases. It's just another exoneration." They do not want to report about Frank Lee Smith because he was convicted of other homicides and he was African American; in other words, the media felt that the story would not attract an audience due to demographics alone. It is really quite shocking.

[119] Our book *Actual Innocence*[49] is not really about DNA. It is concerned with the major causes that explain why innocent defendants are nevertheless convicted. We examine each of the causes of wrongful conviction: mistaken identifications, false confessions or admissions, junk science, police or prosecutorial misconduct, bad lawyers, and race. We then propose solutions for each of the causes. They are solutions that Republicans and Democrats, liberals and conservatives, prosecutors and defense lawyers, and even judges can support because they make sense. Solutions that demand support because every time an innocent person is arrested, convicted, indicted, or, God forbid, sentenced to death or executed, the real perpetrator is out there committing more crimes. This is a mainstream, core message that the American people understand. The exonerations of death row inmates are actually a de-

[49] DWYER ET AL., *supra* note 31.

legitimatizing force; everyone sees that the system in fallible and unreliable when those who are innocently convicted of murder are released from prison.

[120] As Albert Vorspan said earlier today, the issue is: fair or unfair. Public opinion polls show that people know that the poor and the middle class do not get good lawyers – the criminal justice system does not pay for experts or a good defense. Recall that it did not take long for reporters at the Chicago Tribune to review death row statistics in Illinois and to find that lawyers who have subsequently been suspended or disbarred represented twenty five percent of the death row inmates, and that jail-house snitch testimony was involved in a high percentage of death row cases in Illinois. This discovery was a critical factor in Governor's Ryan's decision to declare a moratorium on executions. There are so many capital defense lawyers that are literally asleep at the switch, not just in Illinois.

[121] I truly believe that there are thousands of innocent people who have been charged with or convicted for crimes they did not commit. Remember, DNA evidence was used in only ten to fifteen percent of the cases in which death row inmates were exonerated even though a DNA test can definitively establish innocence.

[122] With the help of our colleagues Larry Marshall and David Protess at Northwestern University, we have established Innocence Projects that are taking on both DNA and non-DNA cases. We are also working with social scientists, who are beginning to conduct research in this area. The causes of wrongful convictions and the injustices of the capital punishment system are so deep that the system will fall from its own weight if we continue to expose the injustices and begin to build an infrastructure of people willing to reexamine this system. Public opinion on the death penalty is going to change, but the public needs to hear about people like Frank Lee Smith in order for opinions to change as fast as they should. When they hear of the injustices, then

people will realize that we absolutely cannot continue with it. It is a game not worth the candle. And while some will not reach the conclusion that as a matter of moral principle the death penalty is wrong, they will realize, however, that they cannot, as Justice Blackmun said, "tinker with the machinery of death" anymore.

[123] When someone asks me how long it will take, I think about Dr. Martin Luther King's march from Selma to Montgomery, Alabama. When he was asked how long it was going to take until we get real civil rights in this country, he said, "How long will it take? . . . [I]t will not take long, because truth pressed to earth will rise again. How long? Not long, because no lie can live forever. How long? Not long, because the arm of the moral universe is long but it bends toward justice."[50]

V. DR. S. DAVID SPERLING,** PROFESSOR OF BIBLE, HEBREW UNION COLLEGE – JEWISH INSTITUTE OF RELIGION: HOW OFT-MISUNDERSTOOD JEWISH BIBLICAL TEXTS CAN, IN THEIR PROPER CONTEXT, ASSIST US IN CONSIDERING CAPITAL PUNISHMENT

A. Introduction by Rabbi Joshua Davidson

[124] It is my great privilege to introduce Dr. David Sperling. Dr. Sperling's specialties are Bible, ancient Semitic languages, and the history of the Israelite religion. He has authored numerous articles in journals and encyclopedias. His recent works include: *Students of the*

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[50] U.S. National Archives & Records Administration (NARA), *Report of the Select Committee on Assassinations of the U.S. House of Representatives: Findings in the Assassination of Dr. Martin Luther King, Jr.*, JFK Assassination Records, *at* http://www.archives.gov/research_room/jfk/house_select_committee/committee_report_mlk_findings.html (last modified Nov. 17, 2002).

** Rabbi S. David Sperling, Brooklyn College, Jewish Theological Seminary, ordained 1967; Columbia University, Ph.D. 1973. S. David Sperling is Professor of Bible at Hebrew Union College – Jewish Institute of Religion.

Covenant[51] and *The Original Torah*.[52] Those two titles capture precisely what Dr. Sperling can bring to this discussion of the death penalty – to speak to us about Biblical and related texts often cited for and against the death penalty. It is my great honor to introduce Dr. David Sperling.

B. Remarks of Dr. S. David Sperling

[125] I am here today to discuss certain Biblical texts and what I think they contribute to the issue of capital punishment.

[126] Let me begin by saying that I am a Reform Jew and I am opposed to the death penalty. I am also a Bible scholar; I study Biblical texts to see what they meant to their earliest audiences and to the persons who wrote them.

[127] As a scholar, I believe that you cannot expect Biblical texts to consistently support what you want them to support and to agree with what you want them to agree with. The process of stretching Biblical texts – to force those texts to support views that you accept – is somewhat arrogant. In other words, it is intellectually dishonest to interpret Biblical texts so they say what you want them to say, otherwise, any text can mean what you want it to mean.

[128] As a Reform Jew, I think it is very important for us to follow the dictum that tradition has a voice but it does not have a veto. Thus, when Biblical texts do not say what we would like them to say, that is when we have to part company with those texts. Because many Biblical texts are quite old, some are more than 2,700 years old, I realized that I must be open to the possibility that circumstances can improve over 2,700 years.

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[51] S. DAVID SPERLING, STUDENTS OF THE COVENANT: A HISTORY OF JEWISH BIBLICAL SCHOLARSHIP IN NORTH AMERICA (S. David Sperling ed. 1992).

[52] S. DAVID SPERLING, THE ORIGINAL TORAH: THE POLITICAL INTENT OF THE BIBLE'S WRITERS (1998).

[129] The first conclusion that I reached, after examining the meaning of some Biblical texts that relate to the issue of capital punishment, is that the Hebrew Bible is not resolutely opposed to capital punishment. According to some translations, the Decalogue, or the Ten Commandments, provide that "Thou shall not kill." I believe this command, however, is not a blanket prohibition of capital punishment because the best translation of the same passage from the Hebrew is "You shall not murder."[53]

[130] Murder is a tricky term. John Hospers, one of the great philosophy professors at Brooklyn College, spent several class sessions trying to get me and other students to come up with a definition of murder. The best we could do was to say that murder is unjustified killing. But how you define unjustified killing will, of course, vary from time to time and place to place. In the end, the only working definition that we found covered all definitions of murder is: Murder is the kind of killing of which the speaker, that is, the one using that term, strongly disapproves.

[131] When the Decalogue declares, "Thou shall not murder," it is prohibiting certain kinds but not all kinds of killing. For example, killing in warfare is certainly permitted. On the other hand, the Book of Numbers prohibits killing because it would entail taking the law into your own hands;[54] it prohibits an ordinary private citizen from performing what should be a judicial execution. Therefore, there is no blanket prohibition of the death penalty.

[132] An examination of Biblical texts in the original context and against the background of extra-Biblical ancient Near Eastern law led to a second conclusion, which is that some of the verses employed in the debate over the death penalty do not say what they have been alleged to

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[53] *Exodus* 20:13 (JPS HEBREW – ENGLISH TANAKH: THE TRADITIONAL HEBREW TEXT AND THE NEW JPS TRANSLATION (2d ed. 1999) [hereinafter NEW JPS TRANSLATION).

[54] *Numbers* 35:16-34 (NEW JPS TRANSLATION).

say. And, there is a definite trend in Biblical law to limit the application of the death penalty. Furthermore, the Biblical trend of limiting application and jurisdiction of the death penalty was expanded in later Jewish law.

[133] Genesis 9:4-6 is a story set after the flood.[55] God is speaking to Noah. First, there is a prohibition directed towards all humanity, to what Jewish tradition calls the sons of Noah, meaning Jews and Gentiles alike. This first prohibition is that you cannot eat the blood of a living being.[56] Then God says, "[F]or your own life-blood I will require a reckoning: I will require it of every beast."[57] In other words, every beast is liable for killing. For example, if a mountain lion in ancient Israel attacked and killed a person, then God will require the blood of that mountain lion. God applies the same rule to man, He says, "of man, too, will I require a reckoning for human life, of every man for that of his fellow man!"[58]

[134] The next passage is the crucial text, which is generally translated as "Whoever sheds the blood of man, by man shall his blood be shed."[59] Some view this passage as proof that humans are required by God to institute a system of capital punishment. Others, including the great Jewish scholar Arnold Ehrlich, believe the translation should be "He who sheds the blood of a human, for that human shall his blood be shed." In other words, it is *not* **by** man or **by** a human that blood shall be shed, but rather "**for** that human shall his blood be shed."

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[55] *Genesis* 9:4-6 (NEW JPS TRANSLATION).

[56] *Genesis* 9:4 (NEW JPS TRANSLATION).

[57] *Genesis* 9:5 (NEW JPS TRANSLATION).

[58] *Id.*

[59] *Genesis* 9:6 (NEW JPS TRANSLATION).

[135] God requires some accounting for a wrongful death, the murderous death of a human being. It is in the same context that God requires the life of every beast that kills a human. In other words, as it is God who requires these lives then this killing falls within the divine realm. You would have to stretch the grammar to say that the passage requires the institution of capital punishment. Therefore, even though the Bible does not outlaw the death penalty, it also does not ordain that there must be a system of capital punishment. God is the one who requires the blood; what the Rabbis would later call "death at the hands of heaven."

[136] In the same book of Genesis is a much more popular story – the first murder in the Bible. It is the fratricide of Abel committed by Cain. Cain is jealous of Abel; he takes him out to the field and then he stands up over him and kills him. God says, "Cain, where is your brother?" And Cain says, "Am I my brother's keeper?" Then God says to Cain that He hears the sound of Abel's blood coming out of the ground. Cain is now afraid. He says that he will be killed, because anyone who finds him knowing that he is a murderer will kill him. Instead, God punishes Cain – Cain will be cursed, his earth will be fruitless, and he will be condemned to be a wanderer. But God does not impose the death penalty for this absolutely heinous crime.

[137] While the first murderer is not punished with death – God does not strike him down – there is no escaping the fact that certain Biblical texts prescribe the death penalty. The prime example is *lex talionis*, the law of retaliation. For example, Exodus 21:22 provides:

> When men fight, and one of them pushes a pregnant woman and a miscarriage results, but no other damage ensues, the one responsible shall be fined according as the woman's husband may exact from him, the payment to be based on reckoning. But if other damage ensues, the penalty shall be life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise.[60]

[60] *Exodus* 21:22-25 (NEW JPS TRANSLATION).

Therefore, Exodus decrees that "[h]e who fatally strikes a man shall be put to death."[61] We have to understand, however, that these laws in their historical context actually serve as *limitations*.

[138] If you read the oldest criminal code, the Code of Hammurabi, you will find that it provides a limitation based on class. Thus, "If a man strikes a free-born woman [i.e. of the same class] so that she lose her unborn child, he shall deliver ten shekels for her loss."[62] Moreover, if the woman that he struck dies, then his daughter will be killed.[63] Yet, "if a woman of the free class [i.e. a woman of the commoner class] lose her child by a blow, he shall pay five shekels in money."[64] The Code of Hammurabi is typical of Middle Eastern law. In contrast, Biblical law similarly limits the penalty but in regards to the offender; thus, only the offender is killed and there is no difference in punishment based on the victim's membership in a particular class. Thus, while Biblical law definitively prescribes the death penalty, that law must be compared with a system in which the class of the person killed was significant and in which your children could be executed because of something you did.

[139] The Bible also places another very significant limitation on the death penalty. Deuteronomy provides that "[a] person shall be put to death only on the testimony of two or more witnesses;" no one can be executed "on the testimony of a single witness."[65] Likewise,

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[61] *Exodus* 21:12-13 (NEW JPS TRANSLATION).

[62] The Code of Hammurabi: The Code of Laws, ¶ 209, *at* http://www.wsu.edu/~dee/MESO/CODE.HTM.

[63] *Id.* at ¶ 210.

[64] *Id.* at ¶ 211.

[65] *Deuteronomy* 17:6 (NEW JPS TRANSLATION). The limitation is repeated in *Deuteronomy* 19:15 (NEW JPS TRANSLATION).

Numbers provides, "If anyone kills a person, the manslayer may be executed only on the evidence of witnesses; the testimony of a single witness against a person shall not suffice for a sentence of death."[66]

[140] The witness requirement in the Bible is extended in rabbinic thinking. There is a section of the Talmud called the Mishnah Sanhedrin, which says that before a person can be subjected to the death penalty there must be at least two witnesses to the crime and the offender must have been warned of the method that would be used to carry out the death sentence, as methods are determined according to the nature of the crime committed.[67] Therefore, according to this rabbinical statement, when you see someone about to commit a capital crime, you have to warn that person of the method that will be used to put him to death.[68] Despite the warning, the accused will have a defense if he does not respond or merely nods his head after receiving the warning.[69] The accused will not have a defense, however, if he verbally acknowledges the warning and states that he is still going to commit the crime despite the punishment.[70] That is the extreme position of rabbinical law.

[141] There is another famous, often quoted statement, which says that a Sanhedrin, or high court, that executes more than one person in a seven-year period is reckless or tyrannical. Moreover, two famous Rabbis of the Second Century, Rabbis Tarfon and Akiva, said that no one would have ever been executed had they been on the high court. There is also a dissenting

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[66] *Numbers* 35:30 (NEW JPS TRANSLATION).

[67] THE TALMUD OF THE LAND OF ISRAEL: A PRELIMINARY TRANSLATION AND EXPLANATION 153 (Jacob Neusner ed. & trans. 1984).

[68] *Id.*

[69] *Id.* at 153-54.

[70] *Id.* at 154.

statement by Rabbi Shimon ben Gamaliel, who said these Rabbis, Tarfon and Akiva, would have multiplied the presence of murderers in ancient Israel. Notice that even in Rabbi Gamaliel's dissenting view, he does not challenge the infrequency requirement; he only challenges the total abolition of the death penalty.

[142] Lest you think that this is completely impracticable, the Mishnah Sanhedrin deals with situations in which the witnesses do not meet stringent requirements, including the requirements that they need to be at least partially literate and gainfully employed.[71] There is a law in the Mishnah Sanhedrin that provides that a criminal who commits a murder will be permanently locked in a vault, fed subsistence rations but kept alive, if there are no proper witnesses or the witnesses do not meet all of the qualifications.[72] So, they did have a practical way of dealing with it.

[143] In conclusion, I would prefer that the preceding texts completely agreed with me and were opposed to the death penalty – because that is what I believe should be the case. I do not, however, think that is the case. Still, I believe that the trend in the Bible, which breaks down class distinctions and has witness and eligibility requirements, and the extension by rabbinical law, demonstrate that there is a very strong inclination in Jewish law by the Second Century towards the total abolition of the death penalty.

VI. RABBI JULIE SCHONFELD, CHAIR, SOCIAL ACTION COMMITTEE OF THE RABBINICAL ASSEMBLY: WHY THE RABBINIC ARM OF CONSERVATIVE JUDAISM IN THE UNITED STATES TOTALLY OPPOSES CAPITAL PUNISHMENT

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[71] *Id.* at 103-04.

[72] *See id.*

A. Introduction by Rabbi Joshua Davidson

[144] Rabbi Schonfeld is the spiritual leader of The Society for the Advancement of Judaism in Manhattan. She is the creator of "Touch-stones," an interdisciplinary program in which participants explore Judaism through their passions and interests. She is the Chair of the Social Action Committee of the Rabbinical Assembly, which is the rabbinic arm of Conservative Judaism in this country, and she is the former Chair of the Resolutions Committee of the Assembly. Rabbi Schonfeld also serves on the Board of Governors of the New York Board of Rabbis. It is with great pleasure that I introduce Rabbi Julie Schonfeld.

B. Remarks of Rabbi Julie Schonfeld

[145] I am delighted to be here to discuss this important subject. I will start by reading to you the resolution adopted by the Rabbinical Assembly in 1996:

> Whereas, the Torah teaches that all human beings are created in God's image;
>
> Whereas, Jewish tradition upholds the sanctity of life;
>
> Whereas both in concept and practice Rabbinic leaders in many different historical periods have found capital punishment repugnant;
>
> Whereas, no evidence has been [marshaled] to indicate with any persuasiveness that capital punishment serves as a deterrent to crime;
>
> Whereas, legal studies have shown that as many as 300 people in this century have been wrongly convicted of capital crime;
>
> Therefore, be it resolved that The Rabbinical Assembly oppose the adoption of death penalty laws and urge their abolition in states that have already adopted them;
>
> That the Rabbinical Assembly urge the enactment of laws that mandate that some capital crimes be punishable by life imprisonment without parole;

> That the Rabbinical Assembly offer support and speak out on behalf of the victims of violent crime and their families;
>
> That the Rabbinical Assembly encourage its members to send this resolution to their appropriate elected officials.[73]

[146] What can we learn from the Rabbinical Assembly's resolution on capital punishment? First, it is an object lesson on the Conservative point of view, at least in our Social Action Committee, regarding how we apply Jewish tradition to contemporary issues. My colleagues and I believe there is ample precedent in Jewish tradition to support our opposition to capital punishment and our view that the death penalty is a pressing issue in contemporary society that compels us to speak.

[147] Clearly, from Dr. Sperling's talk, we see that there have been times during which Judaism was not completely opposed to capital punishment. Therefore, how was the Rabbinical Assembly able to state with confidence that we speak in the name of a Jewish tradition that opposes capital punishment?

[148] As the Bible permitted capital punishment under certain circumstances, the Jewish people found themselves during the early Rabbinic period, while the Temple was still in existence, with the notion that capital punishment was possible. Yet, although there were crimes for which one could be exposed to the death penalty, there also was a detailed set of restrictions that made it absolutely impossible to impose that penalty. Our ancestors, acknowledging that there are some crimes so heinous that the human conscience cannot bear to let them go unpunished, instituted statutes demanding capital punishment. At the very same time, however, an unequivocal commitment to the sanctity of life made it impossible to mete out capital punishment.

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[73] *The Rabbinical Assembly*, *supra* note 2.

[149] During the time of the Temple, the great Sanhedrin was the highest court of the people. A Sanhedrin of twenty-three judges was required for a capital case, compared with a Sanhedrin of three judges that was required for simpler matters. The judges who heard capital cases had to meet an exhaustive set of criteria in order to assure that they could not be swayed from pursuing the cause of justice as a result of public opinion, graft, or any other improper reason. Additionally, a second group of twenty-three judges listened to the evidence presented, they were obligated to report any error made to the detriment of the defendant. On the other hand, they were not obligated to report an error made to the advantage of the defendant.

[150] Another protection enjoyed by the defendant was a requirement that the evidence presented had to be direct evidence; there had to be two witnesses to the crime and circumstantial evidence was not permitted. That makes one start to think that fingerprint and DNA evidence, had it existed at the time, would not have been permitted. Instead, the two witnesses had to be present before the crime was committed; they had to see the potential murderer with a weapon in hand; they had to ask the potential murderer whether he was aware that he would be eligible for the death penalty if he were to commit the crime; the potential murderer had to respond that he was aware that he could be subjected to the death penalty; the witnesses then had to see the murderer commit the act. Meeting these requirements did not necessarily guarantee the murderer would be punished by death, as the witnesses' testimony would be found invalid if there was any reason to suggest they might be biased. Moreover, the testimony was invalid if the witnesses would receive any benefit from giving their testimony. So, unlike our system, there were no "deals." The witnesses had to be warned at the time of testimony of the serious penalties for perjury, and they had to acknowledge that they are aware of these risks.

[151] Despite all of these various aspects that would keep capital punishment from actually being meted out, no court would or could accept a capital case after the destruction of the Temple. Even where the secular authorities said that the Jewish courts could make the decision, they no longer agreed to hear such cases after the time of the Temple.

[152] As the above examples demonstrate, Jewish tradition has approached capital punishment in an interesting way. In some ways, our ancestors wanted to say that because of our comprehension of the infinite value of human life, capital punishment is not a possibility for the Jewish people. Paradoxically, our ancestors could not say that capital punishment was not possible for the very reason that life is sacred, in addition to the horror that we feel in response to a murder. The assertion of our tradition that murder desecrates God's own presence in our world could not enable us to erase the notion of capital crimes from our legal writings.

[153] So, there was a theoretical possibility of a capital punishment that could not possibly be carried out. That subtlety is not embodied in the Rabbinical Assembly's resolution. I do not think that we have tremendous confidence that should the American people have statutes on the books permitting capital punishment, our society would nevertheless refrain from using that power to mete out execution as a punishment. So, short of that possibility, we extract from the lessons of our ancestors the fact that clearly they did not want to carry out capital sentences. And it is on this basis that we speak unequivocally against capital punishment.

[154] Our resolution is public. It is on the books. The Rabbinical Assembly of the Conservative movement opposes capital punishment.

[155] Thank you.

VII. RONALD J. TABAK: PERSPECTIVE ON GOVERNOR DUKAKIS' RESPONSE IN THE 1988 PRESIDENTIAL DEBATE WHEN QUESTIONED ABOUT THE HYPOTHETICAL RAPE AND MURDER OF KITTY DUKAKIS

[156] The real problem with Governor Dukakis' answer was *not* what the press reported – that people reacted badly because Dukakis did not support the death penalty. The real problem was that, unlike all of our speakers today, who have said that one would be shocked, outraged, and infuriated by such a crime, Dukakis' answer made it sound like he was an automaton who could not care less if his wife were brutally raped and murdered. He simply gave rote answers as to why he did not support the death penalty.

[157] It is very important to realize that the press and politicians like Bill Clinton learned the wrong lesson from Dukakis' experience with the press, which has led them to conclude that a candidate cannot get elected unless he or she supports the death penalty. I do not believe that is the case; evidence shows that it is not a correct conclusion. It is also very important that people who oppose the death penalty show that they do care and are concerned about the victims of crime and the loved ones who survive them.

VIII. SISTER HELEN PREJEAN, AUTHOR OF *DEAD MAN WALKING*: OUR NEED TO JOURNEY WITH CLERGY AND LAITY WHO ARE AMBIVALENT ABOUT CAPITAL PUNISHMENT, AND THEN TO ACT TOGETHER FOR ITS ABOLITION

A. Introduction by Ronald J. Tabak

[158] Sister Helen Prejean has lived and worked in Louisiana all her life. In 1981, Sister Prejean began working with poor, inner city residents of the St. Thomas Housing Project. That same year, she began counseling death row inmates in Louisiana's state penitentiary, which she continues doing to this day. She has accompanied five men to their executions; the second man

was my client, Robert Lee Willie. Sister Prejean also works with the families of murder victims, founded a group called Survive in New Orleans, and is an honorary member of Murder Victims' Families For Reconciliation.

[159] Sister Prejean is the author of *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States*. Along with being made into a movie, *Dead Man Walking* has recently been turned into an opera.

[160] She has been nominated four times for the Nobel Peace Price and travels extensively throughout the United States to speak about capital punishment. Sister Prejean is the Honorary Chairperson of Hands Off Cain, a high official with Amnesty International, and the Honorary Chairperson of Moratorium 2000, which seeks a national and worldwide moratorium on the death penalty for the purpose of leading to abolition.

[161] I am delighted to present Sister Helen Prejean.

B. Remarks of Sister Helen Prejean

[162] It is incredible to be here today. I realize how steeped I am in the Hebrew spirit and the scriptures. When I wrote *Dead Man Walking*, I only wrote one thing: Choose life. I wrote that because the death penalty has propelled this nation into what is essentially a spiritual journey.

[163] We have been down the death road since 1976, when the United States Supreme Court upheld new death penalty statutes that supposedly eliminated the arbitrary and capricious nature of capital punishment, recognized by the Court when it overturned the death penalty in

Furman v. Georgia.[74] Yet, here we are, still on the road having executed almost seven hundred human beings since *Furman*.

[164] Mine is a very spiritual journey, which continues to this day. I spent the first part of my journey trying to understand the Gospel of Jesus through an understanding of the prophetic role and by getting involved with the poor, the marginal, and the cast-aways – as Jesus did, unfurling the scroll as is recorded in the Gospel of Luke.

[165] At first, I rejected the idea that Jesus was about social justice. Although I am a Catholic Nun, I did not understand the connection between my spiritual life and social justice. I told myself, "Hey. We're nuns; we're not social workers. We're not supposed to get involved in social justice or politics. I'm not political. I'm spiritual." But then I came to understand that enlightenment, no matter how it is attained, is always the pure grace of God. That insight came to me while I listened to a fellow Sister speak at a conference. She unleashed for me the prophetic role and the scriptures through the prism of Jesus.

[166] Jesus preached good news to the poor, and integral to the good news that He preached was that they would be poor no longer. I also began to understand through Isaiah, the suffering servant, who said, "Is this not the fast that I have chosen[,] . . . is it not to share your bread with the hungry?"[75] Thus, when I looked at the prophetic impulse in the Hebrew Testament, I saw that it is all about reaching out to the stranger, the foreigner, the marginal, and the disenfranchised. What did I realize? I realized that I did not know any poor, disenfranchised people because we live in such a compartmentalized society. I lived by a lakefront in New Orleans; there are ten major housing projects in New Orleans and I had not been to any of them.

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[74] 408 U.S. 238 (1972).

[75] *Isaiah* 58:6-7 (New King James Version).

[167] We have become so afraid of each other, so afraid of poor people that we do not go to their neighborhoods. We think we can be hermetically sealed off. We separate ourselves by race and by class. How do we cross those boundaries and come together with one another? Martin Luther King, Jr. used to say that the most segregated hour of the week is when people go to church on Sunday; maybe we can include the Sabbath on Saturday. I came to understand that I could not be serious about trying to follow the path of Jesus without ever knowing a poor person. That is what led me to the St. Thomas Housing Project. That is when I put my boat on those waters, to get involved with poor and struggling people, crossing over from a life of protected privilege and going where there was suffering, injustice, and racism. I did not live in the housing project with a blueprint in my back pocket of how to save people from poverty; I lived there with the idea of accompanying people and learning from them.

[168] It was while I lived in the housing project that I received an invitation to write to a man on death row. Louisiana had not executed anyone since the 1960's so I did not think that I would do anything other than write letters. I would be faithful in writing the letters. I knew that this man on death row, whoever he was, did not need me to write a flurry of letters and then abandon him in order to do something else.

[169] When I wrote the first letter, I decided that I would be like a lighthouse; I would keep beaming in those letters even if he did not write back. But he did write back. His name was Patrick Sonnier. I wish I had kept that little piece of paper on which the Prison Coalition Office wrote down his name and address for me. There it was, "Death Row."

[170] I wrote him. He wrote back. And I wrote, then he wrote; I wrote, and he wrote back. It was like a little thin trickle of water across the baked clay, the great divide that divides us from people in prison – especially from people on death row.

[171] I accompanied Patrick to the electric chair. What words did I choose to read to him on the way to the electric chair? I read the words of Isaiah: "I have called you by your name; You are Mine. When you pass through the waters, I will be with you; And through the rivers they shall not overflow you. When you walk through the fire, you shall not be burned . . . ."[76] But his body would be burned – very burned – by 1900 volts of electricity that were going to hit his body. The words of Isaiah were there with me in that execution chamber, walking with this man, and watching him be killed in front of my eyes.

[172] I came out of there stunned, traumatized. The Sisters, who had been holding a prayer vigil, were waiting for me. They put a coat around my shoulders and put me in a car to take me home. We drove about a mile down the road before we had to stop the car so that I could throw up. I had watched a human being be killed in front of my eyes.

[173] Although I was an English major, I had never written a book before *Dead Man Walking*. I had always kept a spiritual journal, and liked reading, liked literature, and liked writing. But instinctively, I felt that I needed to write this book from the point of view of a witness. As executions are a secret process, writing the book was the only way that I could show what I had seen to the American public.

[174] Patrick Sonnier was on death row; his brother Eddie was serving two life sentences. So, my first question about the legal system was how did one brother get death and the other brother get life for the same murder? How did that happen? Although my father was a lawyer, I had never looked into legal matters. I had just assumed that a man or woman on trial for their life would have a proper defense in the United States of America. It never occurred to me that we would send people to death without having given them an excellent defense. That we do not

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[76] *Isaiah* 43:1-2 (New King James Version).

provide an excellent defense to those on death row was one of the things that I was going to learn. Patrick Sonnier, for example, had a lawyer who saw him for two half-hour periods while preparing his defense. One of those half-hours was on the morning of the trial itself.

[175] I did not want to be naive. I knew there had been a crime. So I asked the Coalition office for background information; I read the legal briefs and looked at the faces of two beautiful teenagers – smiling, dressed in their prom outfits.

[176] If you ever meet any of the people on death row and look into their eyes – if we had Timothy McVeigh sitting here where the Rabbi is sitting – you would say, "Oh my God. This is a human being." If you ever met his father, his mother, his family, his parish priest, you would begin to talk about real human beings.

[177] Yet, we have this unspeakable mystery of evil that happens. I looked into the faces of those two murdered teenagers and I felt a huge conflict in my soul. How can you not feel outrage when you hear about the death of innocent people? It is part of moral sensibility to feel outrage. If we do not feel outrage it is because we are numb, we are calloused. If we feel no outrage then it has reached a point where we feel it is just too much.

[178] We must feel the outrage and stand in the outrage. And I learned a very important thing after I left that execution chamber and began to talk to people – first, people close to home, and then, after the book and the movie, people across the United States and in other countries as well – I learned that if we are going to take people through this issue then we need to get into the fierce whirlpools that are emotionally part of this issue. One of those whirlpools is outrage. Outrage wells up within us, saying, "Whoever did this deserves to die." Thus, in the death penalty debate, you will hear people say, "Well, at least let's have the death penalty for Timothy McVeigh because he deserves it." But you have got to remember: before Timothy McVeigh

there was Ted Bundy, who killed and raped many women. If you go to Starke Prison in Florida, you can still see one hundred phone jacks where the media gathered outside the prison for Bundy's execution. They had to close the blinds in the execution room because they were so scared that a sniper was going to get him through the window before they could execute him. So great was the rage and fear of the community.

[179] When I read about those two murdered teenagers, and that people were keeping their children locked inside after they were killed, I thought about the two men whom I was visiting. I had to take it into my own soul, because there was no doubt when I visited Pat and Eddie that they were human. There was no doubt that they were worth more than that one act of their life; there was more to them than that. Yet, I looked into the faces of the two teenagers and read what those two brothers did on the night of November 4, 1977 – a date that the families will never forget. The teenagers were parked after leaving a football game. The brothers were out rabbit hunting with .22 rifles. They approached the kids and said that they were security guards and asked whether the kids knew that they were trespassing. The brothers told the teenagers that they would not be reported if the girl had sex with Pat and Eddie. Five other teenage couples later came forward and said, "They did the same thing to us," although none of them were killed. But this night, the teenagers were found face down, their faces in the wet grass and bullet holes in the back of their heads.

[180] I read all of this. And then I had the terrible knowledge of what they had done. I was not naive anymore.

[181] That is when the real spiritual journey began. How can we feel the outrage in our soul but also know in our deepest spiritual essence that we do not want to imitate that violence – duplicate that violence by putting another family through that now?

[182] Through Patrick Sonnier, I met a victim's family member, an incredible man named Lloyd LaBlanc. He is the hero of *Dead Man Walking*. If you are looking for a hero, it is not me. I was the scribe. I wrote what happened. I was a witness. Lloyd LaBlanc, whose son David was killed, is a hero who went through an intense spiritual journey. There are many like Lloyd, whose children or other loved ones have been killed, who will come to events such as this and speak about their journey and how they came to reconciliation and forgiveness instead of vengeance.

[183] There is a group called Murder Victims' Families For Reconciliation. One of its members is Bud Welch, whose daughter Julie died in the Oklahoma City bombing. If you hear Bud speak, he will tell you that he understands why Timothy McVeigh wore a bulletproof vest when he walked from the police car into the courthouse. He will admit to you that he would have killed McVeigh with his own hands if given the opportunity. Can anyone sitting in here today, myself included, say that we would not feel the same rage if one of our loved ones was murdered?

[184] Julie had not only been Bud's daughter, she was also his best friend. He had lunch with her every Wednesday. And in this one act, one man killed her and one hundred and sixty-seven other people.

[185] As time passed after his daughter's death, Bud Welch began to drink and smoke too much. Several months passed; then, one day Bud Welch was in the car and he turned on the car radio. The grace of God hits us in so many ways. For Bud, the grace of God hit him as he turned the knob on the radio – he remembered being in the car with Julie; he remembered that they were listening to the radio together when they heard a report about an execution in Texas; he remembered that Julie had turned to him and said, "Dad, that's about nothing but vengeance.

I'm not for the death penalty. Are you, Dad?" And then he knew. Julie would not want the death of Timothy McVeigh – so neither could he.

[186] Bud was the first victim's family member to stand under what they call the Survivor Tree – so named because it was alive after the bombing had knocked out everything else – and say, "I'm not for the execution of Timothy McVeigh." Afterwards, people began to treat Bud as though he were nuts. Some people even asked him whether he loved his daughter Julie.

[187] The death penalty exerts pressure on people in a community to seek the death penalty when there has been a terrible murder; it exerts pressure on juries, who have to play God behind closed doors, when they are faced with a terrible crime yet terrible mitigating circumstances, when they are forced to decided whether a human being should live or die; it exerts a great pressure on the victims' families. Just think of the jurors in Jasper, Texas, who had to decide a case in which white supremacists killed the victim, a black man, by dragging him behind a car. What was that jury going to do? The jurors would have been seen as lacking respect for the victim if they had not decided the death penalty was an appropriate punishment. When you have an ultimate punishment and you do not use it, it looks like you are not honoring the victim.

[188] When I began visiting Lloyd LaBlanc and praying with him, I discovered that he was clearly choosing the road of reconciliation and forgiveness. In addition to Lloyd, I came to know the Harveys because their daughter was the victim of the second man whom I knew on death row, Robert Lee Willie (whom Ron Tabak represented).

[189] Robert and another man, Joseph Vaccaro, brutally killed a young girl, Faith Hathaway. Faith's biological mother, Elizabeth, and her stepfather, Vernon Harvey, could not wait to see Willie die. Anyone can understand that. A week before his execution, they had their

own press conference and Vernon Harvey said, “I am going to pull the switch myself. Oh, I can’t wait to see the smoke come off his body.”

[190] Despite all the efforts to save Robert’s life and the injustice of his legal proceedings, most people only thought of the crime – the rage of the crime – and the desire to get “justice.” After Robert’s execution, we all filed out of the prison. The media was waiting for us because the case had received national media attention. Vernon Harvey stepped up to the microphones and was asked, “Well, Mr. Harvey. You finally got your wish tonight. You got to watch Robert Lee Willie die in the electric chair. How do you feel now?” He said, “Anybody got any whisky? Anybody want to dance?” But then he said, “You know what, though? The SOB died too quick. I hope he burns in hell.”

[191] Vernon and Elizabeth were outside the prison gates with their aluminum folding chairs, water cooler, and two signs, which said “Another murderer getting his due” and “Justice for the victim’s family,” every time there was an execution in Louisiana. They could not break out of it.

[192] There is pressure on victims’ families to publicly declare that they support the death penalty. They often say, in their confusion and rage, that they do want the death penalty. Some of them feel that it is the only way to honor their loved one, and that asking for anything less will look like they are not honoring their loved one.

[193] How do they get out from under that?

[194] I read recently that as many as half of the victims’ families in the Oklahoma City bombing did not want to see Timothy McVeigh die. They had passed that point; they realized that they would still have to deal with their grief and with the empty chair at their dining room table when Tim is dead.

[195] Once you have something like the death penalty in a society, then you must also protect yourself from it. People will use the death penalty if we have it. And then where are we?

[196] I was shocked when I began visiting support groups for victims' families and started listening to their stories. I knew that death row inmates are treated like pariahs. But I did not know that victims' families are similarly treated like pariahs. One after another said, "After the funeral, people don't come around. When I try to talk about my daughter's murder, people change the subject. Sometimes, people say to me, 'Shouldn't you be past that by now?'" Our culture does not know how to deal with death or pain. People stayed away from victims' families as much as they stayed away from people on death row. That is what led to the creation of a victim's support group in New Orleans for those who survive after a loved one is murdered.

[197] Forming that group led me to discover the relationship between racism and the death penalty. While I knew that a disproportionate number of people of color were filling the prisons and death row, I did not know how it worked from the victim's side.

[198] There were around forty African Americans, mostly women, in the survivor support group. Some were like Shirley Carr, who lost two of her sons – killed within 6 months of each other. But all were alike in that the death penalty was never sought for any of the defendants who had murdered the survivors' loved ones. None of the defendants' cases even went to trial in New Orleans.

[199] We cannot escape the conclusion that race is implicated in our application of the death penalty. The death penalty is pursued according to who the victim is; more often than not, it is pursued when the victim is white. But where is our outrage about that?

[200] When I lived in the St. Thomas Housing Project and took the side of the poor and the disenfranchised, I began to see things because I was there with them. When a person in the

housing project was killed, you were lucky if you could find a story about it on page fifteen of the Times Picayune, the New Orleans newspaper. But every time a white person was killed, the story was always on the front page along with a picture of the victim. That is a pretty clear indication that we are very outraged over the deaths of some victims of crime but not particularly upset over the deaths of other victims of crime.

[201] And then there is class. Try to imagine this: a homeless person is killed in the middle of the night and his or her body is found on some doorstep the next morning; in response, the District Attorney's office holds a full court press and says, "One of our valuable citizens was killed in the middle of the night so we are going to pursue the ultimate punishment." Can you imagine that happening? Does anyone care when the "nobodies" are killed? Justice is not sought for them.

[202] For us to be clean and pure enough as a society to be entrusted with something like the death penalty, we would have to show that we care as much about the child who is killed in a drive-by shooting as the white suburban housewife who is killed in the suburbs. Are we anywhere near that?

[203] When I visited death row, I began to meet people there. I am not going to make them into heroes. We are not talking about heroes. We are talking about human beings.

[204] When we get into trouble as a society, we turn that little switch towards some human beings and say, "They are not human the way the rest of us are so it is OK to terminate them." We never see them, and we are not anywhere near them during the execution. We hire somebody to do the killing for us.

[205] I have been doing this for fifteen years. Since I walked out of that execution chamber when Pat was executed in 1984, I have been getting on planes and speaking to the American public about the death penalty, helping to bring them through the journey.

[206] I have found that people are not really committed to the death penalty. I have also found that people are very ignorant of it. It is not a personal, moral issue for most of us. Most of us, thank God, have not had somebody close to us murdered. But, if you give people a chance, help them to make a choice, then I have found that they are going to choose life.

[207] I have met politicians who are now on this road, as well as many universities, churches, and some synagogues. One politician approached me and said, "Look, Sister. I want you to understand something. Personally, I am against the death penalty, but I was running in an election. My opponent had ten times the amount of campaign money that I had; he could afford to pay for television advertisements but I could only afford a few radio and newspaper advertisements and a couple of billboards. He would have blown me out of the water if I had said that I did not support the death penalty. He would have said, 'Soft on crime, soft on crime, soft on crime.' So, I said, 'Hey, I'm also for the death penalty.' I headed him off before he could create an issue. And I won the election. Now I am going to try do something good." He felt that he could not win an election if he said he did not support the death penalty.

[208] Still, we have reached a point in this country where a shift in thinking is starting to emerge. A prime example of that shift is a Massachusetts politician, John Slattery, who stood before the Massachusetts Legislature and said that he was changing his vote – he decided to vote against implementation of the death penalty in Massachusetts because Louise Woodward could have been executed. People threw garbage on John's lawn, a disc jockey gave out his personal phone number over the air, and he even had to go with his family to Florida for a week. But

guess what? When he ran for re-election the next year, he won. It was refreshing for the public to see a politician act according to his principles when dealing with a very, very controversial issue that they voted for him. Similarly, there is a Pennsylvania legislator who is repeatedly re-elected even though he has made it known that he is against the death penalty.

[209] More and more, we are finding out that the death penalty is not the litmus test to which people look in deciding whether or not to vote for someone. Yet, the death penalty does affect politicians. After I was a guest on a radio talk show in Hartford, Connecticut, Al Gore was a guest on the same show. The host said, "Welcome, Mr. Vice President Gore. We just had the death penalty nun on, Sister Helen, the *Dead Man Walking* nun. Do you have any comments?" Al Gore replied, "Admirable person, inspiring movie." End of comment.

[210] Al Gore knew that he and George W. Bush were competing in a close presidential race, which meant that Gore would not publicly support a moratorium or a permanent end to the death penalty. What I found interesting about the presidential race is that neither of them pushed the death penalty issue to the front burner. They spoke about the death penalty when they were asked about it. Both of them used the fig leaf that George Pataki used – he almost made me wreck the community car when I heard him on NPR news – the fig leaf of deterrence; that the death penalty will deter crime. Pataki said that while we are not sure about its deterrent effect, it is worth having the death penalty if it stops one person from being killed.

[211] Everyone who works in this area knows that the death penalty has got nothing to do with deterrence. For example, the New York Times printed an article about rising and falling crime rates over the past twenty years. The article reported that states with the death penalty often have a higher homicide rate than states without the death penalty. Furthermore, homicide rates are not dependent on the state's proximity to states with the death penalty or states without

it. People close to the dynamics of crime know that the people doing the thinking and the people doing the murdering are two separate sets of people. If people do not think about the consequences of their actions at the moment they commit the act, then we could boil people in oil to punish them and it would not stop those with chaotic lives, who use alcohol and drugs and have guns in their hands, from killing each other.

[212] I was talking to the warden at the Louisiana State Penitentiary and I said, "Warden. You know all these people on death row. Did any of them ever say, 'Maybe I better not. I might get the death penalty.'?" The warden laughed. He said, "Sister. Not just the guys on death row; there are five thousand guys in this maximum security prison who never thought they would get caught."

[213] If you do not consider the consequences then how can the death penalty be a deterrent? Why do death penalty proponents use the deterrence argument? Why did George Pataki use it when he ran? I had the opportunity to be on *Crossfire* with George Pataki. When he made the deterrence argument, I talked about Canada's abolishment of the death penalty in 1976, after which the murder rate in Canada, which had been rising, evened out and dipped down. I pointed out that there is a higher homicide rate in states that have the death penalty than in other states. I kept going. Then, he said, "Sister, with all due respect . . . ." That is where he made his mistake. Every time he said, "With all due respect," I would give him five more statistics.

[214] You hear the death penalty legitimized through the deterrence argument by many politicians; both George W. Bush and Al Gore used it. Politicians do not want to look like or sound like they are for selective retribution and vengeance. But there is no doubt that the death penalty *is* selective retribution and vengeance. There are 17,000 homicides in this country every

year. Granted, not all of them are first-degree murders. From those 17,000 homicides, picture the funnel and picture a narrow, narrow little spout: only one and a half to two percent of people who kill other human beings are selected for death. There are more than 3,700 people on death row right now who could move into life in prison and there would barely be a blip on the criminal justice screen.

[215] The big blip would be on the political screen, because what symbol would politicians use to demonstrate they are tough on crime? Do not underestimate how much of this is about symbolism.

[216] As I mentioned earlier, I have seen the goodness and decency of the American public from the time I got on this road to tell these stories, to help people through this journey. People are not wedded to the death penalty. Often, all some people have to hear is that there really is life without parole in their state, that people who are sentenced for first-degree murder are not going to get out in a few short years. That is all they need. That is the safety net that they feel they need. That is very different from retribution. And safety is a legitimate interest; we have to protect our children and grandchildren from people who do these violent acts. Of course we must protect them.

[217] The death penalty is just the tip of the iceberg. There are approximately two million incarcerated people in this country – with one out of every three black men aged eighteen to twenty-nine in the prison system, and one out of every seven black men in this country is ineligible to vote because he has a felony record. We must do something about this.

[218] The question is how can we get young men into education rather than into prisons? This is one of those instances where we hope people will listen to Deuteronomy, which says, “I

set before you death and life, blessing and cursing; therefore, choose life, that both you are you descendants may live."[77] How are we going to live?

[219] What the fairness and innocence issues show us, myself included, is that we did not realize how faulty the system was when we started going down this road saying that some innocent people could get death.

[220] When I first started visiting Pat on death row, I thought it was an absolute fluke or very rare that innocent people could end up on death row when we live in a country that has the best court system in the world, one that allows many appeals. But now we are beginning to see that capital punishment is like visiting a hospital that we have heard has a high incidence of patients who die and seeing that the hospital uses the same needle twice; it does not use sterile techniques; it does not have a clear triage in the emergency room; it treats someone with a broken thumb before someone who cannot breathe. We are not surprised when we hear that patients are more likely to die in that hospital. That is like what we are beginning to find out now about the criminal justice system and the death penalty.

[221] The reason that we are not going to be able to fix the death penalty is that we do not have a system that we can depend upon to expose the truth during a trial: we do not have an adversarial system of truth, in which the prosecution presents evidence, the defense presents independently tested evidence, the prosecution presents witnesses, the defense presents witnesses, the prosecution presents a scenario of the crime and timing and so forth, and the defense presents alibis to discredit the prosecution's theory of the case.

[222] Even if we did have a true adversarial system, it would still be difficult for a jury or, in some states, a judge to play God behind closed doors because sometimes the mitigating

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[77] *Deuteronomy* 30:19 (New King James Version).

circumstances are so horrible. Horrible as in the case of Paula Cooper, a sixteen year-old black girl who killed a Sunday school teacher. Paula had been beaten since she was a young child. Her mother's husband was so abusive that Paula, her sister, and her mother had almost committed suicide together. The three went into the garage, where the mother put the two little girls in the car and waited until they went to sleep. Then she turned on the car, thinking that they would have to die together because of the abusive man that was in their household.

[223] Paula Cooper developed a rage inside of her. And one day, she turned that rage onto an innocent Sunday school teacher, Bill Pelke's grandmother.

[224] The judge who presided over Paula's case saw evidence of a terrible crime involving four young girls – with Paula Cooper, who seemed to be in charge, leading the killing. He also heard all the terrible things that had happened to Paula Cooper. What was that one judge to do? As Bill Pelke says, all of us should read the judge's agonized decision; he decided on death because he felt that the victim's honor was at stake.

[225] What is a sentencing jury going to do when it, and not a judge, is responsible for making the decision? How must the jurors have felt when they heard that Anthony Porter, whom they had sentenced to death and who had almost been executed, was innocent – his innocence established by journalism students after having worked on his case for only three weeks? Those jurors had done their best; yet, they had convicted an innocent person and sentenced him to die.

[226] When we presented 3.2 million signatures favoring a death penalty moratorium to Kofi Annan at the United Nations in December 2000, he said, "Look. Societies are frail and comprised of human institutions. How are we ever going to be able to say that we can have the death penalty without it coming back to haunt us? How can we assure ourselves that we are never going to kill an innocent person?"

[227] But the deepest moral question, the one that is at the heat of the spiritual journey, is not what to do about innocent people – we know that we should not execute innocent people – but rather what to do about the guilty? Many say, "Sure, we shouldn't execute innocent people, but let's execute Timothy McVeigh. We know he is guilty." But can we execute the guilty? Then we have to come to this question: How are we going to create a designer death penalty net in order for us to just catch the guilty or just the Timothy McVeighs? Remember that before Timothy McVeigh there was Ted Bundy, and before Ted Bundy there was John Wayne Gacy. We are always going to have the atrocious "crimes of the century."

[228] The religious community is a very important catalyst in this movement regarding the death penalty. The awakening of the religious community was a major factor in the abolition of slavery in this country. There was a time when people could pass through a town square and see people being sold at an auction. At one time, more than seventy percent of the American public believed in slavery. Their awakening came after churches, synagogues, and people of conscience began the anti-slavery movement.

[229] When we do wake up, there are things that we can do. First, we can educate ourselves on the issue. Another thing that we can do is to have the religious leaders stand up. Religious leaders of the community can hold a press conference, they can take the issue to the legislature, and they can awaken people in the churches and synagogues. The really vital task is to get the people in the pews to come on the journey with us. While religious leaders have issued statements in opposition of the death penalty for the past twenty, possibly even thirty, years, most of the people in the pews have continued to say, "Fry them." That is because we have not all been at the same point in the journey – we need to make the journey together.

[230] The film *Dead Man Walking* is not an anti-death penalty film, it does not offer dozens of arguments explaining why the death penalty is wrong. Instead, the film takes people and shows them both sides of the debate thereby awakening people from the ambivalence that they felt towards this issue. Ambivalence is something God can work with. Ambivalence means that our soil is purest. And God can work in the purest soil with us. The spirit of God can work so that people can go from one side to the other until they reach a position that is truly for life.

[231] The prophets have shown us that any time is a good time for us to wake up. But when we do wake up, consciousness brings with it the responsibility to act. And what the prophets have shown us – in Isaiah, Jeremiah, Amos, and the whole prophetic tradition – is that we must call attention to a wrong when we see it, only then will we begin to help society move down the road to a place where we no longer administer injustice.

[232] I am very happy and pleased to have been with you today. Thank you very much.

IX. RABBI PETER J. RUBINSTEIN, CENTRAL SYNAGOGUE: CLOSING REMARKS

[233] It is one thing for me as a Rabbi of this congregation to be involved in this most important issue. It is another for this congregation to make the death penalty, initially a moratorium and hopefully the absolute abolition of capital punishment, its mission. And it is to that mission that you will be called in the weeks, months, and, if need be, even years ahead.

[234] There are steps along the way that will be pursued. I, on behalf of the clergy, hope to succeed in forming an organization, New York Clergy Against the Death Penalty, that will enable clergy across this state to join together and protest what I believe is an act of murder.

[235] But what can a congregation do? The Social Action Committee of this congregation planned this conference so that people with different points of view would come here today. Hopefully, you have gained some perspective on this issue, even if your perspective is ambiguous. This is an issue where ambiguity mandates that you speak against the death penalty. You must speak our even if you are unsure.

[236] A human being should not be put to death, even if he or she is a cold-blooded murderer. What we have learned today is that although we have a right to feel vengeful, we need to turn away from taking revenge. I hope that when the call comes for us to do what is necessary, whether to sign petitions or to lobby, that this congregation will stand among those who are willing to speak out on this issue. That is the point of view of this Rabbi. I hope that it will become the point of view of this congregation.

X. RONALD J. TABAK: AFTERWORD ON CAPITAL PUNISHMENT HIGHLIGHTS SINCE THE SYMPOSIUM

[237] Since the March 2001 symposium, there has been an increased realization that there are serious problems with capital punishment, as implemented. The following are examples of this trend.

A. Moratoriums, Related Studies, and Illinois Clemency Grants

[238] On May 9, 2002, Maryland became the second state in which a pro-death penalty governor imposed a moratorium on executions.[78] Governor Parris N. Glendening said there were "'reasonable questions' about the fairness of Maryland's death penalty" system and declared a

[78] Francis X. Clines, *Death Penalty Is Suspended in Maryland*, N.Y. TIMES, May 10, 2002, § A, at 20.

moratorium pending the release of a forthcoming University of Maryland report on possible racial disparities in the death penalty's implementation.[79] He stated, "Very serious questions have been raised about the system, about its impartiality, . . . particularly relative to race and especially the race of the victim."[80] Twelve of Maryland's thirteen death row inmates were convicted for murdering white victims.[81] Nine of these inmates were prosecuted by Baltimore County, which "does not have a particularly high homicide rate."[82] Moreover, nine of the thirteen death row inmates were African American.[83]

[239] On January 7, 2003, the University of Maryland released its study on Maryland's capital punishment system.[84] The study showed that there are disparities based on both the victim's race and the geographic area in which the crime occurred.[85] The study's principal author, Raymond Paternoster, found that, in cases where the death penalty is a possible punishment, defendants with white victims "are two to three times more likely to receive a death sentence than those" with nonwhite victims; African Americans with white victims are the most likely to receive the death penalty; and persons in Baltimore County who are eligible for capital punishment are twenty three times more likely to receive the death sentence than those in the

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[79] *Id.*

[80] Dennis O'Brien & David Nitkin, *Glendening Halts Executions*, BALTIMORE SUN, May 10, 2002, at 1A (internal quotations omitted).

[81] Clines, *supra* note 78, § A, at 20; O'Brien & Nitkin, *supra* note 80, at 1A.

[82] O'Brien & Nitkin, *supra* note 80, at 1A.

[83] *Id.*

[84] Sarah Koenig, *Death Penalty Study is Reviewed: Author Briefs Lawmakers; Says Crimes' Venue, Race of Killers, Victims are Factors*, BALTIMORE SUN, Jan. 10, 2003, at 2B.

[85] *Id.*

City of Baltimore, "[eighteen] times more likely than [those] in Prince George's County, and [fourteen] times more likely than [those] in Montgomery County."[86] Nevertheless, Maryland's incoming Governor, Robert Ehrlich, Jr., continues to adhere to his pre-election commitment to end the moratorium[87] immediately upon being inaugurated.[88]

[240] A "blue ribbon" study commission appointed by the first governor to impose a moratorium on executions, Republican Governor George Ryan, issued its report in April 2002 after two years of in-depth study of capital punishment in Illinois.[89] The commission recommended eighty-five reforms, "ranging from videotaping police interrogations . . . to reducing the factors that make someone eligible for the death penalty to [five] from [twenty]."[90] On January 11, 2003, Governor Ryan commuted the death sentences of all inmates on death row in Illinois[91] to life without the possibility of parole. He did so, in substantial part, because the Illinois legislature failed to take any action on the commission's recommendations.[92] The

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[86] *Id.*

[87] *Id.*

[88] *See New Md. Gov. to Lift Execution Ban*, SEATTLE POST-INTELLIGENCER, Nov. 17, 2002, http://seattlepi.nwsource.com.national/apus_story/asp?category=1110&slug=Maryland%20Executions (reporting that Robert Ehrlich, Jr. stated after his election in November 2002 that he would end the moratorium as soon as he is inaugurated).

[89] *See* Steve Mills & Christi Parsons, *Ryan's Panel Urges Fixes in Death Penalty*, CHI. TRIB., Apr. 15, 2002, at 1; *Report of the Governor's Commission on Capital Punishment*, *at* http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html (Apr. 2002).

[90] *Id.*

[91] *Freed from Death Row*, CHI. TRIB., Jan. 12, 2003, § C, at 8 [hereinafter *Freed From Death Row*].

[92] *See id.*; Christi Parsons, *Capital Justice Challenges Go to Hands of Others*, CHI. TRIB., Jan. 12, 2003, § C, at 17.

incoming Illinois Governor, Rod Blagojevich, while very critical of the clemency grants,[93] promised to continue the moratorium on executions,[94] and key legislators promised to push such legislation.[95]

B. American Bar Association Initiatives

[241] The American Bar Association ("ABA") took several steps to buttress its long-standing calls for reforms in the implementation of capital punishment and for a nationwide moratorium on executions until those reforms are implemented. In mid-2001, the ABA's Section of Individual Rights and Responsibilities issued detailed protocols, for use by jurisdictions evaluating their capital punishment systems and deciding what to do about capital punishment.[96] The protocols set forth, with regard to eight topics, an overview of fairness concerns, questions that should be considered, and recommendations.[97] Also in mid-2001, the ABA issued a report on recent death penalty moratorium-related developments, and issued a videotape for use in support of moratorium efforts.[98] Moreover, in September 2001, the ABA initiated a Death Penalty Moratorium Implementation Project.[99]

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[93] *See* Parsons, *supra* note 92, at 17.

[94] *Freed from Death Row*, *supra* note 91, at 8.

[95] *See id.*; Parsons, *supra* note 92, at 17.

[96] American Bar Association Section of Individual Rights and Responsibilities, *Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States*, 63 OHIO ST. L.J. 487, 493 (2002) [hereinafter *Death Without Justice*].

[97] *Id.*

[98] *See ABA Death Penalty Moratorium Implementation Project*, *at* http://www/abanet.org/moratorium/ (last visited Nov. 16, 2002).

[99] *Id.*

C. Increased Concern Over Quality of Defense Counsel in Death Penalty Cases

[242] During the second half of 2001, United States Supreme Court Justice Sandra Day O'Connor repeatedly expressed concern about the quality of defense counsel appointed to represent poor people in capital cases.[100] She stated, "Perhaps it's time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used."[101] Justice O'Connor also encouraged attorneys to perform more *pro bono* work for indigent defendants, to prevent more innocent people from receiving the death penalty.[102]

[243] In April 2001, United States Supreme Court Justice Ruth Bader Ginsburg expressed support for legislation imposing a moratorium on executions.[103] She stated, "People who are well represented at trial do not get the death penalty," and "I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial."[104]

[244] Newspaper investigations showed that Justices O'Connor and Ginsburg had ample reason to be worried about the quality of defense counsel in death penalty cases. For example, the *Mercury News* reported in April 2002 that California "has the same systemic problems that

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[100] *See O'Connor Questions Death Penalty*, N.Y. TIMES, July 4, 2001, § A, at 9.

[101] *Id.*

[102] John Fulwider, *O'Connor Lectures Lawyers, Recollects for Students in Lincoln*, *at* http://nebraska.statepaper.com/vnews/display.v/ART/2001/10/18/3bcf6460c1279?in_archive=1 (Oct. 18, 2001).

[103] *Ginsburg Backs Suspending Executions*, *at* http://www/aclu.org/DeathPenalty/DeathPenalty.cfm?ID=7011&c=67&Type=s (Apr. 10, 2001).

[104] *Id.*

are fueling concerns about capital punishment nationwide."[105] After reviewing hundreds of cases, the Mercury News found that "the dozens of death sentences reversed since 1987 involved trials marred by the same types of problems found in states known for spending less on capital cases, such as Texas and Alabama: lawyers who put on perfunctory defenses; prosecutors who concealed evidence; and mistake-prone trial judges."[106] It reported that "[o]ne persistent problem that stands out in appeals . . . is incompetent defense lawyers."[107] Furthermore, "[a] particular issue is whether a lawyer adequately represents the defendant in the trial's sentencing phase, when jurors who just found the defendant guilty must decide whether that person should live or die."[108] For example, a "lawyer, who had a record of bad work in death-penalty trials, spent only a few hours preparing for the penalty phase. Though there were more than a dozen witnesses he could have called to help spare [his client's] life, he presented one witness. He didn't meet with his client before the penalty phase."[109]

[245] A perhaps fatal example of ineffective counsel is the case of Ronald Wayne Frye, whom North Carolina executed on August 31, 2001.[110] His trial lawyer eventually "admitted he was drinking heavily during the case, downing nearly a pint of 80-proof rum every afternoon. He also revealed he was in a car wreck about the same time and was found with a near-lethal

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[105] Howard Mintz, *Death Sentence Reversals Cast Doubt on System*, MERCURY NEWS, Apr. 14, 2002, http://www.bayarea.com/mld/mercurynews/news/special_packages/3062323.htm.

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] Jeffrey Gettleman, *Execution Ends Debatable Case*, L.A. TIMES, Aug. 31, 2001, § A, § 1, at 11.

blood-alcohol level of 0.44% – at 11 a.m."[111] The jury that sentenced Frye to death heard virtually nothing about his "nightmarish childhood," during which "his alcoholic parents gave him away at a diner" when he was four years old, he was beaten "with a bullwhip" by his new father, leaving extreme scars, and he was "shuffled from family to family, six changes in all."[112]

D. The Danger of Executing Innocent People

[246] In July 2001, Supreme Court Justice Sandra Day O'Connor stated, "If statistics are any indication, the system may well be allowing some innocent defendants to be executed."[113] Then, in October 2001, Justice O'Connor said, "More often than we want to recognize, some innocent defendants have been convicted and sentenced to death."[114] Justice O'Connor's statements attracted widespread attention, especially because she

> has rarely expressed any misgivings about the way the states mete out death sentences. Rather, she has been a key swing vote on numerous of the Court's death penalty decisions [in which she has voted against death row inmates], including several in which profound questions of innocence and due process were raised.[115]

[247] During the symposium, Barry Scheck discussed the exoneration of Massachusetts inmate Kenneth Waters, and the years of effort his sister devoted to gaining his freedom.

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[111] *Id.*

[112] *Id.*

[113] *O'Connor Questions Death Penalty*, *supra* note 100, § A, at 9 (internal quotations omitted).

[114] Fulwider, *supra* note 102 (internal quotations omitted).

[115] Alan Berlow, *A Supreme Court Shocker – Sandra Day O'Connor's Criticisms of the Death Penalty Couldn't Have Come From a More Unlikely Source*, *at* http://archive.salon.com/news/feature/2001/07/04/oconnor/ (July 4, 2001).

Unfortunately, Waters' life after being released was very short; he died in a tragic accident in September 2001.[116]

E. Unconstitutionality of Executing People with Mental Retardation

[248] In June 2002, the Supreme Court held that it is unconstitutional to execute a person who has mental retardation.[117] This reversed the Supreme Court's contrary holding in 1989.[118] One reason for the Court's new position was the enactment of laws prohibiting executions of people with mental retardation by five states – Arizona, Connecticut, Florida, Missouri and North Carolina – in 2001;[119] thereby increasing the total number of states that prohibit such executions to eighteen out of the thirty-eight states with capital punishment.[120] In addition, the federal government's death penalty also exempted the mentally retarded.[121]

[249] Unfortunately, the holding in *Atkins* came too late to save the lives of approximately forty people known to have mental retardation who have been executed since the death penalty was reintroduced in the 1970's.[122] Moreover, the Supreme Court's decision will not automatically prevent future executions of persons with mental retardation. Most defense

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[116] Farah Stockman & Ellen Barry, *A Tragic End to Newly Won Freedom: Fall Kills R.I. Man Cleared in Slaying*, BOSTON POST, Sept. 20, 2001, at B1.

[117] Atkins v. Virginia, 122 S. Ct. 2242 (2002).

[118] *See* Penry v. Lynaugh, 492 U.S. 302 (1989).

[119] *Atkins*, 122 S. Ct. at 2248.

[120] *See id.*

[121] *Id.*

[122] Steve Mills & Andrew Zajac, *Ruling Too Late for 40 Inmates: Some with Low IQ Executed Before High Court's Ban*, CHI. TRIB., June 23, 2002, at 1.

counsel who handle capital cases are woefully unaware of how to investigate the possibility that their clients have mental retardation, and are unprepared to prove retardation. In addition, counsel who *do* have the requisite knowledge often find it difficult to prove mental retardation, particularly where the passage of time makes it extremely hard to unearth evidence of the client's behavioral difficulties as a child. For these and other reasons, a great deal must be done – much of it advocated in the ABA protocols[123] – before there can be any assurance that people with mental retardation will no longer be executed in this country.

F. Execution of Juveniles

[250] The United States is in the dubious company of Iran, Nigeria, and Saudi Arabia in executing people for crimes committed before age eighteen.[124] Pakistan and Yemen have banned the juvenile death penalty in recent years.[125] In March 2002, Indiana became the sixteenth of the thirty-eight capital punishment states that, along with the federal death penalty, set eighteen as

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[123] *Death Without Justice*, *supra* note 96.

[124] *United States of America: Indecent and Internationally Illegal – The Death Penalty Against Child Offenders*, Amnesty International, *at* http://www.web.amnesty.org/ai.nsf/recent/AMR511442002?OpenDocument (Sept. 25, 2002).

> About [fifty six percent] of the known executions of child offenders since 1990 were carried out in the United States [eighteen out of thirty two]. The others occurred in Democratic Republic of Congo, Iran, Pakistan, Saudi Arabia and Yemen. Yemen and Pakistan have now abolished such use of the death penalty in law. The Democratic Republic of Congo, where a child soldier tried by military court was executed in 2000, commuted the sentences of five child offenders in 2001, and at the time of writing had a moratorium on executions.

Id.

[125] *Id.*

the minimum age for death penalty eligibility.[126] In five states, the minimum age for eligibility is seventeen.[127]

[251] In October 2002, four justices of the Supreme Court stated, in dissenting from the denial of a petition for a writ of habeas corpus, that it is unconstitutional to execute people for crimes committed before age eighteen.[128] The dissent, authored by Justice Stevens, said, "The practice of executing such offenders is a relic of the past and is inconsistent with evolving standards of decency in a civilized society. We should put an end to this shameful practice."[129]

G. Execution of the Mentally Ill

[252] After the Supreme Court held in June 2002 that it is unconstitutional to execute people with mental retardation,[130] the National Mental Health Association urged the Court to render a similar holding with regard to mentally ill death row inmates.[131] The Association said "that like the mentally retarded, the mentally ill suffer from impaired judgment, confess to

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[126] *See* Michael J. Rochon, *Age for Executions Raised to 18*, INDIANAPOLIS STAR, Mar. 27, 2002, at 01B; Victor L. Streib, *Minimum Death Penalty Age by American Jurisdiction*, Death Penalty Information Center, *at* http://www.deathpenaltyinfo.org.juvegelim.html#agechart (last visited Nov. 16, 2002).

[127] Streib, *supra* note 126.

[128] *In re* Stanford, No. 01-10009, 123 S. Ct. 445 (Oct. 21, 2002) (Stevens, J., dissenting), *available at* http://www.supremecourtus.gov/opinions/02relatingtoorders.html.

[129] *Id.*

[130] Atkins v. Virginia, 122 S. Ct. 2242 (2002).

[131] Patty Reinert, *Death Penalty Debate Reopened by Court's Retardation Decision*, HOUS. CHRON., June 23, 2002, § A, at 17.

crimes they didn't commit, make terrible witnesses at trial and may appear to jurors to be unrepentant."[132]

[253] The Union of American Hebrew Congregations, the largest Jewish congregational group in the United States, advocated in December 2001 that "state and federal jurisdictions within the United States that retain the death penalty . . . exclude from consideration for the death penalty persons with mental illness" and committed "to find common ground with all groups – including those who [unlike the Union of American Hebrew Congregations] otherwise support the death penalty – to oppose the execution of persons with mental illnesses."[133]

[254] In February 2002, the second part of Columbia University School of Law's study on erroneous decisions in capital punishment cases recommended that the death penalty no longer be imposed on severely mentally ill people.[134] According to the study, "severe mental disorder is [a] condition that prevents defendants from helping to prove their innocence or that they are unfit candidates for execution," and litigating issues about severely mentally ill people is extremely expensive both at trial and on appeal.[135] It concluded that "states or counties that bar capital prosecutions when there is clear proof of psychosis or other severe mental disorders . . . stand to avoid many of the worst capital costs and risks of serious, reversible error."[136]

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[132] *Id.*

[133] Resolutions Adopted by the UAHC, *Establishing a Comprehensive System of Care for Persons with Mental Illness*, Union of American Hebrew Congregations, *at* http://www.uahc.org/cgi-bin/resodisp.pl?file=mentalillness&year=2001D (Dec. 2001).

[134] *See* James S. Liebman et. al, *A Broken System, Part II: Why There Is so Much Error in Capital Cases, and What Can Be Done About It*, *at* http://www.law.columbia.edu/brokensystem2/index2.html (Feb. 11, 2002).

[135] *Id.* at 902-04.

[136] *Id.*

H. Public Opinion

[255] The Gallup Poll's October 2002 survey, conducted during the frenzy created by the Washington, D.C. area sniper shootings, found that recent events, including the September 11, 2001 terrorist attacks, have had "little effect" on public support for capital punishment.[137] In October 2002, seventy percent of respondents supported the death penalty when no alternative was indicated; according to Gallop, this figure was statistically similar to the seventy two percent support level in May 2002 and the sixty seven percent support level in May 2001[138] (four months before the terrorist attacks on the United States). Gallup pointed out that support for capital punishment "falls dramatically when survey respondents are asked to choose between the death penalty and life imprisonment with no possibility of parole."[139] For example, in both May 2001 and May 2002, fifty two percent of respondents favored the death penalty and forty three percent preferred life without parole when offered the choice between capital punishment or life imprisonment without parole.[140] Moreover, adults presented with these alternatives favored the death penalty by a ratio of 5:4 whereas teenagers favored life without parole by a ratio of 2:1.[141]

[256] These polling results show that abstract support for capital punishment is not moving back towards its high-water mark of eighty percent in 1994, and that it is possible that at least fifty percent of the public may prefer life without parole over the death penalty within the not too

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[137] George H. Gallup, Jr., Commentary, *The Death Penalty: American Views Over Time*, The Gallop Organization, *at* http://www.gallup.com/poll/topics/#D (Oct. 29, 2002).

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

distant future. This makes it all the more important that people are informed about religious-based reasons why they might oppose the death penalty.