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Dying Twice: Incarceration on Death Row

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DYING TWICE: INCARCERATION ON DEATH ROW
A SYMPOSIUM HELD AT THE ASSOCIATION OF THE
BAR OF THE CITY OF NEW YORK
JUNE 17, 2002

PANELISTS
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(continued)

JOSEPH INGLE⁵
MICHAEL B. MUSHLIN⁶

NORMAN L. GREENE

Welcome to our program on death row, *Dying Twice: Incarceration on Death Row*. I am Norman Greene, Chair of the Committee on Capital Punishment of the Association of the Bar of the City of New York. After my introduction I will turn over the program to Bill Buckley, our moderator, and a member of the Committee, to provide an overview of New York's Death Row and then introduce the panel.

I would like to make a few points, and then I will mention the names of a number of people who helped to create this project.

The reality of the death penalty

As lawyers, we talk about decisions in habeas corpus cases and philosophically about whether people deserve to die or not. Some would even assign certain convicted killers to a quick and painless death or worse. From our offices and desks, our work is often bloodless. I sat through the entire Harris appeal.⁷ I did not get the sense from the appellate argument and from the judge's questions that a man's life was at stake. It was somewhat unreal. There was a good deal of talk about procedure and *stare decisis*.

Death row brings us closer to what is real. The prisoner lies for years in his cell with a very real possibility hanging over him, every single day, that he will be killed. One day people will come to his cell and tell him that "it is time."⁸ I do not know why they say that when they come to kill a man, but wardens reportedly do that regularly. Then they take him, drag

backgrounds and social histories of capital defendants for more than twenty years, and has conducted research on and written extensively about the nature of the capital jury decision-making process, as well as the psychology of imprisonment. Professor Haney has testified in many state and federal courts concerning death penalty mitigation and the ways in which incarcerated persons are affected by the conditions of their confinement.

⁵ Joe Ingle is a United Church of Christ Minister and a native of the South who has spent his ministry with men and women on death row throughout the South. He resides in Nashville, Tennessee.

⁶ Michael B. Mushlin is a Professor of Law at Pace University School of Law. He served as Chair of the Committee on Corrections of the Association of the Bar of the City of New York from 1998 to 2001.

⁷ *People v. Harris*, 749 N.Y.S.2d 766 (2002).

⁸ Rev. Carroll Pickett & Carlton Stowers, *Within These Walls: Memoirs of a Death House Chaplain*, ST. MARTIN'S PRESS, 2002, at 73; Norman L. Greene, *The Context of Executive Clemency: Reflections on the Literature of Capital Punishment*, 28 CAP. U. L. REV. 513, 525, n. 34 (2000).

him, or do whatever is necessary to bring him to the death chamber. They strap him down so he cannot move and is helpless, and then they poison him; make him stop breathing, hearing, feeling, smelling, remembering, recognizing and knowing anything at all ever again. Nothing and no one he loves, nothing he hates. If today is Monday and the execution will happen on Tuesday, then today he is here and we talk to him like we talk to anyone else, and then he is "gone," as they might say euphemistically. They kill him and then bury him in the ground to decompose. Our death penalty, which was once in view on public scaffolds, is now indoors and bloodless but with the same result.

Why have I become so interested in death row and why is it important that people care about conditions on death row? To begin with, the people on death row are not dead yet. They may never be executed. Some may go back to the general prison population. Some may be exonerated. There is no basis for putting a prisoner into a situation where he is driven half or completely insane, if the thought that he was going to be executed was not enough to do that already. We simply should not torture people.

Professor Robert Johnson, in his classic depiction of the death row population and guards in *Death Work: A Study of The Modern Execution Process*,⁹ found that death row can be torture. Johnson said that the notion that torture must involve overt physical violence is needlessly narrow. The pain and torture may take any form, physical, psychological, or both. Worse yet, according to Johnson, some contend that prisoners come to hunger for execution as an escape from the life they suffer on death row. The first edition of this book was written in 1990, and even at that point he was discussing individuals (termed volunteers) who gave up their right to appeals.

Studying death row is also part of recognizing the humanity of the inmate. When we look at death row we say that this is a man, and we ask how we will treat him. Perhaps if we take another step we will next recognize that this is a man, and then we will ask: why are we executing him?

Common ground

If the death penalty is to be abolished, present death penalty opponents and supporters must work together. This is a political process, and people of diverse views must reach a mutual understanding. A project on death row is a perfect area for death penalty opponents and supporters to work together. Death row is a common ground. The study regarding death row is about prison conditions. Individuals do not need to agree on the death penalty in order to agree on death row conditions or other prison

⁹ ROBERT JOHNSON, *DEATH WORK: A STUDY OF THE MODERN EVOLUTION PROCESS* (Wadsworth Pub. 2d ed. 1998).

conditions. As time goes on, perhaps the coalition will remain, as people seek general criminal justice reform over excessively long sentences or prison conditions other than on death row and even address crime prevention. Perhaps the coalition will split apart.

There are so many people to thank for this program. I would like to thank Betsy Wilson of the Committee on Capital Punishment, who believed in the importance of the subject and who ran our project in its early stages, including working with us on the important outline of the project. Art Cody, a Committee on Capital Punishment member who named the project "Dying Twice" after a line from Albert Camus¹⁰ and who co-chaired the subcommittee on the project. Mike Mushlin, a speaker tonight who will be introduced by Bill Buckley. Mike saw our outline of the project and shared our interest and more importantly sparked interest in the report from the Committee on Corrections, which he chaired. Dave Hammer, now Chair of the Committee on Corrections at the Association of the Bar of the City of New York, for his editorial skill, which made the report a reality. Dr. Arthur Zitrin, Professor of Psychology, New York University School of Medicine, and Richard Wolf, members of the Committee on Capital Punishment and Committee on Corrections, respectively, who worked on the report and visited the Clinton Correctional Facility in Dannemora, N.Y., with us in August 2000 in preparation for the report. Risa Gerson, for her work on the report with the Committee on Corrections. Martin Leahy, who fresh from a successful program on May 22, 2002, jumped into this program as a one-person public relations firm to help build an audience. Finally, Bill Buckley, the chair of tonight's program.

We should thank other people who are not here but may see the tape or publication. Professor Robert Johnson, the author of *Death Work*, a tiny classic about death row, who inspired my interest. Donald Cabana, who has done his share to humanize death row with stories in his book *Death at Midnight*,¹¹ a book about his friend on death row, Connie Ray Evans, who he executed. The quiet dignity of Edward Earl Johnson, so effectively shown in the movie about Donald Cabana and himself and about Johnson's execution, "Fourteen Days in May." Finally, Pace Law Review, especially their editors Kara Bonitatibus and Michelle Snow, for publishing our City Bar Association death row report, *Dying Twice*, in an updated form.

I want to give a quick introduction of the panel, on which Bill Buckley will elaborate. This is a group that some people speak of with awe. First

¹⁰ RESISTANCE, REBELLION AND DEATH 205 (Justin O'Brian trans. Vintage Books 1974) (1961) (cited in *Dying Twice: Conditions on New York's Death Row*, 22 PACE L. REV. 347, 349 (2002)).

¹¹ DONALD A. CABANA, *DEATH AT MIDNIGHT: THE CONFESSION OF AN EXECUTIONER* (1996).

Craig Haney, who was Tony Amsterdam's¹² single response to my question: "who is an expert on the psychological effects of death row?" Tony also recommended to us Joseph Ingle as our Chaplain on the panel tonight. I first came to know of Joe while researching a law review article that I was writing on how it feels to be on death row and executed.¹³ We did not need references to Russell Stetler of the New York Capital Defender's Office and Professor Michael Mushlin of Pace Law School. They are well known here. We have had some well known speakers here, including Governor Ryan, Pat Robertson and others. Tonight's program will match those programs in all respects.

Let me introduce our moderator Bill Buckley. As a member of the Committee on Capital Punishment and program chair for tonight's program, he has devoted countless hours to this project. He is appellate counsel at Garbarini & Scher, New York, N.Y. He was a death penalty law clerk to the Supreme Court of New Jersey in 1988 under Associate Justice Alan B. Handler. At the time he began his clerkship, New Jersey had reinstated the death penalty and the court was overwhelmed with death cases. It needed to create special law clerks just for that purpose.

WILLIAM D. BUCKLEY

Back in the early 1960's the curriculum of my fourth and fifth grade class offered a study of United States history. I clearly recount learning in those days, 40 years ago, about social reform movements in the United States that had taken place in the 19th and early 20th centuries.

While you may not recall specific accomplishments, I am sure many of us remember an endless list of great American reformers like Horace Mann, Henry Ward Stowe and, of course, his daughter Harriett Beecher Stowe, Dorothea Dix, Jane Addams, Jacob Riis, and the Muckrakers.

Among other things, these people called for such reforms as an end to slavery, universal education for all Americans regardless of class, humane treatment of the mentally ill, sanitary conditions and adequate housing in our cities and the eradication of slums. These American reformers also sought an end to both debtor's prison and the incarceration of the mentally ill or the insane, recognizing discoveries in developmental and education psychology. We later saw the establishment of juvenile courts as an acknowledgement that children are fundamentally different from adults in their capacity to intentionally commit a crime. I also learned as a child that more than 100 years ago Americans had undertaken to reform the conditions in which the country incarcerated prisoners. I was led to believe that Americans, with the Eighth Amendment of the nation's

¹² Professor Anthony Amsterdam, New York University School of Law.

¹³ JOSEPH B. INGLE, *LAST RIGHTS: 13 FATAL ENCOUNTERS WITH THE STATE'S JUSTICE* (1990).

Constitution in hand condemning cruel and unusual punishment, had become enlightened during the past two centuries and had moved on from the days when prisoners were housed in the most squalid and inhumane conditions.

I therefore find it odd, disturbing, and alarming that we must gather here tonight to start the 21st Century to discuss frightening situations that exist in some American prisons, including New York prisons, conditions that many consider cruel but which are more and more usual.

This evening's panel on conditions on death row in the USA was brought together from a report published in 2001 by a joint subcommittee of this Association's Committee on Capital Punishment and the Committee on Corrections. In 1995, New York had revived the death penalty as punishment for certain categories of murder and the State accordingly established a "death row" for condemned men at the Clinton Correctional facility in Dannemora, New York. The joint subcommittee began work in 1999 to study the conditions of confinement on this death row or, as it is officially called, the Unit for Condemned Prisoners, which we will call the UCP. The results of this study and assessment were reported in the summer of 2001 volume of "The Record" of this Association. They titled the report *Dying Twice: Conditions on New York's Death Row*.

For undefined reasons of security the New York State Department of Corrections, also known as DOCS, permitted no one from the joint subcommittee to visit the UCP or to interview the prisoners housed there while they carried on their study and writing. The subcommittee had to proceed with very little information from the Department of Corrections, which of course affected their ability to gather and establish a factual record. In fact, although the Department was invited to send a representative to participate in this panel tonight, they declined the opportunity. Nevertheless, even an incomplete record reveals one basic point. New York's UCP is modeled on the punitive segregation units that normally house only inmates who violate important prison rules, that is prisoners who prove violent and or highly disobedient during incarceration. New York's condemned are under constant surveillance and are in nearly complete isolation from each other and from outsiders. They have severe limitations on the privileges normally accorded other inmates. The subcommittee's report contains an argument against this punitive segregation model, which punishes all condemned inmates whether or not they have violated any prison rules.

Apparently condemnation to death in New York is an insufficient sentence. The UCP presently holds six condemned men -- three were convicted and sentenced in Suffolk County on Long Island and one of each

from Brooklyn, Rochester and Syracuse.¹⁴ It is about a six-hour drive from New York City. A report found that the Commissioner of Corrections does not investigate each condemned prisoner's background to determine the appropriate conditions of incarceration. Instead, all such inmates are immediately assigned to the UCP. The UCP presently houses the six condemned prisoners, all of whom are men, in a 12-cell tier of the "segregated housing units" at Dannemora. The six are in single cells that all face a single hallway. The wall across from the cells has a series of opaque windows. Unless those windows are opened, the prisoners have no view of the outdoors. Each prisoner cell is divided into a primary living area of 78 square feet that contains a sink, toilet, bed, mattress and pillow. There is also a visiting and showering area which the prisoner can enter when a guard activates an electronically-controlled partition. Showers, under surveillance and without a curtain, are permitted three times per week. There is no air conditioning and fans are not permitted in the cells. While in the visiting portion of the cell, the prisoner is always separated from his visitors by a plexi-glass partition. That includes his attorneys. Walls between the cells are solid. Although the prisoners cannot see each other, they can hear each other and speak to each other.

The condemned are under constant surveillance 24 hours per day by guards, video cameras and microphones. Until the publication of the subcommittee's report, the lights were on 24 hours per day. This, of course, caused sleeping difficulties. Infra-red lights are now used for surveillance when the lights are turned down. At the time of the publication, visitation was limited to counsel, immediate family, the media pursuant to court order and spiritual advisors. Friends may not visit. There may be one non-legal visit per week. If there is no immediate family, and since visits by the media and spiritual advisors are rare, the rule of the "immediate family only" effectively means no visitors at all. All visits are under surveillance through a plexi-glass barrier in the visiting and shower section of the cell. Prisoners are allowed one ten-minute phone call per week.

At the time of the report, these conditions also applied to visits from the prisoner's attorneys. During visits from the prisoner's attorneys, the microphones were turned off. Nonetheless, the prisoner was under surveillance by a video camera on the visitor's side of the glass. This condition has eased since publication of the report. They now have a separate visitors room when they visit with counsel.

¹⁴ The UCP located at Dannemora, in Clinton County, is fifteen miles from the Canadian border and three-hundred and twenty-two miles from New York City. It is about a six hour drive from New York City.

All exercise is solitary and outdoors. Prisoners are sent alone into a 2,000 square foot dog-run for one hour per day. In inclement weather the prisoners receive golashes and coats, but not gloves.

Regulations require the superintendent to visit the UCP once per week. The Department of Correctional Services regulations however, do not provide for oversight by anyone outside DOCS itself.

On June 22, 2001, approximately one year before tonight's lecture, the Correctional Association of New York visited the UCP. However, as of the date of our subcommittee's report, a report on the Correctional Association's visit was not available.

All UCP prisoners are mechanically restrained by hand cuffs or leg irons when they are led off the UCP, for example, to exercise.

As to the commissary, privileges are more limited than for those in the general population. Prisoners may go to the commissary once per month and may spend up to 55 dollars, but not more than 15 dollars of it may be for food. This creates a hardship, because all three meals on the UPC are served during the same eight-hour shift of the correctional guards. Therefore the prisoners wait 16 hours between dinner and breakfast. At the time of the subcommittee's report there had been no incidences of violence, attempted escape or serious violations. DOCS, nonetheless, have continued operating the UCP as though the inmates were a serious threat to the prison security.

The subcommittee noted that "the punitive segregation model may have seemed a plausible way to organize the UCP in 1995 before the state had any actual experience" with the condemned inmates.¹⁵ The report urges DOCS to abandon the present policy of holding all UCP inmates in close confinement and complete isolation until immediately before execution. Instead, the committee proposes that DOCS attempt the same case-by-case analysis that it employs for determining how and where to house all other inmates entering the correctional system.

I now turn to our panelists and request that they introduce themselves.

My name is Michael Mushlin. I am a professor at Pace Law School and I was the Chair of the Committee of Corrections.

My name is Craig Haney, I am a professor of psychology at the University of California at Santa Cruz. I have been doing death penalty research for about the last 25 years and simultaneously researching prison conditions, confinement, and the psychological effects of incarceration.

I am Joe Ingle, and I am a United Church of Christ minister based in Nashville, Tennessee. Since 1974, I have worked with men and women on death rows across the south – from Virginia to Texas.

¹⁵ *Dying Twice: Conditions on New York's Death Row*, 22 PACE L. REV. 347, 352 (2002) (hereinafter *Dying Twice*).

Russell Stetler, Director of Investigation and Mitigation at the Capital Defender Office in New York. I have served in this capacity since 1995. For more than 20 years I have been investigating capital crimes and the lives of capital offenders. I have made hundreds of visits to death row in California and here in New York at the Unit for Condemned Persons in Dannemora.

Russell Stetler

It has been more than 20 years since I first visited someone on death row. I can remember the sense of foreboding about that wing at San Quentin which housed the death row inmates. A few years after the death penalty had been reenacted in California, well over a hundred men were on death row. On my first visit to death row, the client had received a death penalty for a prison killing, but he had won a new trial for the wrongful murder conviction that sent him to prison in the first place. He was acquitted at retrial, and his death sentence was voided. He later walked out the East Gate of San Quentin into the free world, damaged by his years on the row, but at least free.

However, at the time of my first visit, this prisoner was just another distrustful, frightened, angry young man wearing the label: condemned. He was what San Quentin called "Grade B." B for bad, B for second-class citizenship among the condemned, based on his history of prison violence. That meant he was housed in punitive segregation at the Adjustment Center, and I had to visit him through glass, talk through a phone, and hold papers against the glass for him to read.

The rest of the death row prisoners were having their visits behind me in a large room with tables, chairs and vending machines. Some were meeting with their lawyers, speaking quietly at tables on the edges of the room. Others were visiting with friends and family – hugging them at the beginning of their visits, sharing soft drinks and microwave popcorn, playing checkers. Others prayed or conversed with lay and clerical representatives from the prison ministries of various faiths. For the "Grade A" prisoners at least, those people who were discipline-free during their condemned incarceration, visits were remarkably relaxed social occasions. Prisoners even shared their visitors with one another. New friendships formed. Visiting mothers and fathers sometimes "adopted" some of the stray prisoners who were friends of their sons.

Enough nostalgia. Suffice it to say that even death row had its good old days. One fight a couple of years ago brought an end to a common East Block visiting room at San Quentin. All contact visiting was suspended for a time. However, booths were then constructed with bars for security and Plexiglas for confidentiality. They are now used for both legal and social visits, though on different days. In other respects, though, the basic rules remain. "Grade A" inmates have contact visits, both with social visitors and legal teams. Those who act out are punished by means

of non-contact visits. The "Grade A" population still get soft drinks and popcorn, though the visitors have to shop at the vending machines before being locked in the booths. The booths are large enough to accommodate the multidisciplinary teams which typically handle post-conviction cases - lawyers, investigators focused on guilt and innocence, others exploring mitigation evidence, and perhaps specialists in anything from crime-scene reconstruction to pharmacology. The teams often huddle around the table covered with photos, police reports, legal papers, transcripts, and so forth.

Contrast that with the description Bill Buckley has offered of New York's death row at Dannemora. As a death-sentenced prisoner in New York, you will never meet a new friend. No old friend is allowed to visit you - no aunts, uncles, or cousins. If you were lucky enough to call your father yesterday, or if you called your child yesterday on Father's Day, your call would have ended abruptly and arbitrarily after ten minutes. You will never get a Christmas package from a loved one. You will never worship with others or pray untelevised. You will never shoot hoops, play sports, or even walk around the yard with anyone else.¹⁶

You will never touch a loved one, shake hands with a lawyer, or give a high five when the Mets beat the Yankees, or vice versa. You will never talk to a neighbor without all your neighbors listening. You will never make a phone call without others listening. You will never know what is being recorded or where the NFL-style headsets may be broadcasting your confidential conversation.¹⁷ You will never bathe, defecate, or urinate without being on television. Your legal visits are televised. So are your visits with your mother, father, brother or sister.

I cannot predict what all this will mean in the long term for legal representation. Appeals are automatic under the New York statute. They cannot be waived. They are being vigorously, diligently litigated. There are now only six client and appeals teams competing for one confidential booth. However, the long term effects on the changing inmate population and changing litigation needs do raise new concerns. Conditions which can be endured for two, three, or four years may exact a more profound toll emotionally and spiritually after six, eight or ten years. Moreover, post-conviction representation will require a qualitatively different level of trust and cooperation between clients and their legal teams. Let me explain this by focusing upon my experience in California.

Before moving to New York in 1995, I had spent the preceding five years at the California Appellate Project, which coordinated the

¹⁶ Those who live at Dannemora, not just the prisoners, but the guards, will tell you there are four seasons in the north country - almost winter, winter, still winter and construction.

¹⁷ Recently, the prison offered "NFL-style headsets" that you can put on when you talk to the clients in the backs of their cells.

representation of hundreds of condemned prisoners. Effective representation in collateral proceedings, not direct appeals but state and federal habeas proceedings, meant going beyond the trial record and discovering new facts about the crime, the prosecution of the case, and, most importantly, reinvestigating the life of the client. Litigating those claims required continuing cooperation from clients.

Clients and their legal teams start off with enormous barriers between them. Death-sentenced clients do not get to choose their lawyers. Clients and lawyers are typically divided by barriers of race, nationality, ethnicity, class, education, age, gender, sexual orientation, religion, politics and social values. If we look at the national picture, where there are approximately 3,700 death-sentenced prisoners, more than half are people of color. Nearly ninety-nine percent are males. All are poor. The exceptional individual who had funds at any point will have exhausted them by the time a death sentence is imposed. Many have mental illness, often undiagnosed and untreated. Trauma histories are almost universal. Substance abuse has a very high prevalence, often secondary to trauma or untreated psychiatric disorders. There is often poor intellectual functioning, sometimes even illiteracy. Brain damage is common. Suicidal histories are also frequently present, and often are unrecognized as such, as well as long histories of self-destructive behaviors. Many clients in this population have suffered at the hands of their caretakers historically, or have been abandoned by them. The new lawyers in the pinstripe suits are often perceived through a suspicious lens by the prisoners who feel despised and betrayed by all of society, deprived of all consolation, deserted by humankind, overpowered by a conspiracy of their whole species.¹⁸

How do we struggle to win their confidence? Empathy, patience, tenacity. Keeping all the small promises. Listening, not always talking. Visiting, not always interrogating. All of these characteristics go into building trust and rapport, to overcome the barriers which prevent disclosure of the painful, sensitive information which may be the difference between life and death in the post-conviction setting. With trust, there can be answers to psychic mysteries.

One California client, for example, had fired his lawyers at trial, represented himself at the pending proceeding, and, not surprisingly, was sentenced to death. His trial lawyers never understood what was driving his sudden irrational impulses, but a post-conviction legal team established enough trust for this client to disclose the shameful secret that he was being raped at the county jail. He had fired his lawyers to speed up the process of getting out of jail, even though it meant escaping to death row. That humiliating disclosure, or other similar disclosures, would not likely

¹⁸ To paraphrase Edmund Burke.

have come through Plexiglas, over phones, or even through state-of-the-art NFL headsets. Trust came from contact, touch, whispered conversation, a handkerchief offered when a client cannot choke back his tears.

There are also many instances where the barriers are never overcome, there is no trust or rapport, and death-sentenced prisoners spiral downward in depression to the point of self-destruction. So called "volunteers" who waive their appeals have accounted for about twelve percent of the executions over the past twenty-five years. In addition, there has been roughly one death-row suicide for every ten executions. Prison conditions which make it harder for legal teams to build trust can only increase those numbers.

I want to end with a comment on an illuminating peculiarity of the New York execution plan. New York chose to separate the housing and the killing function. Dannemora's Clinton Correctional Facility is merely the place where the condemned are to be warehoused in the years prior to execution. The death house is at Greenhaven, near Poughkeepsie, New York. With all the elaborate procedures which are in place in the name of security, I was really taken aback at the thought of transporting the prisoner hundreds of miles down the blizzard-prone Adirondack Northway on the eve of execution. When I asked a corrections official about the plan, he explained the experience of other states, for example Texas, which have indicated that it will minimize the negative effects of execution on staff if the two functions are separated. That is, the execution will be performed by officers who have had no personal contact with the prisoner. And those who have had human contact, even the limited contact at Dannemora, would just say goodbye to a man who never returns.

In a sense, both the bifurcation of the custodial and execution functions and all the dehumanizing features of death row itself have the goal of making execution easier for those whose job it is to carry out society's punishment of last resort. Ex-warden Donald Cabana has addressed the effects of capital punishment on those who work in the system. He has written that the executioner dies with the prisoner. Cabana was profoundly affected by executing Connie Evans in the Parchman gas chamber in 1987, and according to Cabana, no executioner escapes that fate; whether it is "the general who gave Socrates the hemlock or that deputy warden in Nebraska who executed Charlie Starkweather – one of the most hated men of the decade." Cabana says that the warden will never get over it.

In my personal view, the anonymous corrections task force which designed New York's capital punishment system is engaged in a futile attempt to escape this inevitable consequence. It is like the old system of giving blanks to one member of the firing squad in the vain hope of avoiding the torment of the soul which shooters experienced as they grew older and reflected that they have killed one of their own.

CRAIG HANEY

Despite the somber nature of topic that has brought us together tonight, I want say that it is an honor to be on stage with such a distinguished panel. I am grateful to the Bar Association for inviting me to take part in this discussion, and grateful to Norman Greene and Bill Buckley for their role in organizing these events and for their gracious introduction of tonight's panel and the issues on which we will focus. Indeed, the very fact such a discussion is taking place gives me some optimism that the serious problems we are about to discuss some day may be solved.

At the outset, I want to note that, like most of you, I have not visited the New York state death row unit at Clinton. I have toured and inspected many of the supermax type units in the United States on which it appears to be modeled. But, obviously, what I am about to say applies, if at all, only by analogy to the New York death row unit. I also want to commend the bar association committee's report, *Dying Twice*. It is a thoughtful, incisive report that captures much of what happens to people who are placed in units like this. And finally, I cannot resist expressing my surprise and dismay at learning that members of your committee, and apparently all other groups of interested citizens and professionals outside of the corrections industry, have been denied access to this facility.

Like your bar association committee, I, too, have sometimes been turned away from such units after initially requesting access. In some cases it has taken a court order before I finally got in. As I am sure you understand or can easily intuit, secrecy and humane treatment rarely go hand in hand in corrections. Thus, I have never met resistance from a department of corrections that was concerned that their supermax unit was too pleasant or too luxurious to allow me to see it. The New York Department of Corrections' unwillingness to allow the responsible members of the Bar Association committee to tour and inspect this unit should concern us all.

These new style, long-term, total isolation units like the one described in the bar association report—the so-called “supermax” prison form—in some ways represent the renewal of a very old and very much failed experiment. Shorn of its technological overlay, this kind of total isolation was tried—in this state and the nearby one where I grew up—Pennsylvania—and put to rest some 150 years ago. The early 19th century Pennsylvania model of total isolation, and the Auburn/New York model of isolation plus silent, congregate labor was ended when prison administrators and politicians reluctantly concluded that this form of confinement literally drove people crazy. By the end of the 19th century, in an 1890 case,¹⁹ United States Supreme Court Justice Miller summarized the previous

¹⁹ In re Medley, 134 U.S. 160 (1890).

hundred years of experience with solitary confinement this way: "[T]here were serious objections to it... and solitary confinement was found to be too severe." Specifically, Miller recounted:

A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.²⁰

Nothing has changed to alter this view. The renewed use of this form of long-term, complete isolation, as best I can tell, is the product of the unfortunate convergence of several troublesome trends that coalesced over the last several decades, whose nature I will not belabor.²¹ However, there is no evidence that the technologically-enhanced version of this once abandoned prison form has re-emerged in response to some unprecedented problem or threat, no evidence that it performs some necessary or essential function that was not and could not be handled by a less onerous, less restrictive, and less psychologically risky form of confinement.

Despite the modern and sophisticated technology with which it is now accomplished, near total, long-term isolation is not being imposed in many of these new supermax units in a significantly less damaging or more humane manner than in the distant past. Despite what you may have heard, and despite what an occasional court is persuaded to conclude, the empirical record on the effects of modern supermax-type prisons is clear and it is troubling. There are distinctive patterns of destructive psychological effects that have emerged clearly, consistently, and unequivocally from personal accounts, from descriptive studies, and from systematic research on solitary and supermax-type confinement.

The studies to which I refer have been conducted at different times over a period of four decades, and were conducted in locations across several continents by researchers with diverse backgrounds and a wide range of professional expertise. Even if one sets aside the corroborating data that come from research on situations that are merely psychologically

²⁰ *Id.* at 163.

²¹ I have recounted some of these trends in Haney, C., *Mental Health Issues in Long-term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQUENCY 124-56 (2003). See also, Haney, C., & Lynch, M., *Regulating Prisons of the Future: The Psychological Consequences of Supermax and Solitary Confinement*, 23 N. Y. U. REV. L. & SOC. CHANGE 477-570 (1997), and Haney, C., *Infamous Punishment: The Psychological Effects of Isolation*, 8 NAT'L PRISON PROJECT J. 3-21 (1993).

analogous to supermax confinement—like studies of harmful effects of acute sensory deprivation, the psychological distress that comes from the loss of social contact (such as studies of the pains of isolated, restricted living in the freeworld), or the well-documented psychiatric risks of seclusion for mental patients—strikingly similar negative consequences have been reported in numerous direct studies of solitary and supermax-type confinement.²²

Among the case studies, similar symptoms were reported in each account—appetite and sleep disturbances, anxiety, panic, rage, loss of control, and self-mutilations, are among the recurring themes. The more systematic, direct studies of prison isolation have documented a wide range of very specific harmful psychological effects. They include: increases in negative attitudes and affect, insomnia, anxiety, panic, withdrawal, hypersensitivity, ruminations, cognitive dysfunction, hallucinations, loss of control, aggression, rage, paranoia, hopelessness, lethargy, depression, emotional breakdowns, self-mutilation, and suicidal impulses and behaviors. Among the correlational studies of the relationship between housing type and various incident reports, again, self-mutilation is prevalent in isolated housing, as is deterioration of mental and physical health (beyond self-injury), other-directed violence, such as stabbings, attacks on staff, and property destruction, and collective violence. In addition, many of the negative effects of solitary confinement are analogous to the acute reactions of trauma victims, and the psychiatric sequelae fit the common diagnostic criteria for victims of what are called “deprivation and constraint torture” techniques.

Thus, there is not a single study of solitary or supermax-like confinement in which non-voluntary confinement lasting for longer than 10 days where participants were unable to terminate their isolation at will that failed to result in some negative psychological effects. The damaging effects range in severity, they vary from prisoner to prisoner, are more severe in environments that are more oppressive and impose the most extreme deprivations, and some of the most problematic changes emerge only after long-term exposure. But the effects are real, painful, damaging, and very, very few people emerge completely unscathed.

What about prevalence? That is, how many of these effects occur in how many supermax prisoners? My own study of prisoners at what was a “state-of-the-art” supermax prison at the time I evaluated it found extraordinarily high rates of symptoms of psychological trauma among prisoners confined there. More than four out of five of those evaluated suffered from feelings of anxiety and nervousness, headaches, troubled

²² The findings to which I refer in the next several pages have been reported in studies that are cited and extensively reviewed in the three articles referenced in the preceding footnote.

sleep, and lethargy or chronic tiredness, and over half complained of nightmares, heart palpitations, and fear of impending nervous breakdowns. In addition to these indices of general psychological distress, equally high numbers reported suffering from the specific psychopathological effects of social isolation. That is, more than four of five prisoners evaluated in this supermax unit suffered from ruminations, confused thought processes, an oversensitivity to stimuli, irrational anger, and social withdrawal.

In addition, well over half of the prisoners reported violent fantasies, emotional flatness, mood swings, chronic depression, and feelings of overall deterioration, while nearly half suffered from hallucinations and perceptual distortions, and a quarter experienced suicidal ideation and/or behavior. I have very similar data from a number of other supermax prisons located in the largest prison systems in the country and therefore, if anything, representing the modal experience of prisoners confined in supermax throughout the United States.

I think it is very important in this context to make a critical distinction between diagnosable and measurable psychiatric disturbance on the one hand, and what might simply be called "misery," on the other. Even though I think we have plenty of unsettling data on the measurable, negative psychological effects, and indeed have just spent a few minutes listing many of these specific effects, I'd like to propose that these otherwise serious and disturbing consequences are in some ways less important and less problematic than a whole series of much deeper changes that take place in prisoners who are kept in supermax-type confinement for long periods of time. The things to which I refer are more difficult to measure but they are every bit as troublesome as the things we can measure. They are forms of psychological deterioration and dysfunctional adaptations to the supermax environment that literally change who the prisoners are and what they are capable of becoming once they leave supermax. (And, I should remind you, parenthetically, of one of the sub-texts of tonight's panel, as I'm sure you know: most condemned prisoners in most death penalty jurisdictions do, in fact, leave death row before the state can end their lives. It does matter, for reasons I will return to shortly, how these prisoners are changed in the course of their confinement.)

So, how are they changed? Well, I am not an expert on misery, by any means, but I do know about how human beings in general and prisoners in particular adapt to the conditions under which they live. And I can tell you without equivocation that prisoners, like all people, adapt to miserable treatment and miserable conditions in miserable ways. Indeed, you do not have to be a psychologist to know that people who live most of their lives entirely within the confines of an 80 square foot cell, who are sometimes treated more like laboratory specimens than human beings, who can go for many years completely removed from nature and from the natural rhythms of social life, who are denied meaningful social programs or stimulating activities in which to engage, who get out of their cells no more than a few

hours a week and who have no more than a few minutes of actual, normal conversation a day (if that), and who are denied the opportunity to ever touch another human being with affection or caring, or to receive such affection or caring themselves, will—in order to survive such extreme distortions and deprivations—have to transform themselves into some one or some thing that it is unhealthy, whose patterns of thinking, and acting, and feeling often will not resemble those of normal human beings. And a great many of these transformations have the potential to rigidify, to become deeply set ways of being, that are, in varying degrees for different people, more or less permanent changes, as I said before, in who they are and what they can become.

Here then are just a few of the social pathologies that can and do develop in many prisoners who have been left for periods of longer than a year in the supermax prisons I have evaluated:

- 1) For one, the unprecedented totality of control forces people to become entirely dependent upon their surroundings to organize their existence. Thus, long-term supermax prisoners may lose the ability to initiate and control their own behavior, to organize their own lives. Apathy, lethargy, depression and despair often result. Prisoners report and manifest a loss of initiative, the inability to begin even mundane tasks or to follow through once they have begun them. They find it difficult to focus their attention, to concentrate, or to organize activity. Others literally stop behaving, give up, become inert.
- 2) The absence of social contact and context creates a feeling of unreality that pervades one's existence in these places. Since so much of our identity is socially constructed and maintained, the loss of such contact and the opportunity to ground our thoughts and feelings in a social life leads to an undermining of the sense of self and a disconnection of experience from meaning. Some prisoners act out literally as a way of getting a reaction from their environment, proving to themselves that they are still alive and capable of eliciting a human response—however hostile—from other human beings.
- 3) For others the experience of total social isolation leads, paradoxically, to social withdrawal. That is, they move from being initially starved for social contact to eventually being disoriented and even frightened by it. As they become increasingly unfamiliar and uncomfortable with social interaction, they are further alienated from others and made anxious in their presence. In extreme cases,

another pattern emerges: this environment is so painful, so bizarre and impossible to make sense of, that some prisoners create their own reality—they live in a world of fantasy instead.

4) Finally, the deprivations, restrictions, the totality of control and the total and prolonged absence of opportunities for happiness and joy fills many prisoners with intolerable levels of frustration, which can lead to anger and then to rage. They ruminate in the course of the empty hours of uninterrupted time they are given during which they can do little else, and many of them commit themselves to lashing out against those who have treated them in what they experience as inhumane ways, often irrationally pursuing courses of action that further insure their continued mistreatment.

There are people who cannot and will not return from these extreme adaptations to these extreme places, who do not have the personal resiliency, who will not have the sustained level of social support needed to return to the world of the normal and healthy, whether it is another mainline prison, or back into the larger society.

My final point is this: There is absolutely no reason to believe that the kind of conditions that prevail in many supermax prisons in the United States and that are described in *Dying Twice* are necessary – not as disciplinary segregation units, and certainly not as places where death-sentenced prisoners are required to be housed. Whatever their alleged justification in the overall scheme of prison disciplinary sanction (and many of us who study these units have serious doubts about whether they can be justified), there is no penological rationale that can be sustained for placing death row prisoners in conditions this severe, deprived, and over-controlling. The notion that condemned prisoners are likely to be driven unmanageably violent by virtue of having “nothing to lose” is the stuff of correctional mythology, belied by the facts. All other things being equal, death row prisoners are among the best behaved in the prison system, and always have been. Ironically, if anything, they have the most to lose by misbehaving and incurring disciplinary infractions—if they persist in their appeals, they have a higher probability than other prisoners of winning new trials and, unlike any other prisoners in the system, their in-prison behavior is admissible in their new trial, where it will bear directly on the question of whether they are subsequently sentenced to life or death. In addition, because we know that, if they persist in their appeals, at least half of them are likely to win permanent reversals of their death sentences—and be sentenced to mainline prisons or, for some, eventually released directly back into the freeworld—the harmful psychological effects of supermax-

like death row confinement should be of concern to the prison system and to society at large.²³

You have no doubt noticed that I have emphasized the issue of “if they persist in their appeals” in the last few comments I have made. Not surprisingly, the conditions of confinement under which death row prisoners are kept have a direct bearing on whether or not they will continue to challenge the legal proceedings that led to their death sentence or, in an act of coerced despair, ask the state to take their life by withdrawing their pending appeals. Capital appeals, as so many of you in this audience who have engaged in them are aware, are Sisyphus-like undertakings. They require extraordinary fortitude, optimism, focus, attention to minute detail, and almost unbounded levels of interpersonal trust that often must be maintained in the face of invariably long delays and sometimes repeated setbacks and defeats. Capital appeals require this no less of the clients than they do of the lawyers who undertake them. Condemned prisoners who are driven by their conditions of confinement into depression and despair, who become emotionally unstable, cognitively impaired, unable to engage in social interaction with others let alone extend them unguarded interpersonal trust, are far less likely to competently assist in their appeals, and far more likely, depending upon the length of their supermax-like confinement, give up hope and relinquish their appeals altogether. As more and more states move to this supermax-model of death row confinement, the problem of condemned prisoners in essence volunteering for executions is likely to grow.

So, in closing, let me add my voice to New York Bar Association’s report, *Dying Twice*. Subjecting condemned prisoners to conditions that we know are likely to lead to cognitive, emotional, and behavioral deterioration, and to result in other forms of potentially disabling psychological harm, is both unnecessary and inhumane. It is a dangerous and unjustifiable combination.

JOSEPH INGLE

I am really honored to be here. I went to Seminary in New York, love New York City, lived and worked in East Harlem while I was

²³ According to Professor James Liebman and his colleagues, between 1973 and 1995, appellate courts found reversible error in sixty-eight percent of all capital sentences nationwide. In addition, in eighty-two percent of the cases that were retried after reversal, a sentence of less than death was rendered. In fact, in seven percent of the retrials, the defendant actually was acquitted of the capital crime. See JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES 1973-1995 (2000), available at http://www.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf (last visited Dec. 3, 2001).

here. I am staying with friends in East Harlem, and I want to thank the Bar for giving me an excuse to come. It is a real pleasure to be on this panel.

There is a gospel song called the Poor Wayfaring Stranger and I feel like a poor, wayfaring stranger tonight. I am in the company of such distinguished colleagues. We have an expression in the South that says sometimes the best you can get is a pissant. That is what you have got with me. That is a Southern colloquialism for someone who is a ne'er do well, someone just trying to get through life. I came to New York in 1970 to attend Union Theological Seminary. I got my degree and was subsequently ordained in the ministry in the United Church of Christ.

Since 1974, I have been traipsing in and out of Southern prisons and jails, particularly death rows. What I want to do tonight is share a little bit of that personal encounter. I also think it is important on the basis of what you have heard so far and as we look at where we are on the whole scene of capital punishment, that we come up with a common framework. I want us to start by looking at this legally, and I realize this is a daunting task, because I am not a lawyer. Since 1972 when *Furman v. Georgia*²⁴ came down, this very month 30 years ago almost to the day, we have been engaged in a debate about the death penalty in this country. The wisdom of Justice Brennan of the Supreme Court proved most helpful for me, and he has written two decisions in particular which are critical to understanding the death penalty. His first opinion in *Furman v. Georgia*,²⁵ a five to four decision that struck down the death penalty, is worth revisiting since we are approaching the 30th anniversary. I would like to do that tonight because it points us in a direction we need to understand when we are talking about conditions of confinement. When discussing the death penalty, it is necessary to recall what Justice Brennan talks about in *Furman*. The concept of the dignity of human beings. The dignity of human beings.

When Justice Brennan discusses the dignity of human beings in *Furman*, he talks about the cruel and unusual punishment clause of the United States Constitution. If you recall, in *Furman*, Justice Brennan referred to a prior case where a man went AWOL.²⁶ The serviceman came back, was apprehended and was court-martialed.²⁷ Ultimately, the serviceman lost his citizenship rights.²⁸ When the United States Supreme Court looked at this, they thought the punishment was too extreme.²⁹ The Court thought that it was cruel and unusual for a person to lose his

²⁴ 408 U.S. 238 (*Furman* was decided on June 29, 1972).

²⁵ *Id.*

²⁶ *Trop v. Dulles*, 356 U.S. 86 (1958).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

citizenship rights under those circumstances.³⁰ In *Furman*, Brennan drew upon prior precedent and extended that prior holding to the death penalty. Let us think about that decision in terms of the condemned.

I want to read to you just a little of Justice Brennan's opinion. He wrote "the cruel and unusual punishment clause prohibits the infliction of uncivilized and inhumane punishments."³¹ If you recall, the conditions we have discussed, the state even as it punishes must treat its members with respect for their intrinsic worth as human beings. A punishment is, "cruel and unusual" if it does not comport with human dignity. In the religious realm that I dwell, the Judeo-Christian tradition, we talk about being children of God. We are all children of God - you, me, the prisoners, the wardens, the executioner, the Governor. There is this wonderful story in Genesis about the creation experience. According to that story, God fashioned man and woman out of the earth and breathed breath into them. Ruah is the Hebrew word. We carry that breath. Every human being carries that breath. That is part of our inherent worth. It is, as Justice Brennan said, our dignity. What happens to that dignity when you are placed in conditions that you have heard described in the report the Bar has prepared and which Craig Haney has talked about and that he has visited and witnessed in countless instances? What happens is we treat people as less than human, we make them objects. We turn them into something that is inanimate so we can do whatever we wish to do with them. We destroy their dignity long before we kill them. We have to look at what we who are outside of that environment can do. I would like to turn to that just for a little bit, as a United Church of Christ minister. Unfortunately, the religious community does not have a very good record in this area. The way people on death row encounter folks who are of religious persuasion is through a phenomenon called state-paid chaplains. This is where someone is on stipend or salary from the State of New York, or Tennessee where I am from, and they are to perform ministerial functions for death row prisoners. Think about that conflict for a moment. The state is paying for chaplains to perform functions for the death row prisoners it is set to exterminate. There is the basic lack of trust from the get go between death row prisoners and the state chaplain. It does not matter if they are good people or not. That is not the issue. It is the balance of power, you have to understand. The chaplain is accountable to the warden, when push comes to shove.

One of the things that we need to do now, what we saw in Tennessee, is to get ordinary religious folks involved in visiting prisoners. Tennessee has a death row visitation program at the Riverbend Maximum Security Institution. We recruit people primarily out of the religious community,

³⁰ *Id.*

³¹ *Furman v. Georgia*, 408 U.S. 238, 270 (1972).

train them, and match them one on one with death row prisoners. The visitation commitment is at least twice a month. Death row in Tennessee is in Nashville, so that is obviously easier than where you are - six hours from Dannemora. But that is the kind of thing that helps maintain dignity. We have interaction between the outside world and the prisoners. Friendships are made, community is built and the visitation program has a lot to do with that.

The death penalty in Tennessee was struck down in 1976. I actually see guys we worked with in 1974 out on the streets, paroled, intact and doing well, everything you would want. One of the reasons they are able to do that is because we were able to provide community for them while they were confined. "Dignity" as Justice Brennan would call it.

I have seen some terrible things, and I have lost too many people to execution. I would like to share a few stories with you. In Tennessee, we have interaction between the outside world and the prisons. Friendships are made, community is built and the visitation program has a lot to do with that.

We started the visitation program in 1974. It has been going on ever since with an annual training at the prison.³² My first story relating to the visitation program is about John Spenkellink. John was the first death row prisoner I was very close to. John was like a brother to me. The State of Florida electrocuted him on May 25, 1979. I was with John, while he was under death watch. In Florida, the Governor usually signs the death warrant 30 days in advance. However, in John's situation, he was the first one up and during this time Florida was operating an express train to the electric chair. John's death warrant was signed literally one week before his execution. The Chaplain, whose name was Chaplain Savage, came to see John. John had been on death row for five years at this time. Chaplain Savage came to John's cell and said "John, would you like to pray?" John was aware of the fact that the Chaplain had not even really even spoken to him in five years. John looked at him and said, "well Chaplain, I understand you are for the death penalty. Is that correct?" Chaplain Savage said, "well yeah." And John said, "that means that really you want to see me killed." The Chaplain said, "I guess you can look at it like that" and John then said, "well then how can I pray to someone who wants to see me dead?" John always had a way of hitting it right on the nose. That illustrates the heart of the problem with state paid Chaplains and the death penalty.

I was with James Adams the night before his execution in Florida, on May 10, 1984. I was with James, an African American, who was innocent, but that is another story, and during the course of our conversation he told

³² A videotape of our visitor training program is available.

me, "you know Joe, the hardest thing for me is not the dying. It's the slaughter. It's the killing. That's what they are doing here."

Jerry Wayne Jacobs, on death row in Alabama, was what we call a cracker. He was a white guy who worked in all kinds of environments throughout Alabama. He never had two dimes to rub together. He was on death row in Atmore, Alabama which is pretty much the end of the earth. If you think Starke, Florida is remote, go down to Atmore, Alabama sometime. Jerry Wayne was on death row there. We were talking one day and he said, "Joe, you ever been in a slaughter house?" I said "no, Jerry Wayne, I haven't." He said, "let me tell you what it's like. They get all the cattle up at one end and then one by one they lead them down the chute to this gate and they kill them." Jerry Wayne looked at me. Jerry Wayne who may have had about a fifth grade education, looked at me and said, "that's exactly what they are doing to us here. They keep us penned up here. They're leading us down the chute to the Yellow Mama down there and one by one they are going to kill us."

Jerry Wayne, James Adams, and John Spinkelink, all knew exactly what was going on and were able to put their finger right on the problem. What we have here is not lovely language of euphemisms: UCP in New York, or in Tennessee the proposed facility was to be called CPU, Capital Punishment Unit. CPU, even had an executioner's lounge too. We found out about the lounge and stopped the executioner's lounge. Beneath these acronyms is the fact that we are slaughtering human beings. If we cannot keep that in mind, we cannot remember the dignity of everyone's worth no matter what they may have done - and I have worked with some folks who have committed some God-awful murders. Unimaginable things! However, as St. Augustine said, "you hate the sin, but you love the sinner." That is our calling, to maintain the dignity of the human being. That is what Justice Brennan talked about. We have to separate out the worst things about ourselves. Who wants to be judged by the worst thing we have done? No one.

Through my work with people on death row, I have found that they are no different from you or me, except for two things. One is, these individuals are poor. Every last prisoner that I have worked with has been poor, and more likely than not, they have also killed a white person. Because society values white life greater, we prosecute people who kill whites. If you set those facts aside and sit down and have a conversation, the way you and I could, over a cup of coffee, which is all I do when visiting a death row prisoners, you would see that there is nothing magical about it. You just sit down and talk. Under these circumstances you would find how much you have in common and how much you can learn and be enriched by these individuals.

It is critical to realize that we are talking about human beings trapped in an engine of destruction. It is what Justice Blackmun has termed "the machinery of death."³³ It is geared to kill people. Society will use countless euphemisms to describe it. That is why it is important to read someone like Albert Camus. He so eloquently talks about this process and it's intricacies. As he points out, no one, no matter what they have done, has contemplated anything so cruel as what is being done to them. Society essentially puts these individuals in a closet. The system tells them they are going to be killed. They are told when they are going to be killed and how; they have to think about that again and again and again until they are actually executed.

For some reason tonight, I am feeling optimistic and I cannot really explain that. Maybe it is because I have been up so long. Things are percolating around the country, they are percolating on this issue. There is a moratorium in Maryland. There is a moratorium in Illinois and we are working on one in Tennessee. The reason things are percolating, is that things have changed. People are seeing an unfairness which is at the heart of what we are talking about.

When we brought a death penalty conditions case in 1985 in Federal District Court in Nashville, Tennessee, before Judge Nixon – the case was *Groseclose v. Dutton*³⁴ – we demonstrated to the judge's satisfaction that the conditions of confinement on death row in Tennessee were indeed unconstitutional. Subsequently, something remarkable happened. People in the community realized how these people were housed, because of the press, and there was no justification for it. When the judge declared death row unconstitutional, there was no big bruhaha, no one saying "this crazy, liberal judge." It was a forgone conclusion. You cannot keep people in a dungeon for God's sake.

That is one of the important things about the *Dying Twice* report. That report needs to be distributed in the community to help people see what happens to the dignity that we were talking about earlier. Everybody realizes that individuals deserve dignity. If there is no justification for how these men and women are treated, they should not be able to be treated that way.

When I think about crazy things I have seen, I think one of the most bizarre was just in 2001. I was working at the time with Philip Workman, who came within twenty-five minutes of being executed. I was with him outside his cell when we found out about the stay of execution. In Tennessee, we move prisoners from death row, which is unit two, to death watch seventy-two hours before the execution. Death watch is where the execution chamber is and where the four holding cells are located. Once

³³ Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., *dissenting*).

³⁴ 609 F. Supp. 1432 (M.F. Tenn 1985).

they are moved to death watch, then you get into the non-contact visit situation. In Tennessee we have full contact visits, for regular death row visitors up to seventy-two hours before the execution.³⁵

I went to visit Phillip with his family when he was on death watch. They brought him into the no contact booth. The man was shackled at his waist and he was shackled at his wrists. He sat down. I had his daughter with me and her three children, all under age eight. We were crammed into this booth. Philip was crying and his adult daughter looked at me and said, "I cannot deal with this." She left and I scooted her kids out. There sat Phillip with tears rolling down his face. He could not wipe his tears because he was shackled. So I had to get the guard to hand him a Kleenex. He dabbed his eyes with the Kleenex. When I saw the Commissioner of Corrections in the hall about four hours later, when we came back for our evening visit, I pulled him aside and I said, "Commissioner Campbell, can you give me one reason of correctional philosophy that would tell me why you would confine a man to total shackles during a non contact visit?" He could not. For the rest of the visits that weekend, he had his shackles removed.

What I am doing is using an illustration to show how the system tries to dehumanize, to strip away dignity, and to destroy. You have to fight every step of the way right up to the end. You have to work with your friends in the community by educating them about what is going on. I have been to every death row in the South. There is not one that is as bad as what is going on up at Dannemora. Not a single one. That is not because we are progressing, we still have some inadequate facilities. Believe me. So get up in arms for God's sake! I do not know who these people are running your system, but they are working for you. These are your tax dollars at work and you need to hold them accountable.

Citizens have a right to go into these prisons. The clergy certainly has a right. We have a visitation program, like I said, in Nashville. You should have something similar here. If we do not challenge this leviathan, it will literally get away with murder. So as Justice Brennan said, for our own dignity or as Genesis says, for our Ruah, our own life that God breathed into us, raise some hell. I hope you will continue to do your good work and challenge "the machinery of death." Thank you.

MICHAEL B. MUSHLIN

***Dying Once: The implications of Dying Twice for the Use of
Supermaximum Security Prisons***

³⁵ That is based on a level system. Prisoners are either an A level to get that or a B level to get a modified version. If prisoners are C level they have no contact. The assigned level is decided by behavior.

Dying Twice is an important report. The work is a collaboration between the Corrections Committee of the Association of the Bar of the City of New York, which I chaired, and the Committee on Capital Punishment of the Association chaired by Norman Greene. The working group that researched and wrote the report was drawn from members of both committees. The attorneys and the physician who served on the committee are wonderful, talented, dedicated people. It was a pleasure to work with professionals of this caliber on such an important effort. *Dying Twice* was endorsed as the position of the Association of the Bar of the City of New York, one of the largest and most prestigious bar associations in the nation with a long history of efforts at government reform.

Despite its origin, most bar association reports - even those from the Association of the Bar of the City of New York - die an early death, unnoticed during their brief lives. I was pleased, but hardly surprised, that this one has not suffered that fate. I sensed that the report would be well received. That is one reason that when Norman Greene, Chair of the Capital Punishment Committee, first approached me about the possibility of a joint investigation of conditions on death row by our two committees, I reacted positively. I knew this report would receive recognition even though it would deal with the conditions of confinement imposed on only six inmates, a tiny and almost infinitesimal minority of New York's prison inmates.³⁶

Events proved me right. The report was first published (without footnotes) in *The Record*, the official organ of the Association of the Bar of the City of New York.³⁷ Its publication was noted in the press,³⁸ it has been reviewed in a professional correctional law publication,³⁹ it entered the legal literature through its republication with full footnotes in the *Pace Law Review*,⁴⁰ and is now the subject of this public panel discussion which will be published by the Capital University Law Review. I do not want to exaggerate. The report findings and recommendations certainly are not general knowledge. Yet, the recognition that this research project has received surpasses what is normally expected of bar association research

³⁶ New York currently has some 67,000 prisoners, six of whom are on death row. Correctional Association of New York, *State of the Prisons: Conditions of Confinement, in 25 New York State Correctional Facilities*, at 9 (June 2002). Thus, the report describes the conditions imposed on .0000895% of the total prison population.

³⁷ *Dying Twice, Conditions on New York's Death Row*, 56 THE RECORD 358 (2001).

³⁸ William Glaberson, *On a Reinvented Death Row, The Prisoners Can Only Wait* N. Y. TIMES, June 4, 2002, at 1; Dan Wise, *Conditions on Death Row Called Harsh*, N. Y. L. J., Sept. 20, 2001, at 1).

³⁹ Michele Deitch, *Death Row*, 14 CORRECTIONAL LAW REP. 72 (February/ March 2003).

⁴⁰ *Dying Twice*, *supra* note 15.

projects, especially when the project deals, as does this one, with prison conditions.

Why the interest in this report when so many others are ignored? The report is carefully researched and well written to be sure: but that does not account for its recognition. Many other reports are just as well written and researched. Had we issued a similar report, as we could have, just as well researched and written about the thousands of other inmates subjected to virtually identical prison conditions in New York State, I am convinced that such a report, no matter how well done, would have gone unnoticed. Why then is the report different? Why the interest in these few inmates when a report about thousands of others would elicit no notice? I am convinced that it is because these are not just any inmates; these are prisoners who have been sentenced to death. Prisoners under a sentence of death are of intense interest to the public.

No one needs me to argue the point that the death penalty poses an array of problems that are of enormous legal and moral significance. That we have a death penalty in this country, when so many other industrialized advanced cultures do not, speaks volumes about how American society functions. One invited panelist who was not able to attend tonight, Donald Cabana, the former warden at Mississippi State Penitentiary at Parchman prison, is surely right in his compelling book,⁴¹ when he says that no other topic seems to grip the public's consciousness in quite the same manner as the death penalty.⁴²

The report findings are clearly germane to any realistic discussion of the death penalty. By focusing on inmates who are under a sentence of death, by looking exclusively at death row in New York, and by contrasting the conditions there with the conditions in death rows in other parts of the country, the report contributes to an understanding of the American death penalty and the manner in which it is administered. That inmates under a sentence of death in New York will spend years, if not decades, in such barren and harsh conditions clearly has implications for the imposition of the death penalty in this state. The very title of the report *Dying Twice*, with its rhetorical hyperbole, suggests that the manner in which the penalty is being carried out in New York imposes additional and cruel punishment on inmates beyond that to which they were sentenced when the trial court imposed a death sentence.

In keeping with this focus of the report, the speakers this evening have centered their remarks on the implications for the administration of the death penalty of the conditions that we describe. This is certainly appropriate. But there is another message in the report, and I fear that it

⁴¹ CABANA, *supra* note 11.

⁴² *Id.* at Preface ("Capital Punishment grips the imagination of Contemporary Americans like no other issue.").

will not receive the same amount of attention, if it is noticed at all. I want to use this platform to highlight that message.

It is this: *Dying Twice* is not just a report about conditions on death row. The conditions described in the report about death row in New York are almost identical to conditions in “supermax” facilities used to house thousands of inmates not under a death sentence. Between 1998 and 2001, New York developed not only the death row described in the report; it also built ten “supermax” prisons.⁴³ The use of Supermax has grown so much that currently, eight per cent of New York’s total prison population, 5,257 inmates, is held in “supermax” units.⁴⁴ As in death row, these maximum security units lock people in their cells for twenty-three hours every day.⁴⁵ I visited one of these units, Southport Correctional Facility, near Elmira, New York. Southport is a “supermax” prison. Everyone in it is subjected to the kinds of conditions described in *Dying Twice*, or even worse. To take one example, the recreation facility, resembles a dog kennel with row after row of barred open “recreation” cages, each of which hold one inmate. The average sentence of people in these facilities is not days. It is measured in years. There are some people held in these facilities who are not scheduled to be released from them until 2014.⁴⁶

To make matters worse, many of these inmates are mentally ill. According to one source eleven percent of the inmates in New York State prisons are mentally ill; that is defined as having significant, serious or persistent mental illness.⁴⁷ The percentage of mentally ill inmates who are held in supermax facilities is even higher. The number has ranged from 30% to 60%. At Elmira, it was 60%. At Greenhaven, it was 64%. Fifty-four percent of all the suicides that occur in New York State prisons occur in these units.⁴⁸

If the conditions described in *Dying Twice* are senselessly harsh and unnecessary for death row inmates, the same can be said for thousands of inmates not sentenced to death housed in these supermax facilities. For these inmates, just as is true for New York’s death row inmates, the prison experience has become unrelentingly cruel and unproductive. Just as we

⁴³ Correctional Association of New York, *State of the Prisons: Conditions of Confinement in 25 New York State Correctional Facilities*, at 12 (June 2002).

⁴⁴ *Id.* at 14.

⁴⁵ *Id.* at 13 (“Conditions include 23-hour lockup, solitary confinement or double-celling, and limited or no access to education or vocational programs, phone calls and congregate activities. Meals are eaten in the cell and served through ‘feed-up’ slots in thick metal doors. Visits with family and friends are conducted behind Plexiglass or mesh-wire barriers and limited to one, four-hour visit per week.”).

⁴⁶ *Id.* at 14.

⁴⁷ *Id.* at 16.

⁴⁸ *Id.*

must find a better way to treat inmates who have been sentenced to death so, too, we must find a better way to treat inmates in "supermax" facilities who have not been sentenced to death.⁴⁹ My fear is that even in a sympathetic audience like this, this point will be overlooked.

Just as the use of the death penalty has grown over the last twenty-five years, so too has the use of imprisonment mushroomed. The American system of criminal justice is now the largest in the world.⁵⁰ With the growth of imprisonment has come an increased use of supermax facilities. Thus, far from being relevant to just six inmates, *Dying Twice* is important because of the light it sheds on conditions to which thousands of inmates are subjected. Of the close to two million people in prison, with about five to ten percent being held in supermax facilities, there are at least 100,000 people and probably more in the United States, right now who are held in conditions not dissimilar to those described in *Dying Twice*.⁵¹

There are serious consequences to treating people this way. For one thing, the conditions can produce or exacerbate mental illness; for another, it can create bitterness beyond that experienced by the fact of incarceration. These afflictions can cause severe social consequences latter since most of the people in supermax facilities will one day be released. The Correctional Association of New York, which regularly visits prisons, spoke to a guard at one of these supermax facilities. He described his chagrin that inmates who had served their sentences were being released from supermax directly into the civilian population. They would be taken in shackles to the entrance of the prison, put on a bus and in few hours be back in New York City's Port Authority bus station. The guard raised serious concerns about public safety when this occurs. To paraphrase he said: "I wish I could unshackle them before I let them out, because I'd rather they mug me than mug someone else because I know where this person is going."⁵²

For all these reasons I hope that the people who have a passionate concern about conditions on death row will see the import of this report for

⁴⁹ It may be necessary to subject some inmates for a limited time to supermax conditions. My point is that there is a vast over-reliance on this form of imprisonment.

⁵⁰ Susan Y. Chung, *Prison Overcrowding: Standards in Determing Eighth Amendment Violations*, 66 FORDHAM L. REV. 2351 (2000) (the United States now has the "world's largest overall prison population" (citing HUM. RTS. WATCH, HUM. RTS WATCH WORLD REP. 2000, at 392 (1990)).

⁵¹ *Id.* at §2.3 (citing Craig Haney & Monia Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 497 (1997) (reporting that seven to ten percent of all inmates are held in supermax facilities).

⁵² Correctional Association of New York, *State of the Prisons: Conditions of Confinement in 25 New York State Correctional Facilities*, at 127 (June 2002).

those people who are not sentenced to the death penalty and who will not be sentenced to the death penalty, but who are serving time in supermax facilities in similar conditions to those on death row. The right of these inmates to dignity and decent treatment is every bit as important as it is to a person on death row. The reason I emphasize this point is that I believe that on previous occasions this message has been lost by opponents of the death penalty. Death penalty opponents have sometimes ignored the plight of other inmates who are not subject to the death penalty.⁵³

In a different context, in a case in which he had a serious disagreement with the majority of the Court, Justice Stevens once said, "(t)his case has illuminated the character of an institution."⁵⁴ In like fashion *Dying Twice* illuminates the character of an institution, the closed New York State prison system and its reliance on supermax security units and institutions. Thus, while *Dying Twice* certainly has tremendous significance for the treatment of people subjected to a death sentence, it has equal significance for those who are "dying once," not by being sentenced to death, but by being sentenced to cruel and needlessly harsh conditions in supermax security prisons. I hope that we will carry that message forward.

⁵³ Another message of *Dying Twice* is that it shows how cloaked, how illegitimately closed, the New York Prison system is. When we first began to work on this report, we early came to the conclusion that committee members should visit New York's death row. As the report recounts, the President of the Association of the Bar of the City of New York wrote to the New York Commissioner of Corrections for permission for several of our committee members to visit death row. The request was rejected and we were not permitted to enter death row even though there was no legitimate reason to keep a group of concerned citizens away from this vitally important facility. Justice Brennan made an important point when he criticized the closed nature of prisons and when he stressed how important it is for "light" to be shed into these institutions. See *O'lonc v. Estate of Shabazz*, 482 U.S. 342, 354-55 (1987) (Brennan, J., dissenting) stating that:

[p]risoners are persons whom most of us would rather not think about. Banished from everyday sight, they exist in a shadow world that only dimly enters our awareness. . . . When prisoners emerge from the shadows to press a constitutional claim, they invoke no alien set of principles drawn from a distant culture. Rather they speak the language of the charter upon which all of us rely to hold official power accountable. They ask us to acknowledge that power exercised in the shadows must be restrained at least as diligently as power that acts in the sunlight.

⁵⁴ *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 126 (1984) (Stevens, J., dissenting).