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Articles

Ethical Impulses From the Death Penalty: “Old Sparky’s” Jolt to the Legal Profession*

Joseph W. Bellacosa**

In *People v. Davis*,¹ New York’s then-extant death penalty statute was declared unconstitutional. Chief Judge Breitel dissented and voted to uphold the legislative enactment, but powerfully added:

Speaking for myself alone among the dissenters I find capital punishment repulsive, unproven to be an effective deterrent (of which the *James* case itself is illustrative), unworthy of a civilized society (except perhaps for deserters in time of war) because of the occasion of mistakes and changes in social values as to what are mitigating circumstances, and the brutalizing of all those who participate directly or indirectly in its infliction. This has been a

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1. 43 N.Y.2d 17, 371 N.E.2d 456, 400 N.Y.S.2d 735 (1977), *cert. denied*, 435 U.S. 998 (1978). *Davis* was decided together with *People v. James*, 43 N.Y.2d 17, 371 N.E.2d 456, 400 N.Y.S.2d 735 (1977), *cert. denied*, 438 U.S. 914 (1978).

lifelong view buttressed by over 40 years of experience as prosecutor, counsel to the Governor entailing 81 applications for commutation of capital sentences, Judge, member of the "National Crime Commission", witness before the British Royal Commission on Capital Punishment, and member of the American Law Institute and its Advisory Committee on the Model Penal Code. In all of these roles, when appropriate, I actively resisted viewing capital punishment as a proper or useful sanction for civilian crime.²

Regardless of categorical views for or against the death penalty, there can be little doubt that the subject presents perplexing ethical issues, particularly for attorneys and the legal profession. Lawyers, whose societal role includes serving as officers of the court while representing clients, have also been characterized as guardians of justice. The connotations of those titles and responsibilities make for one tough vocation.

Preliminarily, I emphasize that my expressions should not be construed as harboring any explicit or disguised predisposed views on the legality or constitutionality of capital punishment. My options and personal prerogatives in that regard are severely restricted and must be reserved against the possibility that my judicial responsibility requires that I rule on such matters in the future.³ Judicial ethics require no less, for judges are obligated to avoid putting themselves in situations that might likely necessitate recusal.⁴ In a nicely balanced intellectual and professional tension, however, judicial ethical norms also encourage judges to speak out and write on important jurisprudential issues with the objective of reform in the justice system.⁵

So, the aim of this Dyson Lecture is to ensnare my listening and reading audience into the intriguing and important discourse and web surrounding some of the professional ethical dilemmas and implications of the death penalty. I have selected some historical commentary on the death penalty in New York, and the discussion of some spin-off aspects focuses especially on the quality and resources of defense representation and availa-

2. *Davis*, 43 N.Y.2d at 39 n.*, 371 N.E.2d at 468, 400 N.Y.S.2d at 747-48 (Breitel, C.J., dissenting).

3. N.Y. JUD. LAW app., CODE OF JUDICIAL CONDUCT Canon 4 (McKinney 1992 & Supp. 1994).

4. *Id.*

5. *Id.*

bility of thorough or even adequate professional services to indigent death row inmates. I also comment in this central ethical context about the humaneness of contemporary methods of execution and the review procedures that attend such circumstances.

Having set the stage with Judge Breitel's trenchant dissent in *Davis*, I add a selection from an outstanding book which I read in the summer of 1993, *Dead Man Walking*,⁶ by Sister Helen Prejean, C.S.J. Her ministry, which led her to act as friend and spiritual advisor to death row inmates in Louisiana, caused her to write:

Albert Camus' "Reflections on the Guillotine" is for me a moral compass on the issue of capital punishment. . . . "*Society proceeds sovereignly to eliminate the evil ones from her midst as if she were virtue itself. Like an honorable man killing his wayward son and remarking: 'Really, I didn't know what to do with him' To assert, in any case, that a man must be absolutely cut off from society because he is absolutely evil amounts to saying that society is absolutely good, and no one in his right mind will believe this today.*"⁷

Using Camus further, Sister Prejean concludes:

In sorting out my feelings and beliefs, there is, however, one piece of moral ground of which I am absolutely certain: if I were to be murdered I would not want my murderer executed. I would not want my death avenged. *Especially by government* – which can't be trusted to control its own bureaucrats or collect taxes equitably or fill a pothole, much less decide which of its citizens to kill.⁸

In New York, the Legislature has tried unsuccessfully eleven times to enact a constitutional death penalty statute to replace the remnant of the one struck down in 1984 in *People v. Smith*.⁹ The old statute was barely breathing anyway, after

6. HELEN PREJEAN, C.S.J., *DEAD MAN WALKING* (1993). *Dead Man Walking* has been described in one review as the death penalty's equivalent to Rachel Carson's *Silent Spring*, the book of the early 1960s that propelled the world's awareness to environmental concerns. Raymond A. Schroth, Book Review, *AMERICA*, Sept. 18, 1993, at 20 (reviewing HELEN PREJEAN, C.S.J., *DEAD MAN WALKING* (1993)).

7. PREJEAN, *supra* note 6, at 21-22 (emphasis added).

8. *Id.* at 21.

9. 63 N.Y.2d 41, 468 N.E.2d 879, 479 N.Y.S.2d 706 (1984), *cert. denied*, 469 U.S. 1227 (1985). Smith was serving a life sentence for murder when he killed a

People v. Davis.¹⁰ Eleven times Governor Cuomo vetoed the legislative initiative, and veto overrides have failed every time as well. New York's minority status, as one of only a dozen or so states without a death penalty, is not new, however.

In 1835, New York was only the second state to remove executions from public view.¹¹ This was done to prevent "the often disorderly and sometimes violent conduct of crowds stirred up by anticipation of the executions and by the spectacle itself."¹² This public order or sensibilities rationale semi-secreted the procedure, obviating public appraisal and confrontation of the consequences, for when "the torture was visible," it was impossible to ignore the fact of a killing. Society's choice to keep the act invisible and anonymous (the devices include masked executioners, one set of blank bullets, elimination of judicial signatures on death warrants, small witness teams and the like) surely connotes an ironic and macabre twist of fate and uncomfortableness despite public bravado. George Bernard Shaw, in his great play, *Saint Joan*, puts these salient words into the role of Chaplain Stogumber:

corrections officer. *Id.* at 50, 468 N.E.2d at 882, 479 N.Y.S.2d at 708. In holding that New York's mandatory death penalty was unconstitutional because it failed to "provide for the consideration of individual circumstances," *id.* at 78, 468 N.E.2d at 898, 479 N.Y.S.2d at 725, the Court of Appeals relied in part on the rationale of the United States Supreme Court:

[A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

Id. at 74, 468 N.E.2d at 895, 479 N.Y.S.2d at 722 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)).

10. 43 N.Y.2d 17, 371 N.E.2d 456, 400 N.Y.S.2d 735 (1977), *cert. denied*, 435 U.S. 998 (1978). The last execution in New York occurred in 1963. Robert M. Bohm et al., *Current Death Penalty Opinion in New York State*, 54 ALB. L. REV. 819, 820 (1990). The case was *People v. Mays*, 13 N.Y.2d 784, 192 N.E.2d 173, 242 N.Y.S.2d 217 (1963), *cited in* WILLIAM J. BOWERS, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982* 471 (1984). In 1984, when the Court of Appeals struck down the death penalty in *Smith*, 63 N.Y.2d at 79, 468 N.E.2d at 898, 479 N.Y.S.2d at 725, there was only one death row inmate in New York. *Id.* at 50, 468 N.E.2d at 881, 479 N.Y.S.2d at 708. In contrast, in 1991, there were 2,412 death row inmates in the United States. Bohm, *supra*, at 820 n.4.

11. Bohm, *supra* note 10, at 819.

12. *Id.* (quoting BOWERS, *supra* note 10, at 8).

I tell my folks they must be very careful. I say to them, 'If you only saw what you think about you would think quite differently about it. It would give you a great shock. . . . I did a very cruel thing once because I did not know what cruelty was like. I had not seen it, you know. That is the great thing: *you must see it*. . . . I saw [Joan] actually burned to death. It was dreadful: oh, most dreadful. But it saved me. *I have been a different man ever since*.¹³

New York marked its special place in death penalty annals again in 1890 when, *to insure an instantaneous and painless death*, it became the first state to electrocute capital offenders.¹⁴ Regrettably, New York also appears to hold the dubious distinction of having executed more innocent individuals than any other state — up to now.¹⁵ At least eight men have been wrongfully executed in New York according to one recent account.¹⁶ Indeed, in this century alone in "civilized" America, the claim is made that at least 417 innocent people were convicted of capital offenses, 23 of whom were executed.¹⁷ An unidentified columnist in a recent *New Yorker* commentary characterized this phenomenon as the creation of a second homicide victim.¹⁸ Instead of righting a wrong, a new second, cloned wrong emerges. We might entitle the hypothetical case, *The People v. The People!* These figures are even more disturbing when one realizes that between 1976 and 1990 perhaps more than half of capital cases reviewed by federal courts were reversed in the exercise of their last chance, last gasp, collateral habeas corpus review power.¹⁹ In that light on this issue, this country's place in relation to the more civilized practices of most other countries on this small, blue globe is hardly envious.

13. PREJEAN, *supra* note 6, at 100-01 (quoting GEORGE BERNARD SHAW, SAINT JOAN 153-54 (1966)) (emphasis added).

14. Bohm, *supra* note 10, at 819.

15. Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 73 (1987) (table listing executions where authors believed defendants to be innocent — listing New York more than any other state).

16. Bohm, *supra* note 10, at 825.

17. PREJEAN, *supra* note 6, at 219. Since 1976, when the Supreme Court reinstated capital punishment, 203 inmates have been executed. *Compassion, Not Revenge*, ST. LOUIS POST DISPATCH, June 6, 1993, at 2B.

18. *Wrongful Death*, NEW YORKER, Aug. 16, 1993, at 4, 6.

19. PREJEAN, *supra* note 6, at 14.

The realistic potentiality by which some innocent individuals are exposed to execution is exemplified by the "Career Girl Murders" case in New York involving two young victims, Janice Wylie and Emily Hoffert.²⁰ On August 28, 1963, they were literally hacked to death in the upper East Side apartment they shared as they started their careers.²¹ The tabloids of the day howled, as these victims were from well-known families. Months later, one George Whitmore was arrested in Brooklyn for an unrelated attempted rape.²² One of the Brooklyn homicide detectives noticed a photograph of a young, blonde woman in Whitmore's wallet and mistakenly identified the woman as one of the "Career Girl" victims.²³ Whitmore originally claimed to have found the photograph in a dump in New Jersey. After a lengthy interrogation, he confessed to the double murder in a 63-page statement.²⁴ This confession turned out to be false and was later cited in the great *Miranda*²⁵ case as an example of coerced and contrived confessions.²⁶ Whitmore would have been convicted at a time when New York still executed offenders. However, a young Assistant District Attorney's dedication to his higher ethical responsibility "to seek justice, not merely to convict,"²⁷ saved Whitmore, along with the dedication and persistence of Whitmore's lawyer, Myron Beldock. Manhattan Assistant District Attorney Melvin D. Glass doubted the validity of the Whitmore confession and doggedly helped to unravel it, to the consternation of the New York Police Department and many others who wanted and were pleased to have a perpetrator — any perpetrator — for the horrendous crime that kept catching so much media attention and public pressure.²⁸ Even-

20. See John F. Keenan, *The Urban Criminal Justice System: A Case For Fairness*, 20 FORDHAM URB. L.J. 579 (1993).

21. *Id.*

22. *Id.* at 580.

23. *Id.*

24. *Id.* at 581. Whitmore also confessed to the attempted rape for which he had been arrested and to a separate homicide. *Id.*

25. *Miranda v. Arizona*, 384 U.S. 436 (1966).

26. Keenan, *supra* note 20, at 581 n.4.

27. N.Y. JUD. LAW app., CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (McKinney Supp. 1994); see also *People v. Pelchat*, 62 N.Y.2d 97, 105, 464 N.E.2d 447, 451, 476 N.Y.S.2d 79, 83 (1984) (explaining that a prosecutor "is charged with the duty not only to seek convictions but also to see that justice is done").

28. Keenan, *supra* note 20, at 581.

tually, the real murderer, one Robles, was caught, convicted and sentenced to 25 years to life.²⁹ (The death penalty by then was essentially in a state of suspended federal constitutional animation in New York.) His conviction was affirmed by the Court of Appeals.³⁰

The *Robles* affirmance highlights another irony. The *Robles* court held that the defendant's right to counsel was not violated, since the "assertion that once an attorney appears there can be no effective waiver unless made 'in the presence of the attorney' is merely a theoretical statement of the rule."³¹ Just six years later, in *People v. Hobson*,³² the Court of Appeals overruled its decision in *Robles*.³³ In *Hobson*, which is an eloquent dual treatise on New York's right to counsel and the meaning of *stare decisis*, the court stated unequivocally that once an attorney has entered the case, there can be no waiver of the right to counsel in the absence of the attorney.³⁴ The court also commented that the nature of the crime in *Robles*, "an egregiously brutal and unnatural double murder," was apparently "what moved the [previous] court" to find as it did.³⁵ Chief Judge Breitel candidly added that the *Robles* case is "reminiscent of the adage about the influence of 'hard cases' making bad law."³⁶ So, we see that the later clarification of the court admitted that even the true culprit was not accorded all his constitutional protections. What a "two-fer" that case could have been in the exposés of death penalty lore. We can only imagine the Sacco-

29. *Id.* at 583.

30. *People v. Robles*, 27 N.Y.2d 155, 263 N.E.2d 304, 314 N.Y.S.2d 793 (1970), *cert. denied*, 401 U.S. 945 (1971). Although at the time of his arrest Robles confessed to the double murder, he later recanted and protested his innocence. Keenan, *supra* note 20, at 583. Twenty-three years later he publicly acknowledged his guilt in an interview televised from his jail cell. *Id.*

31. *Robles*, 27 N.Y.2d at 158, 263 N.E.2d at 305, 314 N.Y.S.2d at 795 (emphasis added).

32. 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976). *Hobson* also overruled *People v. Lopez*, 28 N.Y.2d 23, 268 N.E.2d 628, 319 N.Y.S.2d 825, *cert. denied*, 404 U.S. 840 (1971) and *People v. Wooden*, 31 N.Y.2d 753, 290 N.E.2d 436, 338 N.Y.S.2d 434 (1972), *cert. denied*, 410 U.S. 987 (1973). *Hobson*, 39 N.Y.2d at 486, 348 N.E.2d at 899, 384 N.Y.S.2d at 423. These cases were characterized as "errant footprint[s]." *Id.* at 488, 348 N.E.2d at 901, 384 N.Y.S.2d at 425.

33. *Hobson*, 39 N.Y.2d at 490, 348 N.E.2d at 902, 384 N.Y.S.2d at 426.

34. *Id.* at 481, 348 N.E.2d at 896, 384 N.Y.S.2d at 420.

35. *Id.* at 486, 348 N.E.2d at 899, 384 N.Y.S.2d at 423.

36. *Id.*

Venzetti-like outcry if Whitmore and then Robles had been electrocuted in light of what the world belatedly came to know.

While Governor Cuomo has thus far kept new death penalty statutes off the New York books with his lonely vigil of eleven straight vetoes,³⁷ the state and its highest court, the Court of Appeals, on which I have been privileged to serve for over seven years, have not entirely avoided brushes with death penalty cases. Consider the saga of Sammy Bice Johnson. In 1982, the State of Mississippi convicted Johnson in the fatal shooting of a highway patrol officer on New Year's Eve, 1981.³⁸ Johnson and three other men had been stopped by the officer for speeding. A struggle ensued, during which the officer was stabbed, shot and killed.³⁹ Two of Johnson's cohorts, including the shooter, received life sentences.⁴⁰ The third pled guilty to a lesser charge in exchange for his testimony against the others.⁴¹ Only Johnson was sentenced to death after trial.⁴²

One of the aggravating circumstances used to impose the death penalty against him was a 1963 New York predicate-felony conviction for assault with intent to commit rape.⁴³ In 1986, represented by the New York law firm Cahill, Gordon & Reindel, Johnson belatedly sought to have this New York predi-

37. Ian Fisher, *Session on Guns Produces Little but Discord in Albany*, N.Y. TIMES, Jan. 18, 1994, at B4. Governor Cuomo's predecessor, Governor Hugh Carey, also vetoed several bills that would have reinstated the death penalty. Bohm, *supra* note 10, at 822-25. Carey viewed capital punishment as "the ultimate deception." *Id.* at 824 (quoting Governor's Veto Memorandum, reprinted in 1978 N.Y. LEGIS. ANN. 426). Carey's reasons for exercising his veto power included the lack of evidence of any deterrent effect, the possibility that an innocent person would be executed, and his belief that the death penalty "lowers all of us as a civilized people." *Id.* Carey supported life sentences without parole as has Governor Cuomo. *Id.* at 825; see also Mario Cuomo, Address at the College of St. Rose (Mar. 20, 1989) in MARIO M. CUOMO, MORE THAN WORDS: THE SPEECHES OF MARIO CUOMO 163 (1993).

38. See *Johnson v. Mississippi*, 486 U.S. 578, 580 (1988).

39. *Id.*; see also Rita Ciolli, *Convict, and NY, vs. Mississippi*, NEWSDAY, May 5, 1988, at 4, 41.

40. Ciolli, *supra* note 39, at 41.

41. *Id.*

42. *Id.*; see also Rita Ciolli, *New Death-Row Sentencing*, NEWSDAY, June 14, 1988, at 5; Shirley Armstrong, *May Save Miss. Inmate: High Court Overturns '63 Assault Verdict*, TIMES UNION (Albany), March 25, 1987, at B-10.

43. *Johnson v. State*, 511 So. 2d 1333, 1336 (Miss. 1987), *rev'd sub nom. Johnson v. Mississippi*, 486 U.S. 578 (1988); see also E.J. McMahon, *A Matter of 'Aggravating Factors'*, NAT'L L.J., Feb. 8, 1988, at 6.

cate overturned on *coram nobis* collateral review in New York.⁴⁴ He argued that he had not been advised in 1963 of his right to appeal the New York felony and that his counsel rights had been violated.⁴⁵ By 1986, the records of his trial were no longer available. In addition, the court reporter, prosecutor and trial judge were all deceased.⁴⁶ Only the sentencing minutes were available. They supported Johnson's claim that he had not been advised of his right to appeal.⁴⁷ The Court of Appeals granted *coram nobis* relief and held that the only remedy available was vacatur of the 25-year-old conviction and dismissal of the indictment.⁴⁸

Buoyed by this victory, Johnson filed a petition for post-conviction collateral relief in Mississippi. He argued that since his New York conviction was a nullity, it could not serve as an aggravating circumstance for sustaining the death penalty.⁴⁹ By a six to three vote, the Supreme Court of Mississippi disagreed.⁵⁰ It held that the "foreign" State of New York "cannot vitiate the death penalty verdict in this state by setting aside a prior conviction of a violent crime through a collateral relief petition."⁵¹ The court went so far as to opine that there was "no evidence or indication that the post-conviction relief proceedings in the New York courts were truly adversarial."⁵² I am sure that surprised the New York District Attorney, who argued so vigorously before the Court of Appeals. In dissent, Mississippi Supreme Court Justice Robertson called his own court's majority to task, stating:

[T]he Court of Appeals of New York has enjoyed a reputation as one of the nations [sic] premiere [sic] state courts. I am not for a moment prepared to indulge in the cynical assumption that the

44. *People v. Johnson*, 69 N.Y.2d 339, 506 N.E.2d 1177, 514 N.Y.S.2d 324 (1987).

45. *Id.* at 341, 506 N.E.2d at 1178, 514 N.Y.S.2d at 325; Rita Ciolli, *Where Guilt Is a Side Issue*, *NEWSDAY*, May 4, 1988, at 9, 17.

46. *Armstrong*, *supra* note 42, at B-10.

47. *Id.*

48. *Johnson*, 69 N.Y.2d at 342, 506 N.E.2d at 1178, 514 N.Y.S.2d at 325.

49. *Johnson*, 511 So. 2d at 1337.

50. *Id.* at 1339.

51. *Id.* at 1338.

52. *Id.*

New York Court did less than its duty when it ordered Johnson's 1963 conviction vacated.⁵³

But Johnson, with Cahill, Gordon still at his side, fought on. They appealed to the United States Supreme Court, with then-New York Attorney General Robert Abrams supporting the effort as an *amicus curiae*. The argument was that Mississippi had failed to afford the New York judicial vacatur of that state's conviction full faith and credit required by the United States Constitution.⁵⁴ New York had a stake and interest — respect for the integrity of its judgment. The Mississippi officials became even more perturbed. The Mississippi Assistant Attorney General, summed up his state's views by declaring: "New York doesn't have the death penalty, so I guess they don't understand how the law works."⁵⁵ He opined that the Mississippi Supreme Court "certainly got the message" that New York was trying to block executions and labeled the \$1.7 million in legal fees expended by Cahill, Gordon "ludicrous."⁵⁶

Ludicrous or not, Cahill, Gordon won a unanimous decision of the United States Supreme Court — quite an achievement in its own right — which held that Mississippi had violated Johnson's full faith and credit protection and the Eighth Amendment.⁵⁷ The Court gave the Mississippi Supreme Court a lesson in "how the law works": its option was to order a new sentencing hearing or to decide on the appropriate sentence itself.⁵⁸ In

53. *Id.* at 1344 (Robertson, J., dissenting).

54. The United States Constitution provides, in part: "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State." U.S. CONST. art. IV, § 1; *see also* McMahon, *supra* note 43, at 6; Ciolli, *supra* note 39, at 4. Mr. Abrams also attended the oral arguments at the Supreme Court, explaining that "he wanted to 'lend support' to the position that Mississippi had 'misconstrued' New York's actions." *Id.* at 40. Mr. Abrams' actions were unprecedented. *See id.*; McMahon, *supra* note 43, at 6. Clive Stafford-Smith of the Southern Prisoners Defense Committee, who has represented scores of death row inmates, commented: "No attorney general has ever intervened to help me out in another state . . . I've had cases where a prior felony conviction was unconstitutional, and the other state [in which the conviction occurred] has refused to recognize it was unconstitutional." *Id.*

55. Ciolli, *supra* note 39, at 40 (quoting Marvin White, Jr., Mississippi Assistant Attorney General).

56. *Id.*

57. *Johnson v. Mississippi*, 486 U.S. 578 (1988).

58. *Id.* at 590.

1989, the Mississippi Supreme Court remanded the case to the County Court to empanel another sentencing jury.⁵⁹

I had seen no public record of a new sentencing hearing or of an execution. While a definitive answer on Johnson's status is ascertainable in a variety of ways, I resolved that it was prudent for me to remain judiciously aloof and to abide by the old adage that no news was good news. Subsequent to my presenting the Dyson Lecture at Pace Law School, a former student of mine, a partner in Cahill, Gordon, wrote me to confirm by private letter that Johnson had been resentenced to life imprisonment.

The case marvelously illustrates the central thrust of my remarks and concern today – the disproportionality of resources between the government and the defense in death penalty cases, and the enormous, concomitant professional ethics concerns that are thus implicated. Most death penalty offenders do not receive anything near the persistent and enormous benefits bestowed by Cahill, Gordon on Sammy Bice Johnson. And there is the painful ethical rub! The prosecution has virtually no limits. It operates with virtually unlimited resources with budgets a little like that of the CIA — secret, hidden, fungible, protected by “official” smoke and mirrors.

Recently, in response to a question as to why stays of execution are not sought from the Supreme Court until the eleventh fateful hour, Justice Blackmun commented: “The death penalty cases are a grisly business, in my opinion, and we get three or four of them a week . . . I've never understood why, but its almost always in the middle of the night. It must be some tradition that we have about executions.”⁶⁰ If, indeed, such a “tradition” exists, it is a tradition born of necessity and driven by desperation along the multi-obstacled path of judicial review, afforded by constitutional dictates, statutes, and tradition, but grudgingly and meagerly funded every step of the way.

My first professional job out of law school was on a corporate law staff in New York City which, in the early sixties — if I may recount the culture of the day with understatement — did

59. *Johnson v. State*, 547 So. 2d 59 (Miss. 1989), *overruled by Clemons v. State*, 593 So. 2d 1004 (Miss. 1992).

60. Jeffrey Toobin, *Field Trip*, NEW YORKER, Oct. 18, 1993, at 128 (quoting Justice Harry Blackmun).

not encourage its young lawyers to provide *pro bono* service. I turned to public work and law teaching and was able to take some special assignments. One highlight was defending a convicted murderer on appeal. I visited him in Sing-Sing (Ossining Correctional Facility, Ossining, New York) in 1971 as part of my representation. Sing-Sing is still the "attic" where New York's "Old Sparky"⁶¹ — a macabre nickname, to be sure — is stored and held in reserve. That assigned counsel role reminded me that all lawyers face obligations rooted in the highest traditions of the noble and learned legal profession. The duty is propounded in the Code of Professional Responsibility's call to action.⁶²

The visits to and the conferences at Sing-Sing, as well as the planning and the professional exhilaration of briefing, arguing, and even winning on appeal,⁶³ were counterbalanced somewhat and put in professional perspective by my wife and young

61. "Old Sparky" is the name given to Florida's 69-year-old electric chair. Barry Bearak, *Dispute Over Fiery Death Idles Florida Electric Chair*, L.A. TIMES, July 23, 1990, at A15. Since 1924, over 218 inmates have died in the three-legged oak chair, which was built by inmates. Ellen McGarrah, *Old Sparky Focus of Death Appeals*, MIAMI HERALD, June 24, 1990, at 6B.

62. "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." N.Y. JUD. LAW app., CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (McKinney 1992 & Supp. 1994). As stated in an ethical consideration of New York's Code of Professional Responsibility:

Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services.

N.Y. JUD. LAW app., CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25 (McKinney 1992).

63. *People v. Cathey*, 38 A.D.2d 976, 976, 331 N.Y.S.2d 837, 838 (2d Dep't 1972).

children's conversational skepticism as to why I was working so hard — as they saw it at the time — to set a murderer free. The anxieties and inner challenge that those musings evoked, in sharp contrast to the *pro bono* lawyer's — any lawyer's — professional duty, still stir philosophical questions. Every time I read about or rule on a similar case (the killing of a taxi driver), I utter a small, private mantra that my erstwhile client is not involved. I even fantasize that he is out there somewhere as a reformed, contributing member of society.

The “why” for lawyers and law students performing similar service is found in the Code of Professional Responsibility, which imposes upon all attorneys the obligation to “assist the legal profession in fulfilling its duty to make legal counsel available”.⁶⁴ Indeed, it is a “basic tenet of the professional responsibility of lawyers . . . that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence.”⁶⁵

The principle that a lack of funds should not deprive an individual of the right to effective counsel and related representational services should not be hollow rhetoric. The Code instructs attorneys that “[t]hose persons unable to pay for legal services should be provided needed services.”⁶⁶ Despite the fact that indigent defendants are entitled to court-appointed attorneys, there are currently at least 100 death row inmates in Alabama, California and Texas, some with execution dates, who are not represented by an attorney.⁶⁷ In short, there is a death row counsel crisis in this country.

Since 1982, the number of death row inmates has increased by 142%.⁶⁸ At the same time, the pool of attorneys willing and able to take capital cases is shrinking, in part because of lean economic times, lack of compensation, and seemingly impatient Supreme Court attitudes and rulings.⁶⁹ The view seems to be

64. N.Y. JUD. LAW app., CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (McKinney 1992 & Supp. 1994).

65. *Id.* EC 1-1.

66. *Id.* EC 8-3.

67. Marcia Coyle, *As Executions Speed Up Death Counsel Shortage Grows*, NAT'L L.J., Sept. 27, 1993, at 3.

68. Marcia Coyle et al., *Death Penalty Centers Come Under Pressure*, NAT'L L.J., Oct. 11, 1993, at 5.

69. Coyle, *supra* note 67, at 3.

that popular opinion, measured by prolific polls, shows that Americans favor executions in capital cases. The attitude seems to be let's just get on with them and get them over with! Fortunately, that is not this country's proud constitutional tradition. Our time-tested system tries to ensure, or at least proclaims that it is designed to ensure, the protection of everyone's rights, especially the most needy and most vulnerable, including the guilty.

Recruitment focuses on large firms in major cities, since they have the resources and some expertise in handling long, complicated processes.⁷⁰ However, law firms have been downsizing, restructuring, right-sizing and retrenching. Since virtually all death row inmates are indigent, they are generally dependent upon court-appointed attorneys whose resources are limited by statutory fees, unless a large firm is willing to take the case and absorb the costs. In New York, the fee for assigned counsel in a capital case is limited to \$2,800, unless two or more attorneys are appointed, in which cases the fee is increased to \$3,200.⁷¹ In Mississippi (which ranks forty-ninth in per capita spending for indigent defense)⁷² and in Louisiana, the maximum fee is \$1,000; and in Georgia, it is \$50 to \$150 at trial and no more than \$500 for preparation and investigation for trial and appeal expenses.⁷³ Alabama pays defense attorneys \$20 per hour, up to a maximum of \$2,000 for out-of-court preparation.⁷⁴ Many states do not compensate attorneys at all for post-conviction proceedings.⁷⁵

These statistics reinforce the adage that "capital punishment is for them who have no capital." Sammy Bice Johnson is alive today because of the tenacity, endurance and resources committed by Cahill, Gordon. As of early December 1989, when

70. *Id.* Many major law firms have taken at least one capital case; however, firms are reluctant to take on more than one case at a time because death penalty cases are time-consuming, complex and costly. *Id.* at 46.

71. N.Y. JUD. LAW § 35(3) (McKinney 1992).

72. Frank Judge, *Death Row Defense*, *Wall Street Style*, AM. LAW., Jan.-Feb. 1989, at 35, 36.

73. PREJEAN, *supra* note 6, at 252 n.18.

74. *Id.*

75. Coyle, *supra* note 67, at 46. In San Francisco, the cost of having a private criminal defense attorney, in situations where the public defender's office was unable to represent the indigent defendant, doubled from 1990 to 1991. *Speaking for the Defense*, SACRAMENTO BEE, Sept. 24, 1991, at B6.

the Supreme Court ruled in Johnson's favor, twenty-nine Cahill, Gordon attorneys and twenty-seven summer associates had worked on the case for two years.⁷⁶ They spent a total of 7,886 hours on the case and billings and expenses exceeded \$1.7 million.⁷⁷ Even with all of their available resources, the attorneys who worked on the case felt that they were "stretched."⁷⁸ They worked twenty-hour days to prepare the appeal and stay applications.⁷⁹ Johnson found Cahill, Gordon purely by chance after spending three and one-half years on death row. A young associate in the firm was induced into approaching the partners at the firm by a friend working with the Southern Prisoner's Defense Committee in Atlanta.⁸⁰ When Cahill, Gordon agreed to take on the case, none of its 285 attorneys had any expertise in death penalty cases.⁸¹

Although the Mississippi Assistant Attorney General found the amount of money expended by Cahill, Gordon "ludicrous,"⁸² it is not uncommon for a death penalty appeal to cost over \$1 million. Phoenix lawyer, James Belanger, estimated that he spent between \$2.5 and \$4 million in lawyer hours, court expenses and other expenses when he represented Don Eugene Harding, who died in the gas chamber in April 1992, twelve

76. Judge, *supra* note 72, at 35. When Cahill, Gordon was approached by one of their associates about taking the case, they believed that they could handle it with a handful of summer associates. *Id.* at 37.

77. *Id.* at 42.

78. *Id.* at 39.

79. *Id.* at 38. A month after Cahill, Gordon agreed to represent Johnson, the Mississippi Supreme Court set an execution date only three weeks away. *Id.* at 37. When their motion for a stay was denied, Cahill, Gordon had two weeks to establish a good faith and meritorious basis for post-conviction relief. Although most of the attorneys had experienced high pressure and high stakes litigation, the summer associates were neophytes, many of whom had never worked in a law office before. There was "no time for hand-holding or mistakes." *Id.*

80. *Id.* Anthony Paduano was a 28-year-old, second-year litigation associate at Cahill, Gordon when he was approached by Clive Stafford-Smith of the Southern Prisoners Defense Committee. Stafford-Smith, who joined the Defense Committee in 1984 and routinely handles about 40 death penalty cases, exerted constant pressure on Paduano, including calling him at 4 a.m., until Paduano agreed to approach the partners at Cahill, Gordon about taking the case. *Id.*

81. *Id.* Laurence Sorkin, an antitrust partner who oversees *pro bono* cases, recalled that before Cahill, Gordon accepted Johnson's case, he (Sorkin) did not know that inmates do not have a right to counsel on post-conviction appeals. *Id.*

82. See *supra* text accompanying note 56.

years after committing a double murder.⁸³ John Henry Knapp's attorneys spent over \$2 million in lawyer hours and \$100,000 in out-of-pocket costs.⁸⁴ Knapp was freed in November 1992 after spending twelve years on Arizona's death row.⁸⁵ He pled guilty to two counts of second degree murder in exchange for time served.⁸⁶ The Phoenix firm of Snell and Wilmer provided \$620,838 in legal services over the four years it represented Roger Lynn Smith, who received a life sentence in 1992.⁸⁷ The firm was reimbursed \$102,132 by the state.⁸⁸ No one diligently totes up the prosecution costs to provide some perspective.

83. Pamela Manson, *Matter of Life or Death: Capital Punishment Costly*, ARIZ. REPUBLIC, Aug. 23, 1993, at A1, A2. In 1980, Harding killed two men in Tucson and one in Phoenix. *Id.* at A2. He was the first inmate to be executed in Arizona since 1963. *Id.*

84. *Id.* John Henry Knapp was convicted in the arson deaths of his two young daughters in 1973. *Id.*

85. *Id.*

86. *Id.* He continues to insist that he is innocent. *Id.*

87. *Id.*

88. *Id.* These cases illustrate the fallacy of the economic argument often advanced in support of the death penalty. Research on several states indicates that it is more expensive to execute a prisoner than to feed, clothe and house him/her for life. *Id.* at A1. In Florida, for example, an estimated \$3.2 million is spent per death penalty case; "[i]n Texas, the figure is \$2.3 million." *Id.* Sources estimate that in Arizona, the cost tops \$1 million per case. The high cost is attributable, in part, to the extended appeal process; a death penalty case, from trial through the final appeal stage, often takes up to 12 years. *Id.* at A1-A2. Paul McMurdie, the 34 year-old head of the criminal-appeals division of the Arizona Attorney-General's Office, handled a habeas case where the crime took place before his birth. *Id.* at A2. The defendant received a life sentence.

However, the trial stage also absorbs a large portion of the expense. In a capital case in Arizona, for example, the prosecutor must decide whether to seek the death penalty within 10 days of arraignment. Investigations on both sides are more extensive; as Roland Steinle, a public defender in Arizona, noted an investigator is hired as soon as the defense attorney knows it is a death penalty case. The investigator searches all available records and investigates the family history for the last three generations in an effort to locate mitigating factors. A psychologist is generally hired at a cost of \$1,500 to \$2,000; in comparison, psychological tests for a defendant facing a life sentence generally run closer to \$350. Juries take longer to select, more expert witnesses are called and, if there is a conviction, a separate sentencing hearing must be held. These hearings are equivalent to a second trial, and often take three or four days. Once the defendant is sentenced to death, the appeals process begins. It has been estimated "that a properly conducted death penalty appeal taken through the entire system costs a *minimum* of \$100,000"; it is stressed that that figure is "rock bottom." *Id.* (emphasis added).

Another factor in the high cost of death penalty cases is the nationwide reversal rate of 40%; these cases require a second sentencing hearing. If the conviction is overturned, a new trial must be held, with the possibility of another round of

The New York State Bar Association actively encourages attorneys to take on *pro bono* cases, as do most State Bar Associations, the American Bar Association, and the Association of the Bar of the City of New York. New York's Court of Appeals, and a growing cadre of important entities also officially sanction *pro bono* involvement.⁸⁹ Ironically, in some southern states, the local Bars are relatively inactive in recruiting attorneys for capital cases.⁹⁰ Alabama, for example, has a desperate need for attorneys; yet, the State Bar "never has been a factor in providing death row counsel . . ."⁹¹ Currently, the shortage of attorneys and financial burden falls on death penalty resource centers, which recruit and assist attorneys representing indigent death row inmates. There are twenty of these nonprofit, legal services organizations across the country.⁹² However, their continued effectiveness and existence is uncertain because of a threatened reduction of federal funding. The House of Representatives has approved about \$19 million for the next fiscal year; this would keep the centers running at their current level.⁹³ However, the Senate has approved only \$11.5 million, which would mean that the centers could handle no new cases in 1994.⁹⁴ Representative John Field of Texas has even introduced a Bill to eliminate all funding.⁹⁵ This is curious in the extreme, since Texas has the largest death row population in the nation and the greatest need for attorneys.⁹⁶ The abolition of these centers would result

appeals. Since most death row defendants are indigent at the commencement of their trials, and virtually all are indigent by the time their case reaches the appeal stage, the cost is borne by taxpayers. *Id.*

89. N.Y. JUD. LAW app., CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25 (McKinney Supp. 1994) ("A lawyer has an obligation to render public interest and *pro bono* legal service."); see also Joseph W. Bellacosa, *Obligatory Pro Bono Publico Legal Services: Mandatory or Voluntary? Distinction Without a Difference?*, 19 HOFSTRA L. REV. 745 (1991).

90. Coyle, *supra* note 67, at 46.

91. *Id.* at 46.

92. Coyle, *supra* note 68, at 5. These centers were created by Congress to recruit and aid lawyers representing death row inmates. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 5, 12. In 1991, there were 2,412 death row inmates in the United States. Bohm, *supra* note 10, at 820 n.4. The fact that 332 of them were in Texas, *id.*, is not surprising, since two-thirds of all executions are carried out in Louisiana, Georgia, Texas and Florida. PREJEAN, *supra* note 6, at 49. This explains why the southern states are referred to as the "Death Belt." *Id.*

in a skyrocketing of costs, since noncenter attorneys would have to assume responsibility for these cases.⁹⁷

In addition to the lack of funds, it is also usual for court-appointed attorneys to lack experience with capital cases and, often, with any criminal cases. The American Bar Association has cited incompetent trial defense counsel as the reason that so many cases in which federal habeas relief is sought are reversed.⁹⁸ Louisiana requires that an attorney appointed to represent a defendant accused of capital murder have five years experience practicing law.⁹⁹ However, that experience can be in any field of law.¹⁰⁰ Some states have no minimum experience requirement. The attorneys appointed to defend Johnson at trial in Mississippi were two recent law school graduates with no experience in capital cases.¹⁰¹ The case nearly drove them into insolvency, and their inexperience literally nearly killed Johnson.¹⁰²

97. Coyle, *supra* note 68, at 12. Panel attorneys are paid \$75 to \$125 per hour under the Criminal Justice Act. *Id.* Without the services of the Resource Centers, "lawyers would have to spend a lot more billable time on these cases or they won't be representing inmates adequately," according to Nick Trenticosta of the Louisiana Center. *Id.*

98. *Speaking for the Defense*, *supra* note 75, at B6.

99. PREJEAN, *supra* note 6, at 49.

100. *Id.* In Louisiana, it is not uncommon for judges to appoint attorneys who have never practiced criminal law. *Id.*

101. Judge, *supra* note 72, at 36.

102. *Id.* The state paid them the \$1000 maximum and refused requests for additional money. Requests that the state pay for forensic experts and investigative assistants for the guilt phase of the trial were denied, along with requests for funding to bring out-of-state witnesses to Mississippi for the sentencing hearing. Consequently, there were no witnesses to plead for Johnson's life at his trial. One of his lawyers told the jury that Johnson was poor, and that if he could afford it, his family would have been present and would have "begged for his life." *Id.* After only two days of trial, the jury sentenced him to death.

At his trial, Johnson's attorneys objected to the admission of his 1963 New York conviction on the grounds that it was too remote to support the death penalty, but they had neither the time nor the resources to investigate further. *Id.* at 37. In contrast, Cahill, Gordon, with its resources, quickly discovered that the crime for which Johnson was convicted in New York, second degree assault with intent to commit first degree rape, no longer existed under New York law. However, even with their resources, Cahill, Gordon's summer associates scrambled in the days before Johnson's execution date "to find anyone who might have knowledge or records of the case," accomplishing what was impossible for Johnson's trial attorneys because of their lack of experience, staff and financial resources. *Id.* at 37-38.

In 1990, the *National Law Journal* conducted a six-month investigation into the quality of representation afforded capital defendants in the South.¹⁰³ The results were appalling. More than half of the attorneys interviewed said they were handling their first capital murder case when their client was convicted.¹⁰⁴ Even more disturbing, the *Journal* found that in the six states they studied, attorneys representing indigent death row inmates were disbarred, disciplined or suspended at rates ranging from three to forty-six times the overall rates for those states.¹⁰⁵ About twenty-five percent of the inmates on death row in Kentucky were represented by attorneys who were subsequently disbarred, suspended or convicted of crimes themselves.¹⁰⁶

President Clinton's comprehensive anti-crime bill would require states to appoint attorneys with experience in investigation and defense of capital cases.¹⁰⁷ That is some good news in this subject area. A *quid pro quo*, however, is a drastic reduction in available appeals between conviction and execution. The bill would impose a 180-day time limit for filing an appeal to the federal courts after conviction of a capital crime.¹⁰⁸ After the 180 days has elapsed, there would be no right to an appeal unless new evidence surfaced,¹⁰⁹ and the Supreme Court's opinion in *Herrera v. Collins*¹¹⁰ teaches how restrictive that would be

103. Marcia Coyle et al., *Fatal Defense*, NAT'L L.J., June 11, 1980, at 30.

104. *Id.*

105. *Id.*

106. Anthony Lewis, *A Muted Trumpet*, N.Y. TIMES, Aug. 16, 1991, at A23.

107. See David Lauter, *Clinton's Plan To Fight Crime*, S.F. CHRON., Aug. 12, 1993, at A1.

108. *Id.*

109. *Id.*

110. 113 S. Ct. 853 (1993). Leonel Torres Herrera was convicted in 1982 of murdering two Texas police officers and was sentenced to death. *Id.* at 856. The proof at trial included two eyewitnesses, abundant circumstantial evidence, and a letter written by Herrera in which he impliedly admitted his guilt. *Id.* at 857. In 1992, Herrera sought federal habeas relief on the grounds that newly discovered evidence demonstrated that he was innocent. *Id.* at 856. In support of this claim, he submitted affidavits tending to prove that the murders were committed by his late brother. *Id.* at 857. The Supreme Court affirmed his conviction and sentence, rejecting his argument that he was entitled to habeas relief in light of the newly discovered evidence. *Id.* at 870. Writing for the majority, Chief Justice Rehnquist stated:

Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears. . . .

anyway. The bill also adds fifty new crimes which qualify for death penalty punishment.¹¹¹ That is a lot of bad news.

Add to this potent medicine the fact that prosecutors have carte blanche resources, virtually unlimited access to experts, investigatory-prosecutorial alliances, forensics, science — you name it. As if that does not load the dice enough in favor of the prosecution, our system also virtually insures that the defense ledger in all these services categories be drenched in red ink and debts — they have and are given comparatively nothing! A graph would display the distorted equation as a parabola, with the prosecution at apogee and the defense at perigee.

Disparity of resources is only one of the ethical conundrums attorneys representing death row inmates find themselves in; other dilemmas include whether, and when, to accept a plea bargain and whether to oppose the imposition of the death penalty at all in a particular case. In 1982, Jarvis Cotton was arrested and indicted in Mississippi for the murder of Robert Irby.¹¹² After escaping from his Mississippi jail

Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding. . . . This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution — not to correct errors of fact.

Id. at 860. Herrera was executed by lethal injection on May 12, 1993. Nat Hentoff, *Death and Reasonable Doubt in Texas*, WASH. POST, May 29, 1993, at A31.

Innocence has been labeled "The Achilles' heel of the death penalty. . . ." Marcia Coyle, *Innocence vs. Executions*, NAT'L L.J., Dec. 27, 1993, at 1, 33. Since 1933, 48 inmates have been released from death row "because of evidence of their innocence or serious doubt as to their guilt." *Id.* at 33.

111. Helen Dewar, *Senate Passes Crime Package, Shelves Brady Bill*, WASH. POST, Nov. 20, 1993, at A1, A5; see also Schroth, *supra* note 6, at 20. Under the crime bill, the death penalty could be imposed for the murder of law enforcement officials, drive-by shootings, deaths incident to a carjacking and for large-scale drug trafficking, even if no killing is involved. Dewar, *supra*, at A5. The crime bill, known as the Biden Bill, also contains an amendment which would authorize federal prosecutors to seek the death penalty in cases involving gun-related homicides. Daniel Wise, *U.S. Judges Are Wary of Fallout From Crime Bill*, N.Y. L.J., Dec. 7, 1993, at 1, 7. As a result, murderers in states which have no death penalty, such as New York, could still face the death penalty if state prosecutors agreed to have the case tried in federal court. *Id.*

112. David Holmberg, *A Question of Venue*, NEWSDAY, July 1, 1987, at 4. On March 12, 1982, while tourists were flocking to Natchez, Mississippi's antebellum homes and a pageant celebrating the city's colorful history was being presented, Robert Irby, the 17-year-old son of a prominent, white banker, and three of his

cell,¹¹³ Cotton spent five years living in New York under the name Contee Fuller.¹¹⁴ He was apprehended when his fingerprints, taken during a prior arrest for marijuana use in a New York subway, showed that he was wanted as a fugitive.¹¹⁵

Although New York honored Mississippi's request to extradite him,¹¹⁶ Cotton never went to trial. In a surprise turn of

friends, were approached outside the city's auditorium by three black men. One of the assailants brandished a gun and demanded money. After Irby and his friends handed over \$21, the assailant fired the gun into the air and fled. Irby chased the assailants for about a block, until one of them turned and shot him twice, once in the leg and once in the head. Cotton and three other men were arrested within days of the shooting. Charges were dropped against two of the men, and the third, Terry Johnson, is serving a life sentence after pleading guilty. Cotton maintained that he was not present at the time of the shooting. *Id.*

113. After spending five months in an Adams County jail, Cotton escaped by crawling through an air conditioning duct. According to police, Cotton broke through the wall of his cell with a hacksaw blade, then escaped through the duct in the adjoining cell. Cotton's mother was charged as an accessory following his escape and served six months in the county jail. While she was not charged with aiding Cotton in the actual escape, police alleged that she smuggled money and clothes to Cotton after his escape. A friend of Cotton's was convicted of smuggling in the hacksaw used in his escape. *Id.*

114. *Id.* Cotton chose this alias "because his middle name is Contee and his mother's maiden name is Fuller." *Id.* By using that name, Cotton explained: "I felt like I wasn't really lying . . . I don't like to lie." *Id.* In New York, Cotton lived what the media described as a "nearly exemplary" life, working his way up from bag boy to assistant manager at a supermarket in Greenwich Village, where he supervised 25 people. *Id.*

115. *Miss. Extradition Argued in Court*, NEWSDAY, July 23, 1987, at 22. Cotton was arrested in November of 1986 at the Marcy Avenue subway station in Brooklyn. Based on the fingerprint check, he was rearrested in March of 1987. *Id.*

116. *Id.* In May of 1987, Governor Cuomo signed the extradition order after receiving oral assurances that a "highly competent" attorney would be appointed to represent Cotton; that the Mississippi District Attorney would not oppose a change of venue motion; and that Cotton and his family would receive any necessary protection. *People ex rel. Neufeld v. Commissioner*, 71 N.Y.2d 881, 883-84, 522 N.E.2d 1060, 1060-61, 527 N.Y.S.2d 762, 762-63 (1988) (Bellacosa, J., concurring); Holmberg, *supra* note 112, at 5; *Cuomo OKs Extradition to Mississippi in Capital Case*, KNICKERBOCKER NEWS (Albany), May 29, 1987, at 5A [hereinafter *Cuomo OKs Extradition*]. Cotton appealed his extradition on the grounds that the Governor had not held a hearing. *People ex rel. Neufeld v. Commissioner*, 132 A.D.2d 720, 721, 518 N.Y.S.2d 198, 199 (2d Dep't 1987). The Court of Appeals upheld the extradition, relying on the appellate division's opinion. *Neufeld*, 71 N.Y.2d at 883, 522 N.E.2d at 1060, 527 N.Y.S.2d at 762. The Second Department had relied in part upon the assurances received by the Governor, in holding that no hearing was necessary to protect Cotton's constitutional rights. *Neufeld*, 132 A.D.2d at 721, 518 N.Y.S.2d at 199.

Although I concurred in the result, I harbored some doubts, based in part on the Sammy Bice Johnson experience, as to the reliability of the assurances given to

events, he accepted a plea bargain in return for a life sentence.¹¹⁷ He will be eligible for parole in 1998.¹¹⁸ His attorney expects him to be freed then.¹¹⁹ She also viewed the plea bargain as a victory.¹²⁰

Whether to counsel a criminal defendant to accept a plea bargain is itself a difficult decision fraught with ethical pitfalls. But Cotton's Mississippi attorney, Allison Steiner, believes that "lawyers should fight very hard to obtain plea bargains in death penalty cases, and to persuade clients to accept them . . ."¹²¹ In

the Governor. *Neufeld*, 71 N.Y.2d at 886-87, 522 N.E.2d at 1062, 527 N.Y.S.2d at 764-65 (Bellacosa, J., concurring). The day after the extradition order was signed, the Mississippi authorities appeared to retreat significantly from these assurances, stating, "We cannot give any assurances." *Id.* at 886, 522 N.E.2d at 1062, 527 N.Y.S.2d at 764. I was also troubled by the fact that Cotton's mother was prosecuted as an accessory after the fact of murder for allegedly aiding in Cotton's escape. *Id.* As I said at the time, "These developments represent[ed] to me an apparently guileful affront by Mississippi officials to our State's highest executive official and to the interests of this State in protecting the rights of persons entitled to the benefits of the New York and United States Constitutions." *Id.*

Cotton's New York attorney, Russell Neufeld, was concerned that he would not receive a fair trial in Natchez. David Holmberg, *Mississippi Man Will Stand Trial For 1982 Slaying*, *NEWSDAY*, Apr. 1, 1988, at 9; *Cuomo OKs Extradition*, *supra*, at 5A. Cotton alleged that he had been beaten and tormented by the guards at the Adams County jail prior to his escape. *Neufeld*, 132 A.D.2d at 721, 518 N.Y.S.2d at 199. George West, Cotton's former attorney, told reporters at *Newsday* that while Cotton was in jail, guards "waved burnt toast in front of him and said he would be as crisp as that." *Cuomo OKs Extradition*, *supra*, at 5A. West resigned from the case after receiving death threats. Holmberg, *supra* note 112, at 5. Mississippi Circuit Court Judge Edwin Benoist, while expressing concern about appointing an out-of-county attorney, stressed that Cotton would receive a fair trial. Holmberg, *Mississippi Man Will Stand Trial for 1982 Slaying*, *supra*, at 27. He indicated that he did not understand why there was any concern, stating, "I realize that people in New York think Mississippi is like South Africa, but people in Mississippi are pretty good people. I'd rather be tried in Natchez than in New York." *Id.*

117. David Holmberg, *A Question of Survival*, *NEWSDAY*, Sept. 12, 1988, at 3. Cotton pleaded guilty to felony murder a few weeks before his scheduled trial. *Id.*

118. *Id.*

119. *Id.* His Mississippi attorney, Allison Steiner, noted that "[t]he practice [in Mississippi] has been to parole capital murders at or about first eligibility . . ."
Id. (alteration in original).

120. *Id.*

121. *Id.* Steiner notes that she has never seen a death penalty case where she would recommend against a plea bargain. Steiner's three-person firm had handled seven death penalty cases as of 1988, six of which were court-appointed cases. She has never lost a client to the electric chair. Of the seven cases, a plea bargain was obtained in five and two were convicted and sentenced to life. Although Steiner has not made death penalty cases her life work, she believes that "any

fact, Steiner regards it as "improper" to reject a plea bargain in a capital case.¹²² She bases this belief in part on statistics garnered by the Southern Prisoners Defense Committee in Atlanta. According to the Committee, sixty percent of the death row inmates in Georgia turned down plea bargains.¹²³ Nationwide, the figure is about fifty percent.¹²⁴

Clive Stafford-Smith, a staff attorney for the Southern Prisoners Defense Committee, points out that persuading a client to accept a plea bargain rather than to gamble on receiving the death sentence, does not amount to neglecting the duty to mount a strong defense.¹²⁵ Neither is it an admission, or assumption, that the client is guilty.¹²⁶ Rather, it is a realistic and pragmatic approach. He notes that "[j]urors are death qualified . . . and conviction-prone."¹²⁷ As Cotton's New York attorney, Russell Neufeld, noted, "To take a chance on the electric chair is nuts."¹²⁸ It is imperative, however, that the ultimate decision be the defendant's. As stated in the Ethical Considerations to Canon 7 of the Code of Professional Responsibility: "A defense lawyer in a criminal case has the duty to ad-

lawyer with the competence to do criminal law has an ethical obligation to take indigent cases, and therefore some capital murder cases." *Id.* Steiner noted that District Attorneys are also more "reluctant to plunge into a capital case It's more work, . . . they are subjected to more scrutiny politically[,] . . . and it's not an efficient use of their time." *Id.* She added, "I think they'll only do it if they feel every certainty that they'll win." *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* Although Steiner wonders "if any of us is perfect enough to take a life," she notes that juries in capital cases do not share her hesitancy. Juries in capital cases are comprised of people who have already indicated to one degree or another that they are not squeamish about imposing the death sentence. Stafford-Smith also noted that in many death penalty cases there is a particularly strong case against the defendant. In Cotton's case, Steiner had to contend with the fact that he had escaped. While there was strong evidence implicating him in the shooting, there was also equally strong evidence exonerating him. There were no eyewitnesses to support the claim that Cotton was involved; however, another defendant in the case had testified that Cotton had been a participant. In addition, a cellmate of Cotton's, who had escaped with him, told police where to find the gun allegedly used in the shooting. He claimed to have acquired this information from Cotton, but the police were never able to conclusively link the weapon to the shooting. *Id.*

128. *Id.*

wise the client fully on whether a particular plea to a charge appears to be desirable . . . but it is for the client to decide what plea should be [accepted]."¹²⁹

Take this a step further – to the cause of the client who has been convicted and wants to die. What is an attorney's ethical duty in the situation where death can be postponed, but the client prefers immediate death to a lengthy prison term? This was the ethical dilemma that Johnie O'Neal, a strong opponent of the death penalty, had to confront when he agreed to represent Thomas Grasso in Oklahoma.

Grasso was convicted of second degree murder in 1992 for strangling an elderly man in Staten Island.¹³⁰ He was sentenced to twenty years to life, without possibility of parole until the year 2011.¹³¹ He was then returned to Oklahoma in accordance with the Interstate Agreement on Detainers¹³² to stand trial for a murder committed in Tulsa on Christmas Day 1990 under the same *modus operandi*.¹³³ Upon his return, Grasso pled guilty to the Tulsa murder and requested the death penalty.¹³⁴ He decided he would rather die than grow old in prison.¹³⁵

129. N.Y. JUD. LAW app., CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-7 (McKinney Supp. 1994).

130. Sarah Lyall, *New York Battles Oklahoma Over Custody of a Murderer*, N.Y. TIMES, May 6, 1993, at A1, B10.

131. *Id.*

132. 18 U.S.C. app. § 2 (1989).

133. Matt Siegel, *Defending a Death Wish*, AM. LAW., Apr. 1993, at 60, 61; Lyall, *supra* note 130, at A1; see *Grasso v. State*, 857 P.2d 802 (Okla. Crim. App. 1993). Under the agreement, New York was required to return Grasso to Oklahoma temporarily to stand trial. Oklahoma was then required to return him to New York to serve his sentence, after which he would be sent back to Oklahoma to serve whatever sentence had been imposed there. Lyall, *supra* note 130, at B10. Grasso's case is not the first time that a convicted murderer has been returned to New York to serve a sentence imposed there. In 1990, William Branshaw, who was accused of murder in New York and Florida, was returned to New York to serve a 25-year-to-life sentence. *Id.*

134. Lyall, *supra* note 130, at B10.

135. Siegel, *supra* note 133, at 60. Grasso is not the first convicted murderer to choose death. Of the first 100 executions carried out after 1976, 11 were consensual. Douglas Mossman, *The Psychiatrist and Execution Competency*, 43 CASE W. RES. L. REV. 1, 45 n.195 (1992) (citing Michael L. Radelet & George W. Bernard, *Ethics and the Psychiatric Determination of Competency to be Executed*, 14 BULL. AM. ACAD. PSYCHIATRY & L. 37, 49 (1986)). In 1977, Gary Gilmore instructed his attorneys to forego any appeals and was executed by a firing squad on January 17, 1977. Mossman, *supra*, at 45 n.194.

When Oklahoma refused to return Grasso to New York, New York took the matter to federal court.¹³⁶ Twelve hours before Grasso was scheduled to die, Oklahoma Federal District Court Judge Frank Seay ordered him returned to New York.¹³⁷ The issue is settled at least to the extent that Oklahoma reluctantly returned Grasso to New York, where he is now incarcerated in Attica State Prison. The appeals and publicity have somewhat abated for now, though Grasso has generated television interviews and potential magazine and book exertions.

While the dispute over Grasso's fate is interesting, the underlying ethical issue should focus on what an attorney in Johnie O'Neal's position should do. Very little precedent exists to guide an attorney in unearthing the legal and ethical obligations to the client. The Code of Professional Responsibility requires attorneys to represent their clients "zealously within the bounds of the law."¹³⁸ However, the Ethical Considerations instruct that except "[i]n certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client . . . the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on the lawyer."¹³⁹

O'Neal decided not to contest the death penalty in Grasso's case. He based this decision, in part, on certain assumptions. Among them, that he had never seen a capital defendant in Oklahoma get less than life without parole and that the Judge would not allow Grasso to serve his Oklahoma sentence concurrently with his New York sentence.¹⁴⁰ He also heeded his per-

136. New York *ex rel.* Coughlin v. Poe, 835 F. Supp. 585, 587 (E.D. Okla. 1993). Although Grasso agreed not to be returned, New York maintained that it was not his decision, Siegel, *supra* note 133, at 63, and that the agreement did not give Oklahoma any discretionary authority to retain custody of Grasso. Lyall, *supra* note 130, at B10.

137. Doug Ferguson, *Federal Judge Rules Killer Must Serve New York Sentence*, TIMES UNION (Albany), Oct. 19, 1993, at A-1.

138. N.Y. JUD. LAW app., CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (McKinney 1992 & Supp. 1994).

139. N.Y. JUD. LAW app., CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (McKinney Supp. 1994).

140. Siegel, *supra* note 133, at 62.

sonal conviction that people should be allowed to choose death over life in prison without possibility of parole.¹⁴¹

O'Neal's critics argue that no one can assess the future quality of another person's life.¹⁴² Even more troubling is the issue of whether or not such determinations are the proper function of an attorney. O'Neal counters this argument by pointing out that he often makes these types of decisions.¹⁴³ After all, all attorneys pick and choose among available arguments — discarding the weaker ones in a kind of Darwinian exercise.¹⁴⁴ For a criminal defendant in a capital case a miscalculation by the attorney could not be more critical or meaningful.

What of an attorney's ethical duty to allow the client to determine the ultimate goal of his legal representation?¹⁴⁵ Grasso's reasons for seeking the death penalty are far from legal. As he put it, "I'd rather deal with the possibility of hell on the other side, than deal with living hell right here in prison."¹⁴⁶

141. *Id.* at 61. O'Neal contends that "Grasso could [not] lead a useful and happy life in prison, [and asserts that] he probably could not advocate death for any client who stood a chance of making something of his life." *Id.* at 63. O'Neal also relied upon his personal belief that "his principle [sic] duty was to stand up for a lone client fighting against a powerful system." *Id.* at 61. He describes his advocacy in the Grasso case as "sort of the ultimate act against the government." *Id.* at 63.

142. *Id.* at 62, 63.

143. *Id.* at 62.

144. *Id.* at 62. O'Neal notes that every time he files a brief on appeal, he excludes weaker arguments for tactical reasons. *Id.* Thus, he argues, he "often makes life-or-death decisions about how a judge might reasonably be expected to rule" *Id.*

145. N.Y. JUD. LAW app., CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7, 7-8 (McKinney 1992 & Supp. 1994). Professor Linda Carter, of McGeorge School of Law in Sacramento, contends that failing to advocate for a client's execution where that is what the client wants would amount to a violation of the American Bar Association's ethical rules that the client must determine the goals of his legal representation. Siegel, *supra* note 133, at 62. She notes, however, that complying with the ABA guidelines in these circumstances may result in the facilitation of a violation of the defendant's Eighth Amendment rights. *Id.*

146. Charles M. Sennott, *Grasso Puts Low Value on His Life*, DAILY NEWS (New York), Oct. 14, 1993, at 7, 40. Grasso has stated that he would rather be executed because there is some decency in dying like that. *Id.* at 7.

Knowing that death row inmates often give up hope, O'Neal and his staff vigorously tested Grasso's conviction to die. Siegel, *supra* note 133, at 62. In addition to having him examined by a clinical psychologist to determine his competency, O'Neal's Deputy Public Defender visited with Grasso and explained in graphic detail how he would die; she also "grilled him about how he wanted his body disposed

However, his reasons seem irrelevant. "In the final analysis . . . the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for the lawyer."¹⁴⁷ How does an attorney in O'Neal's position balance this against the duty to zealously represent the client and protect the client from cruel and unusual punishment? It has been suggested that a solution is the appointment of a third attorney to present evidence against the imposition of the death penalty.¹⁴⁸

Grasso fuels the controversy by contending that requiring him to serve his New York sentence amounts to cruel and unusual punishment.¹⁴⁹ He argues that forcing him to live in a prison cell knowing that he will die, just not knowing when, violates his Eighth Amendment rights.¹⁵⁰ Governor Cuomo said of Grasso, "He's asking for mercy, choosing what he sees as the easier penalty."¹⁵¹ Who gets to choose and decide lies at the root and heart of such unique legal questions. Moreover, the ethical dimension adds great complexity, nuance and uncertainty that fuels academic debate among professionals and institutions charged with fair, orderly dispensation of justice.

The case of Rickey Ray Rector starkly illustrates many inequities and pitfalls of capital cases. Since none of the lawyers in Conway, Arkansas wanted his case, Rector was represented by an outside court-appointed attorney.¹⁵² After killing a police officer, Rector shot himself in the head — effectively giving himself a frontal lobotomy.¹⁵³ At the time of his trial, he had an IQ of sixty-three.¹⁵⁴ Thus, the only issues were his ability to

of" *Id.* Grasso did not change his mind; he merely requested that the Deputy Public Defender not visit him again. *Id.*

147. N.Y. JUD. LAW app., CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (McKinney Supp. 1994).

148. Siegel, *supra* note 133, at 62.

149. *Id.* at 63.

150. *Id.* O'Neal maintains that it is hypocritical to keep Grasso alive through years of appeals. He notes, "We've sentenced him to death . . . and yet we won't let him die quickly and with dignity." *Id.*

151. Ferguson, *supra* note 137, at A-1.

152. Marshall Frady, *Death in Arkansas*, NEW YORKER, Feb. 1993, at 112.

153. *Id.* at 105.

154. *Id.* at 113. After the shooting, Rector was unable to conceptualize beyond immediate sensations or provocations. *Id.* at 111. He was unable to grasp the concept of past or future and he did not understand the concept of death. *Id.* He thought he would be back in his cell the next day. *Id.* at 105. He even saved his

assist in his representation and his ability to comprehend that he had been sentenced to death and why. Rector had two competency hearings.¹⁵⁵ The testimony was later described as "hopelessly in conflict."¹⁵⁶ Medical specialists testifying for the defense contended that Rector was incapable of assisting his attorneys; a determination with which one of the State's specialists agreed.¹⁵⁷ The State's witnesses testified that Rector was "attempting to fake psychopathology" and that his emotionless state was a "life choice."¹⁵⁸ Rector was adjudged competent. It took only fifteen minutes for the jury to convict him of murder.¹⁵⁹

Rector's attorneys filed appeal after appeal. The federal district court upheld the determination of competency on the basis that since the proof was in conflict, the decision could not be held clearly erroneous.¹⁶⁰ The determination of competence was accorded a "presumption of correctness."¹⁶¹ In effect, the appeals courts concerned themselves only with the competency of the legal proceedings — not of Rector. In 1983, an Arkansas State Supreme Court Justice indicated that the circumstances surrounding Rector's conviction may be grounds for clemency and should be addressed to the Governor.¹⁶² Rector was given two clemency hearings — one to hear from him and one to hear from those opposed to a commuted sentence.¹⁶³ The latter drew

dessert for later, as was his usual custom. *Id.* His behavior in his cell was, to say the least, erratic and bizarre. He would dance around his cell, singing and laughing, or howling and barking like a dog. *Id.* at 105, 125. He was unable to concentrate on a single topic for any length of time. *Id.* at 113. Instead, he would change the subject — asking a stream of irrelevant questions. *Id.* at 113-14.

155. *Id.* at 114.

156. *Id.* at 115.

157. *Id.* at 114. The State's specialist noted that Rector was "trying to do the best he could on those tests." *Id.*

158. *Id.* at 115. Some of these witnesses had never read the surgeon's report on Rector's operation after the shooting. *Id.* at 114. One had no idea how much brain tissue had been removed. *Id.*

159. *Id.* at 115.

160. *Id.* at 117.

161. *Id.*

162. *Id.*

163. *Id.* at 120-21. Rector made only one simple statement on his own behalf: "I don't want to die. I'll take life without if I can get it." *Id.* at 120. His attorney had labored for two days to draw this statement out of him. With the exception of this single, rehearsed statement, Rector showed no interest in the proceedings.

such a large turnout that it had to be relocated.¹⁶⁴ It took the Board only 35 minutes to receive testimony and vote, unanimously, that then-Governor Bill Clinton should not commute Rector's sentence.¹⁶⁵

As the time of Rector's execution drew near, his attorneys tried desperately to reach Governor Clinton, who was immersed in his presidential campaign. They were deflected by his staff, despite the fact that the Governor had returned from the campaign trail in New Hampshire specifically to be available in his State to deal with this matter.¹⁶⁶ One of Rector's attorneys, who was on his way to witness the execution, finally reached the Governor from a pay phone at a convenience store.¹⁶⁷ But it was unavailing — the then-Governor apparently placed final and great weight on the clemency board's recommendation and the fact that the federal district court had denied Rector's last appeal.¹⁶⁸

The limited resources and appeal rights of death row inmates impacts with singular vengeance and with the most dehumanizing effect on the mentally ill. Many cases, including Rickey Ray Rector's and Bobby Shaw's, demonstrate how at least this category ought to be a fundamental and heightened concern. Bobby Shaw, who was sentenced to death for killing a prison guard in Missouri, is brain damaged and has schizophrenia, but he was never able to use his mental condition as a defense.¹⁶⁹

When he wasn't laughing, joking and playing with the guards, he stared flatly straight ahead. *Id.*

164. *Id.* at 121.

165. *Id.*

166. *Id.* at 123, 125. Rector's attorneys called Clinton every half-hour, but were informed that the then-Governor was not available to speak to them. *Id.* at 125. Out of desperation, they began calling anyone they knew who might have been able to get through to Clinton. *Id.*

167. *Id.* at 126-27.

168. *Id.*

169. James Willwerth, *The Voices Told Him To Kill*, TIME, June 7, 1993, at 46, 47. Schizophrenia is a genetic disease which is characterized by "hallucinations, delusions, depression and disorderly thinking." *Id.* at 48. Shaw was serving a life sentence for a prior murder when he killed the guard. *Id.* at 47. At his first murder trial, the defense made only one motion — a standard motion for acquittal on the grounds that the State had not proven its case. Despite his history of sudden violent behavior, Shaw was placed in the vegetable cutting room, where he worked with knives every day. In addition, "[h]e was neither examined nor treated for

At his trial, the judge refused to instruct the jury that they could take his mental condition into account.¹⁷⁰ The psychiatrist who examined Shaw for his trial later admitted that he had misdiagnosed him.¹⁷¹ His disease was finally recognized by the Missouri Department of Corrections in 1986.¹⁷² But it was too late; his appeals had run out. As a result of the strict rules for the introduction of new evidence into cases under appeal, Shaw's best defense was never permitted inside the courtroom.¹⁷³ In the eyes of the law, he was a normal, functioning human being.

Shaw was scheduled to die by lethal injection on June 9, 1993 — thirteen years after being sentenced.¹⁷⁴ On June 2, 1993, Governor Carnahan, stating there was "little doubt" that Shaw was mentally unfit for execution,¹⁷⁵ commuted his sentence to life imprisonment without parole.¹⁷⁶ The commutation of his sentence unleashed a hailstorm of criticism from correctional officers and citizens.¹⁷⁷ It also brought pleas for a system-wide reform so that individuals with a diminished mental

psychiatric illness." He had several psychotic incidents, and the guards asked that he be transferred. *Id.* at 48. He was not. Shaw heard voices — several of them — they told him to stab the guard. *Id.*

170. *Id.*

171. *Id.* Dr. Parwatarik originally diagnosed Shaw as being "a mildly depressed individual." His misdiagnosis stemmed from incomplete prison records and poorly framed questions. Since schizophrenics often hide their symptoms, it takes skillful questioning to identify the disease. Parwatarik asked Shaw if he was having command hallucinations; Shaw said no. Shaw's *pro bono* attorney brought in Georgetown neurologist Jonathan Pincus to interview Shaw. After some unsuccessful questioning regarding whether or not Shaw heard voices that were not there, Pincus asked Shaw, "Do you hear things that are *there*, but other people don't hear?" This time he got an affirmative response. *Id.*

172. *Id.* at 49.

173. *Id.* Sean O'Brien, Shaw's *pro bono* attorney, noted: "Bobby's death sentence is the product of a complete break down of the adversarial system. The true defense in this case has never been inside a courtroom, and it never will be." *Id.*

174. *Id.* at 47-48. Shaw never asked for clemency or that his lawyers appeal his case. *Id.* at 49.

175. *Across the USA: News from Every State*, USA TODAY, June 3, 1993, at 8A. Carnahan, who supports the death penalty, stated that because Shaw's mental illness, borderline retardation and possible brain damage were not presented to the jury, "the sentence of death may be fundamentally unfair . . ." Virginia Young, *Carnahan Commutes Killer's Death Sentence*, ST. LOUIS POST DISPATCH, June 3, 1993, at 1A.

176. *Across the USA: News from Every State*, *supra* note 175, at 8A.

177. Mike Dawson, *Shaw's Reprieve Was Slap to Guards*, ST. LOUIS POST DISPATCH, June 19, 1993, at 2B. *But see* Andrea Langton, *Mentally Retarded Deserve*

capacity could not be executed. As Andrea Langton, the State Death Penalty Abolition Coordinator for Amnesty International, said, "The punishment must fit the criminal as well as the crime."¹⁷⁸

At this juncture, I want to inject a few comments about the mode of capital execution. In 1890, the electric chair was used for the first time in the United States.¹⁷⁹ William Kemmler was executed at Auburn Prison in upstate New York.¹⁸⁰ The *New York Times* characterized this new method as "euthanasia by electricity."¹⁸¹ After being convicted of murder in the first degree, Kemmler appealed his death sentence directly to the Court of Appeals.¹⁸² He argued that the electric chair constituted cruel and unusual punishment. The Court of Appeals recognized that the "infliction of the death penalty in any manner must necessarily be accompanied with, what might be considered in this age, some degree of cruelty"¹⁸³ Despite this acknowledgement, my antecedents on the court, whom I admire and respect even beyond the demands of *stare decisis*, upheld the use of the electric chair, finding that "the application of electricity to the vital parts of the human body, under such conditions, and in the manner contemplated by the statute, must

Mercy, ST. LOUIS POST DISPATCH, June 12, 1993, at 2B; *Compassion, Not Revenge*, *supra* note 17, at 2B.

178. Langton, *supra* note 177, at 2B.

179. PREJEAN, *supra* note 6, at 18.

180. *Id.* Kemmler was convicted of murdering his common-law wife by striking her more than 20 times on the head, neck and shoulders with a hatchet. *People v. Kemmler*, 119 N.Y. 580, 581, 582, 24 N.E. 9, 9-10, *aff'd*, 136 U.S. 436 (1890); John G. Leyden, *Death in the Hot Seat: A Century of Electrocutions*, WASH. POST, Aug. 5, 1990, at D5.

181. PREJEAN, *supra* note 6, at 18. In upholding the New York State Court of Appeals' decision that executions performed with the electric chair did not constitute cruel and unusual punishment, the Supreme Court stated: "It is within easy reach of the electrical science at this day to so generate and apply to the person of the convict a current of electricity of such known and sufficient force as certainly to produce instantaneous, and, therefore, painless, death." *In re Kemmler*, 136 U.S. 436, 443 (1890) (citing *People ex rel. Kemmler v. Durston*, 7 N.Y.S. 813, 818 (Sup. Ct. 1889)), *quoted in* PREJEAN, *supra* note 6, at 18.

182. *People ex rel. Kemmler v. Durston*, 119 N.Y. 569, 570, 24 N.E. 6, 6 (1890). Kemmler's trial commenced on May 6, 1889, just five and one-half weeks after the crime. Leyden, *supra* note 180, at D5. He was convicted four days later. *Id.* "On May 13, [1889,] he became the first man to be sentenced under New York's new capital punishment law." *Id.* He was executed on August 6, 1889. *Id.*

183. *Kemmler*, 119 N.Y. at 577, 24 N.E. at 8.

result in *instantaneous* and consequently in *painless* death."¹⁸⁴ Two very interesting words!

Unfortunately for Kemmler — and the hundreds who succeeded him to New York's "Old Sparky" — theory and facile semantics, and euphemistic assumptions embodied in those two conclusory words, did not mesh with reality.¹⁸⁵ On August 6, 1890, the first jolt of electricity sent through Kemmler's body did not kill him.¹⁸⁶ His muscles tensed and his chest heaved, causing the attending physician to shout, "Turn on the current

184. *Id.* at 579, 24 N.E. at 9 (emphasis added).

185. Throughout the last century, witnesses have rendered graphic descriptions of electrocutions. A particularly grisly portrait was included in Justice Brennan's dissent in *Glass v. Louisiana*:

[W]hen the switch is thrown, the condemned prisoner "cringes," "leaps," and "fights the straps with amazing strength." The hands turn red, then white, and the cords of the neck stand out like steel bands. The prisoner's limbs, fingers, toes, and face are severely contorted. The force of the electrical current is so powerful that the prisoner's eyeballs sometimes pop out and "rest on [his] cheeks." The prisoner often defecates, urinates, and vomits blood and drool. "The body turns bright red as its temperature rises," and the prisoner's "flesh swells and his skin stretches to the point of breaking." Sometimes the prisoner catches on fire, particularly "if [he] perspires excessively." Witnesses hear a loud and sustained sound "like bacon frying," and "the sickly sweet smell of burning flesh" permeates the chamber. . . . [T]he prisoner almost literally boils: "the temperature in the brain itself approaches the boiling point of water," and when the postelectrocution autopsy is performed "the liver is so hot that doctors have said that it cannot be touched by the human hand." The body frequently is badly burned and disfigured.

Glass, 471 U.S. 1080, 1086-88 (1985) (Brennan, J., dissenting from denial of certiorari) (quoting *Hearings on S. 1760 Before the Subcomm. on Criminal Law and Procedures of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. 20 (1968) (statement of Clinton Duffy, former Warden of San Quentin); LEWIS EDWARD LAWES, *LIFE AND DEATH IN SING-SING* 170 (1928); CHARLES DUFF, *A HANDBOOK ON HANGING* 119-20 (1974); Steven Tyler, *Electrocution as a Spectator Sport*, 2 *FACT* 47, 50-51 (Mar.-Apr. 1965); Gardner, *Executions and Indignities — An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 *OHIO ST. L.J.* 96, 119 & n.164 (1978); Sol Rubin, *The Supreme Court, Cruel and Unusual Punishment, and the Death Penalty*, 15 *CRIME AND DELINQUENCY* 121, 128 (1969); HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA* 16 (3d ed. 1982)).

186. Michael Kroll, *The Chair Marks 100 Years of Ghastly Execution History*, *OREGONIAN*, Aug. 6, 1990, at B7. Accounts of Kemmler's death indicate that he was the calmest person in the room. Leyden, *supra* note 180, at D5. When the electrode was attached to his head, he suggested that the warden press it down further so it would be tighter. The switch was thrown at 6:43 a.m. Despite the attempts of the warden to keep the time of death a secret, scores of curious citizens had gathered outside the prison as early as 4 a.m. *Id.*

instantly, this man is not dead."¹⁸⁷ A second jolt was administered.¹⁸⁸ It killed him, but one witness is reported to have noted that "[t]hey could have done better with an axe"¹⁸⁹

A reporter for the *New World* newspaper recounted the events of this historic "breakthrough" for finding a humane method of execution in revolting detail:

The current had been passing through his body for 15 seconds when the electrode at the head was removed. Suddenly the breast heaved. There was a straining at the straps which bound him. A purplish foam covered the lips and was spattered over the leather head band. The man was alive.

Warden, physician, guards . . . everybody lost their wits. There was a startled cry for the current to be turned on again. . . . An odor of burning flesh and singed hair filled the room, for a moment, a blue flame played about the base of the victim's spine. This time the electricity flowed four minutes¹⁹⁰

This inauspicious beginning – and from Kemmler's perspective, his ending – touched off a debate that has raged for over 100 years. After Kemmler's painful, extended execution, the *New York Press* commented that "[t]he age of burning at the stake is passed; the age of burning at the wire will pass also."¹⁹¹

187. Kroll, *supra* note 186, at B7.

188. *Id.* The second jolt allegedly lasted 70 seconds. *Id.* However, according to some reports, it lasted more than four minutes. Leyden, *supra* note 180, at D5; PREJEAN, *supra* note 6, at 18. The attending physicians waited three hours before performing an autopsy to give the body time to cool down. Leyden, *supra* note 180, at D5.

189. Kroll, *supra* note 186, at B7. The witness was George Westinghouse, the great inventor and business tycoon. Leyden, *supra* note 180, at D5. Westinghouse had unsuccessfully attempted "to prevent the use of his company's dynamos to generate the electricity for [Kemmler's] execution." *Id.* He reportedly paid more than \$100,000 to finance Kemmler's appeal. *Id.* Ironically, after the first jolt was administered, Dr. Alfred Porter Southwick, the inventor of the electric chair, had commented, "We live in a higher civilization from this day" Kroll, *supra* note 186, at B7.

190. PREJEAN, *supra* note 6, at 18.

191. Kroll, *supra* note 186, at B7. George F. Shrady, editor of the *Medical Record* of New York and an eyewitness to Kemmler's execution, wrote in an editorial:

Although science has triumphed, the question of the humanity of the act is still an open one We venture to predict that public opinion will soon banish the death chair as it has done the rope, and imprisonment for life will be the only proper punishment meted out to a murderer

Leyden, *supra* note 180, at D5.

Well, not everywhere and not yet by a long shot. This country seems to be moving against most of the civilized world's modern currents that reject the death penalty.¹⁹² Advocates of the death penalty remain unfazed. They argue that "pain and suffering are part of the penalty."¹⁹³ Opponents do not lobby strenuously for more humane methods, but for elimination entirely.¹⁹⁴ I cannot help but wonder whether my predecessors in office who decided the *Kemmler* case would find any solace in the words "instantaneous" and "painless" today, based on what experience has taught.

What, then, should the defense attorney's role be in this part of the debate? Would a Brandeis Brief Approach¹⁹⁵ on the Scientific-Medical-Forensic plane make some difference? Are there defense resources to mount such an effort? Defense attorneys have an ethical obligation to represent their clients zealously and to insure that the punishment meted out to their clients does not violate the Eighth Amendment.¹⁹⁶ Should this special group bear the burden alone and band together to argue for reform or just go about it one-by-one, case-by-case? Canon 8 of the Code of Professional Responsibility, which states that "[a]

192. Approximately 4,100 people have died in the electric chair since Kemmler was executed. Leyden, *supra* note 180, at D5.

193. Michael deCourcy Hinds, *Making Execution Humane (or Can It Be?)*, N.Y. TIMES, Oct. 13, 1990, at A1, A8.

194. *Id.* at A8. Groups such as the American Civil Liberties Union contend that lobbying for more humane methods would undercut their fundamental opposition to the death penalty. More humane methods would weaken their crusade by defusing public outrage. "[D]octors generally stay out of the debate because their oath requires them to save lives," not take them. *Id.* The American Medical Association explicitly limits a doctor's role in executions to a pronouncement that the inmate is dead. Federal courts have dismissed appeals by defendants who argue that a particular method is inhumane. In June of 1990, a federal judge in Orlando, Florida, held: "The State is not required to employ the most modern state-of-the-art technology in implementing the death penalty or to foresee and meet every problem which conceivably ever could arise during an execution." *Buenoano v. Dugger*, No. 90-473-CIV.-ORL-19, 1990 WL 119637, at *35 (M.D. Fla. 1990) (Fawcett, J.).

195. A Brandeis Brief is "[a] form of appellate brief in which economic and social surveys and studies are included along with legal principles and citations and which takes its name from Louis D. Brandeis, Associate Justice of Supreme Court, who used such brief while practicing law." BLACK'S LAW DICTIONARY 188 (6th ed. 1990).

196. N.Y. JUD. LAW app., CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (McKinney Supp. 1994).

lawyer should assist in improving the legal system,"¹⁹⁷ indicates the answer: Defense lawyers, all lawyers, should do something.

Changes in human affairs and imperfections in human institutions make necessary constant efforts to maintain and improve our legal system. This system should function in a manner that commands public respect and fosters the use of legal remedies to achieve redresses of grievances. By reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein.¹⁹⁸

This is generalized, idealized talk, to be sure, but without an organized effort to level the playing and killing fields, at least as to defense resources and personnel, the number of executions will continue to mount in this country and without the consolation that all rights of all death penalty offenders have been procedurally protected. The mood of the land is not good and not conducive to reflective deliberations that take time and money.

Yale Professor Stephen Carter notes the curious anomaly of America's fixation with the death penalty in relation to its inability to deal with serious crime.¹⁹⁹ He acknowledges the probable facial constitutionality of the death penalty,²⁰⁰ and the enormous as-applied difficulties in the given cases across this great land. He deplores the political rhetoric, the public spectacle, the seeming glee. His proposal: let the religionists who oppose capital punishment keep up their steady drumbeat in the public square, their prayerful candlelight vigils, all so that society will be forced to look at, really look at, the human faces of those it feels obliged to kill. Let the killings, he asserts, at the very least, be "an occasion for sadness, not joy."²⁰¹

Although a century has passed since Kemmler's execution in New York, death by the electric chair is still a grisly affair. It is not unusual for two or three jolts of electricity to be required

197. N.Y. JUD. LAW app., CODE OF PROFESSIONAL RESPONSIBILITY Canon 8 (McKinney 1992 & Supp. 1994).

198. N.Y. JUD. LAW app., CODE OF PROFESSIONAL RESPONSIBILITY EC 8-1 (McKinney 1992).

199. STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 258 (1993).

200. *Id.* at 259.

201. *Id.* at 262.

before an inmate is declared dead.²⁰² Seventeen-year-old Willie Francis, who was executed in 1947 in Louisiana's portable electric chair, is still the only person ever to have survived an earlier attempt that left him burned but alive.²⁰³ Perhaps the most well-known case is that of Jesse Tafero,²⁰⁴ the 218th person to be executed in Florida's "Old Sparky".²⁰⁵ It took three jolts of up to 2,000 volts of electricity each and seven minutes to kill him.²⁰⁶ After the first jolt, "flames and smoke rose from [his] head as the headset connecting him to the current caught fire."²⁰⁷ Tafero continued to breathe, his chest heaving and heart visibly palpitating, and nod slowly as the current was repeatedly turned on and off.²⁰⁸ Each time the switch was turned on, "flames shot out and smoke rose from underneath the black

202. Bearak, *supra* note 61, at A15.

203. PREJEAN, *supra* note 6, at 19. When the first current of electricity was administered, "witnesses reported that the youth's lips puffed out and he groaned and jumped so that the chair came off the floor, and he said, 'Take it off, let me breathe.'" *Id.* After several more jolts of electricity failed to kill him, Francis was returned to his cell. *Id.*; see also *A Friend in the Electric Chair*, WASH. POST, July 22, 1989, at A22. The Governor set another execution date six days later. *Id.* An appeal to the United States Supreme Court was unavailing. The Court ruled five to four that there was nothing unconstitutional about subjecting a man, who has had his head shaved, been strapped into an electric chair and severely shocked and burned, to the ordeal a second time. *State ex rel. Francis v. Resweber*, 329 U.S. 459, 463-64. On May 8, 1947, Francis was returned to the electric chair and this time the State achieved its end, PREJEAN, *supra* note 6, at 19 (citing ARTHUR S. MILLER & JEFFREY H. MILLER, *DEATH BY INSTALLMENTS: THE DEATH OF WILLIE FRANCIS* (1989)), giving new meaning to the term double jeopardy.

204. Tafero was convicted of the 1976 murder of two Florida police officers. Larry Keller, *Foes Call Execution Cruel, Unusual Torture*, SUN SENTINEL (Ft. Lauderdale), May 5, 1990, at 1A. He was executed on May 4, 1990 — fourteen years, two months and two days later. *Electric Chair Shoots Flames During Execution in Florida*, DETROIT FREE PRESS, May 5, 1990, at 4A [hereinafter *Electric Chair Shoots Flames*].

205. Bearak, *supra* note 61, at A15. "Old Sparky" is the three-legged oak electric chair that Florida has used since 1924. *Id.* It was built in 1923 by inmates. Keller, *supra* note 204, at 4A. It does not have an affixed head piece. Bearak, *supra* note 61, at A15. Instead, the condemned wears a detachable leather skull cap with wire mesh underneath. A sponge soaked in conductor is sewn to the mesh. The cap is then attached to the power source with a nut and bolt. After the condemned is strapped tightly to the chair, a gag is inserted in the mouth and a second electrode is fastened to the right calf. The power surge causes a slight burning at the points of connection. Red spots on the scalp and legs are expected. *Id.*

206. Keller, *supra* note 204, at 1A; McGarrahan, *supra* note 61, at 6B.

207. *Electric Chair Shoots Flames*, *supra* note 204, at 4A.

208. Keller, *supra* note 204, at 1A.

mask covering his face.”²⁰⁹ The Florida Department of Corrections attributed the incident to “a fault in the head piece”²¹⁰ A brine-soaked synthetic sponge was used instead of a natural sponge.²¹¹ That it was essentially human error is of little comfort to Tafero — or to other death row inmates.²¹²

The execution of Tafero has led to proposals that Florida change its method of execution to lethal injection.²¹³ By 1990, sixteen states, including Texas and Louisiana, had adopted lethal injection as their mode of execution.²¹⁴ Maryland is currently considering switching from the gas chamber to lethal injection. It is touted as being quick, easy and more humane.²¹⁵ However, there is some evidence to the contrary. “[E]xtreme pain can result if an unskilled technician injects the chemicals into muscle tissue rather than veins, or if the chemicals are given in the wrong order or [the wrong] dosage.”²¹⁶ Raymond Landry was strapped to a gurney for forty minutes, while executioners repeatedly probed his veins with syringes trying to inject a lethal dose of potassium chloride.²¹⁷ In January of this

209. *Electric Chair Shoots Flames*, *supra* note 204, at 4A.

210. *Id.*

211. Bearak, *supra* note 61, at A15.

212. Tafero was not the first condemned man to be tortured during his execution. In 1983, John Evans was executed in Alabama. Kroll, *supra* note 186 at B7. The first jolt caused flames to “burst from the electrode attached to his leg.” Two more jolts were necessary to kill him. It took 14 minutes to kill him, throughout which his heart continued to beat. The three jolts left his body charred and smoking. In Georgia in 1984, Alpha Otis Stephens “struggled for eight minutes after the first jolt failed to kill him” *Id.* His body had to cool for six minutes before the second lethal jolt could be administered. *Id.* It took two jolts of electricity, administered nine minutes apart, to kill Horace Dunkins, Jr. *A Friend in the Electric Chair*, *supra* note 203, at A22. The first jolt rendered him unconscious, but he still had a strong heartbeat. *Bad Wiring Interrupts Execution*, DETROIT FREE PRESS, July 15, 1989, at 1A. A guard in the witness room opened the door to the death chamber and told them they had the “jacks on wrong.” *Alabama Execution Required Two Tries*, WASH. POST, July 15, 1989, at A5. The faulty electrical connection was fixed and the lethal jolt thrown nine minutes later. He was pronounced dead 10 minutes later. *Id.* All told, it took 19 minutes to kill him. Kroll, *supra* note 186, at B7.

213. Bearak, *supra* note 61, at A15.

214. Kroll, *supra* note 186, at B7.

215. *Id.*

216. Hinds, *supra* note 193, at A8.

217. Kroll, *supra* note 186, at B7. The first syringe came out of his arm unexpectedly, “spraying [potassium chloride] across the room toward witnesses.” *Id.*

year, Rickey Ray Rector was executed in Arkansas.²¹⁸ It took a full hour to find a serviceable vein in his arm.²¹⁹

A few states still employ more "traditional" methods. For instance, Utah and Idaho use firing squads.²²⁰ Washington, Montana, Delaware, and New Hampshire use the gallows.²²¹ But hangmen are hard to find. The only known experienced hangman is a backwoodsman in Canada.²²² He "has not responded to notes left on a tree stump for him by the local authorities."²²³ No wonder!

Conclusion

The Code of Professional Responsibility aspires to encourage all lawyers to fulfill the distinctive, central responsibil-

218. Frady, *supra* note 152, at 130.

219. *Id.* at 129-30. Witnesses could hear periodic slaps and sudden groans. The medical crew was increased from two to five in an effort to find a vein that would not wilt at the needle's insertion. Rector is reported to have tried to help his executioners locate a serviceable vein. *Id.* at 129-130. The medical crew went so far as to slash the crook of his arm with a scalpel to find a useable vein. *Id.* at 130. During the hour, Rector was heard to cry out eight times. After a vein was found, the curtains were opened. Rector was lying on a gurney, staring dully into the middle of the room. *Id.* at 130-31. After a few moments, he closed his eyes; then his mouth sagged as he gasped for air. *Id.* at 131. Nineteen minutes after the injection, he was declared dead. *Id.*

220. Hinds, *supra* note 193, at A8.

221. PREJEAN, *supra* note 6, at 217 n.*; see also John K. Wiley, *Delaying Hanging Crueler Than Death*, *Lawyer Says*, TIMES-PICAYUNE (New Orleans), Jan. 5, 1993, at A4; *Preparations for Hanging by the Book*, TIMES-PICAYUNE (New Orleans), Jan. 5, 1993, at A4. Hanging is an art, not a science. Even when performed properly, it is arguably inhumane. When performed improperly, there is no doubt. It is well known that "too much rope can cause decapitation and too little rope will not snap the spinal cord, leaving the condemned to strangle slowly." Hinds, *supra* note 193, at A1. On January 5, 1993, the State of Washington hung triple child-killer Westley Allan Dodd. PREJEAN, *supra* note 6, at 217 n.*. The instructions specified the use of a:

thirty-foot Manila hemp rope 3/4-to-1 1/4 inches in diameter which is boiled to eliminate stiffness and lubricated with wax, soap, or oil to ensure tightness when the noose is placed around the neck. . . . [T]he distance a standing person must fall to generate enough force so that the knot breaks the spine depends on weight. For Dodd, that was calculated at 7 feet, 1 inch. If the condemned feels faint while waiting for the trapdoor to be sprung, "a board with straps is nearby to prop him [or her] up."

PREJEAN, *supra* note 6, at 217 n.*; see also Wiley, *supra*, at A4; *Preparations for Hanging by the Book*, *supra*, at A4.

222. Hinds, *supra* note 193, at A1.

223. *Id.*

ity of providing "necessary legal services" to everyone by "support" and participation.²²⁴ That high responsibility, which is so integral a part of the gift and opportunity of members of an exclusively licensed public profession, rings feeble when measured against what is occurring in the defense of death row clients who need adequate legal services as uniquely and desperately as anyone.

My personal opinion is that the Constitution of the United States and the State can be read to support the checks-and-balances' democratic notion that Legislatures and Congress and Governors and Presidents can fashion death penalty statutes that may pass the scrutiny of facial constitutional muster. But I believe equally strongly that the legal profession — and it should not be principally the government's job — has not done what it is obligated to do to insure proportionality, in the resources-personnel sense, in providing adequate and necessary legal services in death penalty cases. Thus, despite my opening disclaimer, I recognize that my strong words may lead some understandably to conclude that I am against the death penalty. But that would be a wrong impression and inference. I resist forming or articulating a pro or con view with respect to the simplistic proposition, "Are you for or against the death penalty?" The core issue and its orbiting subsidiaries are too complex and subtle for that. Thus, I leave poll-takers to their tallies and superficial observers to their labelling exercises. My nuanced passion is directed at the authentic lawyers' professional and ethical responsibilities.

During the civil rights movement of the fifties and especially the sixties, many inspired attorneys, not all idealistic neophytes, travelled, often at great personal expense and real risk, including their own deaths, to make a difference. That spirit needs revival. Right now, it motivates too few. Those rightly motivated should be commended for what they are trying to do. But the ideal has not actuated or activated a sufficient number of people in the legal profession to do their collective best. Until that conversion occurs, Lady Justice may as well keep her eyes blindfolded so as not to notice with shame the grotesque imbal-

224. N.Y. JUD. LAW app., CODE OF PROFESSIONAL RESPONSIBILITY EC 2-16 (McKinney 1992).

ance in the scales of justice that hang from her fingertips, due to the growing numbers of death penalty cases in this great country that are finally, really finally, resolved under such disproportionate odds and resources. Lives may end, but the issue will not die.