

1990

The Death Penalty: Personal Perspectives

Loyola University Chicago Law Journal

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Recommended Citation

Loyola University Chicago Law Journal, *The Death Penalty: Personal Perspectives*, 22 Loy. U. Chi. L. J. 1 (1990).
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The Death Penalty: Personal Perspectives¹

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But now it is time to go away, I to die and you to live. Which of us goes to a better thing is unclear to everyone except to the god.

Plato's Apology of Socrates

I. INTRODUCTION

Anyone who writes about the death penalty faces a dual challenge. In addition to reporting and analyzing the case law and legislation surrounding the topic, one must address the social factors in this emotionally charged issue. The goal of this article is not to present an exhaustive report of capital punishment law; rather, this

1. This special project represents the efforts of the *Loyola University of Chicago Law Journal* staff. Each section's author(s) appear under their individual by-lines. The Editors especially wish to thank Jeffrey Colman of the law firm Jenner and Block, without whom this project could not have been possible. The Editors also wish to thank Kurt Feuer of the law firm Ross and Hardies, who provided valuable insight.

project's objective is to recount first hand the views and opinions of the people most directly involved in the capital punishment process.

The staff has interviewed former death row inmates, prosecutors, defense attorneys, judges, and members of public interest groups. These people tell surprising, even shocking stories. Few legal issues prompt such intense controversy. To many, no other legal issue should merit more attention. Yet despite the disparity in the opinions expressed by those interviewed, one thing is clear: when the state prepares to take a person's life, lawyers play a critical role in assuring that justice is done.

First, a brief legal and sociological overview of the death penalty presents background information to place the interviews in the proper framework. The interviews follow that introduction.

II. LEGAL ASPECTS OF THE ILLINOIS DEATH PENALTY

Robert Robertson

On September 12, 1990, Illinois executed Charles Walker. He was the first person to die under the current version of the Illinois death penalty statute.² The accompanying media coverage provided much information about Illinois' first execution since 1962. Lost in the frenzy was a single, essential question: is the Illinois death penalty statute constitutional?

Case law suggests that the statute does not violate the federal or state constitution. The Illinois Supreme Court consistently upholds the constitutionality of the death penalty.³ The United States Supreme Court has not addressed the constitutionality of the current Illinois statute, but has found similar statutes constitutionally acceptable.⁴ In 1989, however, a United States District Court declared the Illinois statute unconstitutional in *United States ex rel. Silagy v. Peters*.⁵ Although the Seventh Circuit reversed the lower court decision⁶ and the United States Supreme Court denied

2. ILL. REV. STAT. ch. 38, para. 9-1(d) (1989).

3. See, e.g., *People v. Thomas*, 137 Ill. 2d 500, 561 N.E.2d 57 (1990), cert. denied, No. 90-6682 (U.S. Feb. 25, 1991) (WESTLAW, Federal library, SCT file); *People v. Bean*, 137 Ill. 2d 65, 560 N.E.2d 258 (1990), petition for cert. filed, No. 90-6541 (U.S. Dec. 17, 1990); *People v. Lewis*, 88 Ill. 2d 129, 430 N.E.2d 1346 (1981), cert. denied, 456 U.S. 1011 (1982); *People ex rel. Carey v. Cousins*, 77 Ill. 2d 531, 397 N.E.2d 809 (1979), cert. denied, 445 U.S. 953 (1980).

4. See, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976).

5. 713 F. Supp 1246 (C.D. Ill. 1989), rev'd, 905 F.2d 986 (7th Cir. 1990), cert. denied, 111 S. Ct. 1024 (1991).

6. *Silagy v. Peters*, 905 F.2d 986 (7th Cir. 1990), cert. denied, 111 S. Ct. 1024 (1991).

certiorari,⁷ *Silagy* remains an instructive case study on the constitutional issues surrounding the Illinois death penalty statute.

Charles Silagy confessed to and was convicted of the brutal murder of his two female roommates. Proceeding *pro se* at the sentencing portion of the trial, Silagy asked the jury to impose death, which it did.⁸ The Illinois Supreme Court affirmed the death sentence.⁹ Silagy later unsuccessfully attempted to gain postconviction relief.¹⁰

In challenging his conviction through federal habeas corpus, Silagy alleged that the trial proceedings violated his constitutional rights under the fifth, sixth, eighth, and fourteenth amendments.¹¹ Silagy also facially attacked the constitutionality of the Illinois statute by arguing that it gives the prosecutor too much discretion over whether the death penalty will be imposed. Finally, Silagy contended that the Illinois death penalty statute fails to provide adequate notice that the prosecution will seek the death penalty.

The district court rejected all of Silagy's contentions concerning the constitutionality of the trial procedures. The court, however, found merit in both of Silagy's arguments that the Illinois death penalty statute is unconstitutional.

First, the court found that the statute unconstitutionally vests absolute discretion in the prosecutor to determine when to ask the court for the death penalty. The district court noted that the absolute nature of the prosecutorial discretion contained in the statute raises eighth amendment concerns.¹² Interestingly, the court observed that four Illinois Supreme Court justices had adopted the position, at one time or another, that the Illinois statute violates the eighth amendment. Further, the court determined that the Illinois statute "allows the arbitrary and capricious imposition of the death penalty."¹³

7. 111 S. Ct. 1024 (1991).

8. *Silagy*, 713 F. Supp. at 1248. Silagy told the jury:

I have no desire to sit in no man's penitentiary. That's not a cop-out, and that's not a plea. What I am asking the jury is do not feel sympathy, feel empathy. If you can wear these 11's right now, do so.

... I will say this: I do want the death penalty; and I will go to any lengths to have it served upon me. I took two lives through my own foolishness, not nobody else's fault. *Id.*

9. *People v. Silagy*, 101 Ill. 2d 147, 461 N.E.2d 415, *cert. denied*, 469 U.S. 873 (1984).

10. *People v. Silagy*, 116 Ill. 2d 357, 507 N.E.2d 830, *cert. denied*, 484 U.S. 873 (1987).

11. *Silagy*, 713 F. Supp. at 1248.

12. *Id.* The statute provides that the death penalty may only be considered "[w]here requested by the State." ILL. REV. STAT. ch. 38, para. 9-1(d) (1989).

13. *Silagy*, 713 F. Supp. at 1258.

As an example of the arbitrary nature of the Illinois statute, the district court noted that prosecutors may disagree on whether the death sentence should be imposed in a particular case.¹⁴ The court stated that “because of the lack of adequate guidelines the decision to request a penalty hearing will, to a great degree, depend upon the whim of the individual prosecutor. Without legislatively enacted guidelines, the differences in prosecutors, though they be sincere in their beliefs, will inevitably lead to arbitrary and capricious action.”¹⁵ The lack of legislative guidelines was the key point in the court’s decision. Applying the “arbitrary and capricious” standard established by the United States Supreme Court in *Gregg v. Georgia*¹⁶ and *Furman v. Georgia*,¹⁷ the district court stated that the Illinois statute provides no checks to prevent or “‘minimize the risk of wholly arbitrary and capricious action’” by the prosecutor.¹⁸ Therefore, the court concluded, the Illinois statute is unconstitutional.

The district court in *Silagy* also deemed the Illinois statute unconstitutional because it gives inadequate notice to the defendant that the death penalty will be sought. This lack of notice, the court stated, violated Silagy’s fourteenth amendment right to due process and his sixth amendment right to effective assistance of counsel. Relying on an Illinois Supreme Court dissent, the district court emphasized the importance of early notice to the defendant that the prosecution will seek the death penalty. The court noted that the defendant’s “decisions on what type of defense will be made, what plea bargaining can be done, and whether a jury trial will be waived” may turn on the prosecution’s decision to seek the death penalty.¹⁹ The district court accordingly affirmed Silagy’s conviction, but ordered that he be resentenced because the death penalty was imposed under an unconstitutional statute.²⁰

The Seventh Circuit, however, reinstated Silagy’s death sentence.²¹ Judge Kanne, writing for the court, rejected Silagy’s facial

14. For example, in *People v. Greer*, 79 Ill. 2d 103, 402 N.E.2d 203 (1980), the Illinois Attorney General admitted during oral argument in a federal habeas corpus proceeding that the death penalty had been imposed erroneously. See *Silagy*, 713 F. Supp. at 1259.

15. *Silagy*, 713 F. Supp. at 1259.

16. 428 U.S. 153 (1976).

17. 408 U.S. 238 (1972).

18. *Silagy*, 713 F. Supp. at 1259 (quoting *Gregg*, 428 U.S. at 189).

19. *Id.* (citing *People ex rel. Carey v. Cousins*, 77 Ill. 2d 531, 397 N.E.2d 809 (1979) (Ryan, J., dissenting)).

20. *Id.* at 1260.

21. *Silagy v. Peters*, 905 F.2d 986 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1024 (1991).

attacks on the Illinois statute. Judge Kanne stated that the district court incorrectly held that the Illinois statute is "arbitrary and capricious" under the *Gregg* standard, which requires "that any discretion afforded a *sentencing body* in imposing the death penalty . . . be narrowly channelled."²² The appellate court determined that a prosecutor is not a "sentencing body"; therefore, the discretion vested in the prosecutor need not be channelled narrowly. The court noted that the judge or jury actually imposes the sentence, not the prosecutor. Thus, the court distinguished "the prosecutor's role [in] initiating the proceedings" from the sentencing body's decision to impose the death sentence.²³

Although the Illinois statute is unique in allowing the prosecutor to exercise discretion after the verdict is returned, the appellate court in *Silagy* found the prosecutor's exercise of "fundamental discretionary authority" under the Illinois statute no different than the discretion exercised in other states in which the prosecutor seeks the death penalty before trial. The court likened the Illinois statute to the Georgia statute held constitutional in *Gregg*, noting that in both cases the prosecutor must prove "a specific element of the crime beyond a reasonable doubt" before the death penalty may be imposed.²⁴ Furthermore, the court stated that giving the prosecutor posttrial discretion may be a superior system because it allows the prosecutor to consider all of the trial information in determining whether to seek a sentence of death.

The Seventh Circuit also reversed the district court's holding that lack of pretrial notice under the Illinois statute violates the sixth amendment. Applying the standard established in *Strickland v. Washington*²⁵ and *United States v. Cronin*,²⁶ the court found that lack of pretrial notice does not "interfere with defense counsel's ability to provide effective representation to such a degree that ineffective assistance of counsel may be presumed."²⁷ The court stated that such a presumption may arise if the defendant shows that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate."²⁸ Moreover, the court did not follow the district court's approach of recognizing defense counsel's need to

22. *Id.* at 991 (citing *Gregg*, 428 U.S. at 189 (emphasis added)).

23. *Id.* at 993.

24. *Id.* at 993-94.

25. 466 U.S. 668 (1984).

26. 466 U.S. 648 (1984).

27. *Silagy*, 905 F.2d at 994.

28. *Id.* (quoting *United States v. Cronin*, 466 U.S. 648, 659-60 (1984)).

know that death will be sought. Rather, the court focused on the likelihood that defense counsel already has constructive notice before trial that the death penalty may be sought. Therefore, the court found it unnecessary to provide "certain" pretrial notice.

Additionally, the court listed some potential hazards of requiring certain pretrial notice. For example, the court suggested that mandating this type of notice would create an "untenable constitutional dilemma."²⁹ Whereas Silagy alleged that posttrial notice unconstitutionally impeded his defense, a pretrial notice requirement, the court argued, would produce similar results. Under such a rule, the court postulated that the prosecution's subsequent withdrawal of its pretrial request to seek the death penalty would enable the defendant to raise a sixth amendment argument that he would have adopted a different defensive strategy had he only known that death would *not* be sought. Pretrial notice also would prevent the prosecutor from evaluating the evidence presented at trial before determining whether to seek the death penalty. The court therefore concluded that the Illinois statute does not violate the sixth amendment.³⁰

Judge Ripple's dissent in *Silagy* focused on a constitutional issue not raised by the defendant. Applying the recent Supreme Court decision in *Blystone v. Pennsylvania*,³¹ Judge Ripple questioned whether the Illinois statute provides enough specific guidance to the sentencing jury, especially considering the defendant's burden to produce mitigating evidence. The statute's provision that the

29. *Id.*

30. The Seventh Circuit also rejected Silagy's contention that the Illinois statute unconstitutionally shifts the burden to the defendant to prove that a death sentence is unwarranted. In rejecting Silagy's argument, the court stated that the Illinois statute provides the sentencing body with adequate guidance to decide when the death sentence is appropriate and upon whom the burden of proof falls. Moreover, the court found constitutionally acceptable the statute's imposition of the burden of persuasion on the defendant after the state proves beyond a reasonable doubt that the defendant is eligible for the death penalty.

The court disposed of Silagy's two remaining constitutional challenges with "little discussion." Silagy contended that the statute fails to provide for "comparative proportionality review," which requires "a reviewing court to determine to some degree whether a sentence is disproportionate to that which has been imposed in other similar cases." *Id.* at 1000. The court found, however, that such procedural safeguards are not mandated by the Constitution. Silagy's final contention was that the statute fails to "provide a means of assuring that all of the aggravating factors relied upon by the sentencer are relevant or constitutionally permissible." *Id.* The court retorted, however, that the statute expressly provides that the sentencing body should consider only those factors "which are relevant to the imposition of the death penalty." *Id.* (quoting ILL. REV. STAT. ch. 38, para. 9-1(c) (1989)).

31. 110 S. Ct. 1078 (1990).

mitigating factors "must be sufficient to 'preclude' death" may fail to give the jury adequate guidance, Ripple wrote.³² Specifically, the jury is never instructed that for the death sentence to be imposed, the aggravating factors must outweigh the mitigating factors. According to Judge Ripple, the ambiguity of the term "preclude" might allow the jury to return a sentence of death, even though the mitigating factors outweigh the aggravating factors.

Although the Seventh Circuit declared the Illinois statute constitutional, many questions clearly remain. The amount of prosecutorial discretion, lack of notice to the defendant, or absence of jury guidance in the sentencing phase could each be an independent basis for finding the Illinois statute unconstitutional. Apparently, these issues will remain unanswered for some time in the wake of the Supreme Court's denial of certiorari in *Silagy*.³³ Nevertheless, the debate on the propriety of the death penalty undoubtedly will continue. This debate centers around the more difficult questions of the moral, sociological, and economic implications of the death penalty.

III. THE SOCIOLOGICAL ASPECTS OF CAPITAL PUNISHMENT

Theresa Fehringer

A growing number of countries have found that the death penalty is an inappropriate response to crime.³⁴ Nevertheless, recent polls indicate that seventy-five percent of Americans favor the death penalty, an increase from fifty-seven percent in 1972.³⁵ Because American opinion runs contrary to world trends on this issue, the sociological aspects of the death penalty in America demand attention.

A. Deterrence

The most frequently cited theory supporting the death penalty is that it will deter future crime. Obviously, executing a murderer

32. *Silagy*, 905 F.2d at 1013 (Ripple, J., dissenting).

33. See 111 S. Ct. 1024 (1991).

34. Horgan, *The Death Penalty: Most Americans Favor It, but What Purpose Does It Serve?*, SCI. AM., July 1990, at 17. "Portugal abolished [the death penalty] in 1976; Denmark in 1978; Nicaragua and Norway in 1979; France in 1981; the Netherlands in 1982; Australia in 1985; the Philippines and East Germany in 1987; Cambodia, New Zealand and Romania in 1989; and Namibia [in 1990]." *Id.*

35. *Id.* The death penalty exists in 37 of the 50 states. Bailey & Peterson, *Murder and Capital Punishment: A Monthly Time-Series Analysis of Execution Publicity*, 54 AM. SOC. REV. 722 (1989).

permanently deters him from killing.³⁶ But the question remains whether this punishment deters others from committing capital offenses.

Until the mid-1970s, most social scientists believed that the death penalty did not provide an effective deterrent to murder.³⁷ In 1975, however, Isaac Ehrlich³⁸ challenged this consensus and found that consistent imposition of the death penalty upon murderers lowers the homicide rate.³⁹ Researchers greeted Ehrlich's study with a great deal of skepticism. Attempts to re-create his results failed, and researchers concluded that his work suffered from statistical and methodological faults. Post-Ehrlich research seemed to affirm the consensus that the death penalty does not deter crime.

This revitalized consensus, however, again met challenge. In a 1987 work, Steven Stack studied the relationship between execution publicity and monthly homicide rates in the United States.⁴⁰ Stack found "a significant decline in homicide rates for months with highly publicized executions, but only a chance association for cases receiving moderate or little publicity."⁴¹ William C. Bailey and Ruth D. Peterson, however, could not re-create Stack's results; they were unable to conclude that any patterns in homicides after publicized executions were not due solely to chance.⁴²

Bailey and Peterson based their analysis on the cumulative effects of capital punishment. They concluded that individuals living in a capital punishment state run a statistically greater risk of becoming a homicide victim than individuals living in a state without the death penalty.⁴³ Although Bailey and Peterson found that ex-

36. Horgan, *supra* note 34, at 17.

37. Bailey & Peterson, *supra* note 35, at 722. This consensus was based on early sociological studies dating back to the eighteenth and nineteenth centuries. *Id.*

38. Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life or Death*, 65 AM. ECON. REV. 397 (1975).

39. Bailey & Peterson, *supra* note 35, at 723.

40. Stack, *Publicized Executions and Homicide, 1950 - 1980*, 52 AM. SOC. REV. 532 (1987).

41. *Id.* at 538.

42. Bailey & Peterson, *supra* note 35, at 729.

43. *Id.* at 739. A study by Edmond G. "Pat" Brown and Michael A. Kroll found that in the 14 days following the 1979 execution of John Spenkelink in Florida, the murder rate in Florida rose 16%. Brown and Kroll also cited a study that found two or three more murders than expected in New York within a 30-day period following every execution in that state since 1930. *The Examined Life: Killing Is No Way to Stop Murder*, U.S. CATHOLIC, Apr. 1990, at 2. Brown and Kroll concluded that "[t]he death penalty is not only bad morality, but it is bad law enforcement" and "puts our lives at greater peril." *Id.*

ecutions appear to have a statistically significant deterrent effect on homicides immediately following an execution, they concluded that "whatever deterrent effect . . . might have been realized is of minor significance by comparison with the cumulative effect of executions."⁴⁴ In sum, Bailey and Peterson found that "for periods ranging through one year after executions, the overall effect of executions on homicide rates was essentially zero."⁴⁵ They concluded that no reason exists to question the current consensus that capital punishment does not effectively deter murder.⁴⁶

B. Retribution

Some Americans' views are responses to an increase in violent crimes. This response reflects the public's belief in the retributive theory of capital punishment. Under the retributive theory, convicts deserve death because of their antisocial behavior.⁴⁷ Bailey and Peterson observe that "[t]his argument rests upon a matter of belief and cannot be demonstrated or refuted empirically."⁴⁸

George N. Boyd argues that opponents of capital punishment should partially accept the retributists' argument and agree that many individuals on death row deserve to die.⁴⁹ But Boyd points out that debate about capital punishment is less about what murderers deserve than about how society should express and defend its fundamental values. Boyd argues that "[t]he most fundamental argument for discontinuing the death penalty is that society can best express the seriousness of its commitment to the sanctity of human life by abstaining from taking it, *despite* having justifiable cause."⁵⁰

C. Race

One of the most disturbing aspects of the death penalty is the possibility of error or prejudice in its administration.⁵¹ In 1990, African-Americans, who comprise twelve percent of the popula-

44. Bailey & Peterson, *supra* note 35, at 739.

45. *Id.*; see also Wilkes, *Murder in Mind*, PSYCHOLOGY TODAY, June 1987, at 27 (profile of another study finding that the death penalty has no deterrent effect).

46. Bailey & Peterson, *supra* note 35, at 739.

47. *Id.* at 722.

48. *Id.*

49. Boyd, *Capital Punishment: Deserved and Wrong*, CHRISTIAN CENTURY, Feb. 17, 1988, at 162.

50. *Id.* at 163 (emphasis in original).

51. In the late 1960s and early 1970s, evidence of racial bias in sentencing was one factor that convinced the Supreme Court to rule against the death penalty. See *Furman v. Georgia*, 408 U.S. 238, 249-57 (1972).

tion, accounted for forty percent of the 2347 prisoners on death row.⁵² Current studies indicate that the race of the murder victim is the most significant factor in whether a defendant receives the death penalty.⁵³ Since 1976, eighty-four percent of those executed murdered a white person, even though half of the murder victims in the United States are black. No white person had been executed for killing a black victim in that period.⁵⁴

These statistics recently were presented to the Supreme Court in *McCleskey v. Kemp*.⁵⁵ McCleskey's attorneys challenged Georgia's death penalty statute based on its racist implementation. In a study used by the inmate's attorneys, Professor David Baldus found that a black defendant was approximately twenty-two times more likely to receive a death sentence for killing a white person than for killing a black person.⁵⁶

Writing for the majority, Justice Powell held that the Baldus study indicated at most "a discrepancy that appears to correlate with race."⁵⁷ Justice Powell contended, however, that "apparent disparities in sentencing are an inevitable part of our criminal justice system." Accordingly, the majority held that discrimination against McCleskey would have to be shown specifically.⁵⁸ The Court feared that had it ruled otherwise, it would face similar claims regarding other types of criminal penalties.

In his dissent, Justice Brennan stated that the majority was "shrinking" from evidence that clearly showed "a devaluation of the lives of black persons."⁵⁹ In response to the majority's concern about the risks of future sentencing procedures if McCleskey's claim were upheld, Justice Brennan felt that the court seemed to shy away from "too much justice."⁶⁰ The four dissenters agreed that Baldus's evidence showed a pattern unexplainable on grounds other than race.⁶¹

52. NAACP LEGAL DEFENSE AND EDUC. FUND, *DEATH ROW U.S.A.* 1 (May 30, 1990).

53. Horgan, *supra* note 34, at 18.

54. *Id.*

55. 481 U.S. 279 (1987).

56. Dugger, *The Numbers on Death Row Prove that Blacks Who Kill Whites Receive the Harshes Judgment*, LIFE, Spring 1988, at 91.

57. *McCleskey*, 481 U.S. at 312.

58. *Id.* at 292.

59. *Id.* at 335-36 (Brennan, J., dissenting).

60. *Id.* at 339 (Brennan, J., dissenting).

61. Justices Marshall, Blackmun, and Stevens joined in the dissent.

D. Juveniles and Individuals with Mental Deficiencies

Since 1976, six of the more than ninety individuals executed in the United States had serious mental disabilities. It is uncertain how many more inmates with mental deficiencies currently await execution. One study suggests that "there may be as many as 250 mentally retarded inmates [presently] on death rows across the nation."⁶²

Experts have found that mentally retarded people are no more prone to criminal behavior than others, but a disproportionate number of them are convicted because they fail to grasp the workings of the criminal justice system and because their lawyers cannot meet their special needs. Furthermore, the National Institute of Corrections, a branch of the United States Justice Department, has found that "[i]t is unlikely that they will receive special programming in corrections and even less likely that they will be transferred to other agencies where such special programming is more readily available."⁶³

Professor James W. Ellis believes that a high percentage of mentally retarded inmates are innocent.⁶⁴ In support of his view, Ellis referred to a client who could be made automatically to respond "yes" or "no" to questions based on their phrasing. Ellis stressed that the primary problem with executing such individuals is that "many mentally retarded defendants are tried and convicted without the nature of their handicap ever being properly disclosed to the jury."⁶⁵ One contributing factor to this problem is that courts often treat mental illness and mental retardation as if they are the same when in fact they are not. "Mental illness is a disease affecting one's ability to behave rationally. It can often be cured. Mental retardation impairs one's ability to learn and to adapt to social norms. It is caused by brain injury, genetic disorder, or poor prenatal care [It] can never be 'cured.'"⁶⁶

Confusion in the courts between mental retardation and mental illness adds to the problem of imposing the death penalty on the mentally handicapped. This confusion arises from state laws that govern the determination of whether the defendant is competent to stand trial. These laws often measure the defendant's sanity, not

62. Reid, *Low IQ Is a Capital Crime*, PROGRESSIVE, Apr. 1988, at 24.

63. *Id.*

64. *Id.*

65. *Id.* at 26.

66. *Id.*

his "ability to learn and adapt to social norms."⁶⁷

The question of the defendant's competency also arises when determining whether to impose the death penalty. Recently, in *Ford v. Wainwright*,⁶⁸ the United States Supreme Court held that before execution, the court must administer a test to determine whether the condemned prisoner understands the crime as well as the punishment. Although such a ruling seems helpful to mentally retarded death row inmates, it remains unclear whether the Supreme Court's interpretation of competence for execution adequately differentiates the problems faced by mentally retarded offenders from those affecting mentally ill offenders.

Another area of concern is whether the execution of juveniles constitutes cruel and unusual punishment. In *Thompson v. Oklahoma*,⁶⁹ the court vacated the death sentence of a fifteen-year-old murderer. A four-Justice plurality found a national consensus that minors should not be executed. Three dissenting justices denied that any such consensus existed. Justice O'Connor cast the final vote to reverse the sentence. She agreed that a consensus may exist, but would not adopt it as a matter of constitutional law. Justice O'Connor reasoned that because the defendant was convicted as a result of an Oklahoma statute that allows the state to prosecute some minors as adults, the state had not given "the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death-eligibility."⁷⁰ Justice O'Connor concluded that unless a state's capital punishment statute specifies a minimum age for death-eligibility, the death penalty should not be imposed upon those who were under sixteen at the time of their offense. Although Justice O'Connor clearly set forth her view about the minimum age necessary to make a defendant death-eligible, the case produced no dispositive majority opinion on that issue.

E. Competent Counsel

Another issue in the capital punishment arena is the availability of competent counsel to defend capital cases. In a recent speech prepared for the American Bar Association, Justice Marshall stated that "the single biggest problem with the implementation of the death penalty in this country is the lack of competent, exper-

67. *Id.*

68. 477 U.S. 399 (1986).

69. 108 S. Ct. 2687 (1988).

70. *Id.* at 2711 (O'Connor, J., concurring).

perienced counsel to handle capital trials and direct and collateral appeals.”⁷¹ Justice Marshall added that on many occasions capital defendants with meritorious arguments for escaping the death penalty have been condemned because counsel did “little or nothing on their behalf.” Marshall stressed that if the capital penalty is to continue, it “must include measures to provide competent counsel at all stages of the process.” He implored lawmakers to “mandate that states provide a professional corps of experienced counsel to handle capital cases.”

At the same ABA meeting, Justice Stevens participated in a panel discussion on the death penalty.⁷² Justice Stevens agreed on the need for competent counsel in death cases and reasoned that if the state can support the prosecution, it can also provide competent defense counsel. He added, “The primary cause for the great delay that occurs in the review of capital punishment cases is the fact that in many, many cases either no counsel [has been appointed for state] collateral review or . . . counsel has not done an effective job in the direct trial.” Although other members of the panel suggested that individual lawyers, bar associations, and law schools train lawyers in death penalty cases, Justice Stevens stated that volunteer methods have failed in the past and urged the states to provide more competent attorneys to defend such cases.

F. Habeas Reform

A habeas corpus petition allows state inmates to appeal for federal review of alleged constitutional defects in state court proceedings.⁷³ In 1989, the American Bar Association appointed the Task Force on Death Penalty Habeas Corpus to commence hearings for the purpose of recommending habeas reform. After eighteen months of study, the Task Force found that “‘the post-conviction process of reviewing capital convictions and sentences is, on the one hand, too long and slow and, on the other hand, susceptible to unfair outcomes due to the inadequate presentation of constitutional issues.’”⁷⁴ The Task Force made the following recommendations: (1) a one-year statute of limitations on all postconviction applications in capital cases; (2) qualified, adequately compensated counsel throughout the process; (3) limited federal review of claims that were waived in the lower courts; (4) stay of executions con-

71. Chicago Daily L. Bull., Aug. 8, 1990, at 2, col. 2.

72. *Id.* at 3, col. 3.

73. McMillion, *Death Penalty*, A.B.A. J., Jan. 1990, at 108.

74. *Id.*

strained by the one-year statute of limitations until completion of the initial federal habeas corpus proceeding; and (5) restrictions on the filing of multiple federal habeas petitions. Time will tell whether these recommendations will reduce the long delays, crowded dockets, and arbitrariness at work in the capital punishment process.

IV. INTERVIEWS

A. *The Prosecutors*

Michael Leonard and Robert Robertson

[T]hat societal anger that exists when you pick up the morning paper is good. That is the concern for your fellow citizen, that is the concern for whom the bell tolls, and that concern ought to be satisfied. Whether you call that satisfying a blood lust, fine, so be it. But that's human civilization, and when a society stops caring about the lives of innocent victims, then it's not a society any longer.⁷⁵

The *Journal* interviewed prosecutors William J. Kunkle, Patrick O'Brien, and Terence Madsen. Kunkle, presently a partner with Pope & John, spent thirteen years with the Cook County State's Attorneys Office, serving as First Assistant State's Attorney, Chief of the Criminal Prosecutions Bureau, and Chief of the Felony Trial Division. Patrick O'Brien is now Chief of the Criminal Prosecutions Bureau. Terence Madsen currently heads the Criminal Appeals Division at the Illinois Attorney General's office.

The prosecutors were first asked to explain how they view their role in death penalty prosecutions. Madsen views prosecutors at all levels as "counsel for the people," with the people as the prosecutor's client. At the appellate level in which he operates, Madsen sees the legislature as another client "who has an interest in the constitutionality of the law [it] passed." Ultimately, with these two classes of clients in mind, Madsen believes the prosecutor's role is to "best serve his clients, just like any other lawyer."

Both O'Brien and Kunkle entered the State's Attorneys Office when there was no death penalty in Illinois. Even after the new Illinois death penalty statute went into operation in 1977, it took time for crimes committed under the statute to reach trial. Consequently, the death penalty issue was not something they had to confront consciously when they decided to become prosecutors.

75. William J. Kunkle, former prosecutor.

As Kunkle stated, at the time the "death penalty was an irrelevant issue."

Eventually, however, Kunkle and O'Brien consciously had to confront the death penalty. They both agree philosophically with the death penalty, but consider their personal views on capital punishment to be irrelevant. They see the death penalty as the law of Illinois; it has to be enforced as part of their duties as State's Attorneys. Kunkle said, "If you're not willing to enforce it, you should get out of the business."

Both prosecutors underscored the importance of law school graduates giving the death penalty thoughtful consideration before becoming prosecutors. O'Brien emphasized that during the final round of interviewing prospective prosecutors, he always asks the candidates for their views on the death penalty. O'Brien urges prospective prosecutors to "look inside themselves," although he acknowledged that it is "hard to tell where your views will be in five years" when you may actually have the opportunity to try a death case. O'Brien said that if an applicant cannot reconcile his personal views with the death penalty statute, then "the job is not for him."

The prosecutors were then asked to address the death penalty's classic justifications of deterrence and retribution. In addressing deterrence, O'Brien and Kunkle expressed with varying degrees of conviction the idea that criminals take the death penalty into account before committing a crime.

O'Brien believes that in considering the death penalty, one must first ask whether death is an appropriate sentence. He stressed that deterrence is a secondary issue. Kunkle went further and labeled the deterrence argument "a red herring." Although he does believe that the death penalty provides specific and general deterrence, Kunkle said that whether the death penalty deters anyone is irrelevant.

O'Brien noted that he is "not typically able to ask" defendants whether they considered the death penalty before committing the crime. "I don't have the opportunity to talk to them." Further, O'Brien said that it is "hard to get into their minds or to believe them." He pointed out, however, that some crimes are "rationally planned" and require a "great deal of thought or time so that we can assume that they had time to think about what they were doing." O'Brien concluded that when the death penalty is "not just on the books, but actually enforced, it can be considered a factor by some defendants."

Kunkle and Madsen provided support for O'Brien's theory. Kunkle agreed with O'Brien's assessment of the general deterrence value of the death penalty. He pointed out that "if you go back and look at the history of Britain, where you had very severe sanctions against killing police officers, . . . guess what you had? A society in which police officers didn't get killed and wounded."

Also, Kunkle related how "Charles Walker⁷⁶ was quite eloquent on his experience in the penitentiary in talking to other inmates in terms of their specific planning on particular jobs . . . to carry a plastic gun rather than a real one, . . . making a conscious decision that they didn't want to get in a felony murder situation and expose themselves to the death penalty."

Moreover, Kunkle said that in looking back at typed confessions and trial testimony, there appear "many examples of very brutal criminals who nevertheless made conscious decisions about the types of crimes to commit, how they were going to do it, and whether they really had an intention to get a shooting involved." Therefore, Kunkle said, the death penalty may not deter a murder based on an "argument in the tavern," but it may deter other types of murders.

Madsen and the others also recognize the specific deterrence value of the death penalty. Madsen related that the bottom line is "how do we stop Henry Brisbon or Charles Walker from killing again?" Madsen said that when Walker made his taped statement to the governor in July, he "threw down the gauntlet." Walker said, "suppose you give me life imprisonment. . . . What's my incentive to be good? And if I decide to kill somebody, who are you going to prosecute?" The prosecutors all agreed that the safety of other inmates and the prison guards is an appropriate matter of concern.

The prosecutors also endorse the idea of societal retribution as an appropriate reason for implementing the death penalty. Madsen said that retribution serves as "a kind of societal safety valve saying that there are certain crimes that we just won't tolerate.

76. Charles Walker was convicted of the double murder of an engaged couple. Walker tied his victims to a tree, shot both, and robbed them of about \$40. Walker was sentenced to death and waived any appeals. He was executed by lethal injection on September 12, 1990, becoming the first person executed in Illinois in 28 years.

Kunkle was appointed by United States District Judge James B. Zagel to represent Walker and to determine Walker's position on the then-pending class action suit. When asked if he felt it inconsistent with his death penalty views to represent Charles Walker, Kunkle responded that "whether it was consistent with my views was basically irrelevant. What was important was that my representation was consistent with [Charles Walker's] views."

Also, in response to society dealing with its individual members, we're saying that there are certain avenues for something that happens to you. This [criminal act] offends us as much as it offends you."

Madsen agreed that this societal safety valve might work more efficiently if less time passed between a conviction and an execution. Madsen emphasized, however, the delicate balance between the "need for accuracy and legality" and the "enforcement of the law." Somewhere, Madsen stated, "there is a point where those two things should be able to meet and make sense." He cautioned that in death penalty cases, "you only get the one time around and everything has to be done right."

On the other hand, Madsen said that "certainly swifter enforcement would better serve the 'goals' of the death penalty and the reasons for it." He cited an inmate, convicted in Illinois in 1946, on whom the Attorney General's Office still has an active case. O'Brien expressed his belief that lengthy delays and multiple appeals are problems best addressed by the legislature.

Kunkle strongly agreed with Madsen's endorsement of retribution as a legitimate reason behind the death penalty. Kunkle noted that for years, "revenge has been considered a dirty word and maybe revenge isn't the right word. But in any event, as Berns⁷⁷ points out, that societal anger that exists when you pick up the morning paper is good. That is the concern for your fellow citizen, that is the concern for whom the bell tolls, and that concern ought to be satisfied. Whether you call that satisfying a blood lust, fine, so be it. But that's human civilization, and when a society stops caring about the lives of innocent victims, then it's not a society any longer. Capital punishment is not a disregard for human life at all, but a total regard for the innocent lives of the citizen who is the victim."

Similarly, Kunkle agreed with Madsen that society is dissatisfied with the death penalty process and the length of time between conviction and execution. Kunkle noted that he dealt with the families of over one hundred murder victims as a prosecutor and that the victim's family often comes to the system with unrealistic expectations.

For example, Kunkle said that the family of a victim killed by Richard Speck or John Gacy has "an appropriate and lawfully recognized expectation that the appropriate penalty might be death."

77. BERNs, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY (1979).

Conversely, he stated that families who have had a relative killed in a situation that is not governed by the current statute often come to court with that same expectation. Consequently, Kunkle said, "it's the job of both the prosecutor and the judge to try to straighten out those unrealistic expectations. But those expectations exist, and to totally discount them is to reject the basic feeling of the worth of the life of the victim."

Further, Kunkle alluded to the efforts of death penalty foes to "trot out the occasional victim's family, who because of their personal religious convictions or later conversions to the group involved say, 'Oh gee, we miss poor Johnny but we don't want this killer executed.'" Kunkle said that such expressions of emotion in "no way remove society's duty to follow its own law and to recognize its concept of human dignity in terms of the life of the innocent victim. The point is that it is no more the right of an individual victim's family to decide this issue for the state or society than it is for the criminal to decide the life and death of his victims."

The *Journal* next asked the prosecutors if the Illinois statute allows prosecutors too much or too little discretion in determining whether to seek the death penalty against a particular defendant. In addition, the prosecutors were asked whether this discretion poses any danger that a prosecutor might use the death penalty as a "career move" or for personal aggrandizement.

O'Brien responded that the question of discretion is not the issue. He views the real question as whether the "Illinois death penalty statute is an appropriate statute." O'Brien stated that the discretion embodied in the statute is a decision properly left to the Illinois legislature. He takes the position that as written, the statute is appropriate. "I can only tell you how we carry the statute out."

O'Brien indicated that prosecutorial discretion is necessary. For instance, O'Brien said, "in a multiple homicide with multiple defendants, there are different levels of participation." Therefore, considerations such as "whether a defendant was only the driver to the location, the fact that he has prior convictions, and whether he discussed the crime beforehand" all are appropriate in deciding whether to seek the death penalty.

Madsen expressed the view that "the discretion in our statute is not different than that in other states and it's no different from any other type of crime. There is, and always has been, vested in the executive branch of government, a clemency power, and there al-

ways has been vested in the prosecutor the decision of which crimes to charge. By deciding which crimes to charge, in most cases, the prosecutors are able to control what sentences will be imposed."

Kunkle agreed with Madsen and opined that the "Illinois statute is preferable to other statutes in that it provides the discretion of asking for a sentencing hearing after a finding of guilt. After a trial, the prosecutor knows what has been proven beyond a reasonable doubt and is in the best position to decide whether a sentencing hearing should go forward. He has the opportunity to exercise discretion to grant mercy where it's clear from what's been proven that a death penalty sentence isn't appropriate."

Kunkle also pointed out that after a trial, the converse may be true. "The prosecutor may have evidence come out at trial that makes the crime even more egregious and suggests that it's now quite clear that the aggravating factors have been proved beyond a reasonable doubt and that in fact it is an appropriate matter for the death penalty." He noted that too much is made of the prosecutor's discretion under the Illinois statute. Under the death penalty statutes in Texas, Florida, and Georgia, which do not on their face provide the same discretion as the Illinois statute, the prosecutor, said Kunkle, "really still does have the discretion."

For instance, "if a bigoted prosecutor decides that he's never going to issue a death penalty against a Norwegian, fine. He doesn't have to charge Norwegians with capital murder. He can charge them with regular murder, or he can charge the armed robbery without the murder. Or, even though it was the killing of a policeman, he can draft an indictment that simply states it was the killing of an individual. The bottom line is that the prosecutor always has the discretion to charge, and that's provided for by our constitutional system. It's whether you spell it out honestly or not."

Responding to the possibility that public, media, or outside pressures enter into charging decisions, Madsen said, "I would be surprised because you have to remember that there is an ultimate test for whether you can or can't charge. If you can't meet the test, you're going to lose the case. And if the case is a high-publicity one, I don't see the incentives to going in under those circumstances."

Kunkle was even more blunt in addressing whether a prosecutor might use a death case for ulterior motives. "In Cook County, unfortunately, there are so many cases available that to suggest that in any particular case a decision would be made out of a desire

for publicity or aggrandizement is actually kind of silly.” He added, “it would be unusual to have a situation where the public pressure was ill-informed. The basic facts of the crime are generally known, [as] are the basic data that provide the information on whether you are going to seek the death penalty. I can’t really envision a situation where there would be a public clamoring for the death penalty and aggravating factors didn’t exist.”

Interestingly, Kunkle believes that the same would hold true in “a small downstate county that had its first capital offense case in ten years.” He stated, “Antideath groups make the argument that prosecutors in some downstate counties or other . . . counties have refused to enforce the death penalty because the county budget can’t afford the trial preparation costs or the cost of trial in light of the resources of the state’s antideath coalition. So, rather than viewing it as an opportunity to enhance their careers, they’re deathly afraid of the situation and its monetary impact.”

O’Brien views misuse of discretion as something that is dealt with by our governmental system of checks and balances. He again endorsed the system and said, “If there is a history of the statute being used inappropriately, then the people have the right to change the State’s Attorney.”

Both O’Brien and Kunkle agreed that the outcome of the case may be affected by whether the defendant is given a bench or jury trial. O’Brien stated that the more egregious the case, the more likely that a prosecutor will request a jury trial. O’Brien explained, “As judges have seen more violent crimes and more of man’s inhumanity to man, they may become more jaded. [Conversely,] a juror who has probably never been presented with the details of a violent crime is probably more sensitive to the brutality of the act.” O’Brien stated that this difference is most apparent in felony murder cases, in which the prosecutor will have to meet a “tougher standard” to gain a conviction in bench trials.

Kunkle cautioned, however, that juries are not always easily sold on the prosecution’s case. “Jurors do not come into courtrooms, regardless of their banter at cocktail parties or on radio talk shows, prepared to execute someone. It is not something they confront on a day-to-day basis. In a capital case, I absolutely refute the concept that jurors come in prosecution-minded, which may be a debatable point in a burglary or armed robbery case.”

Kunkle also pointed out that a defense attorney’s decision to recommend to his client a jury or bench trial in a death penalty sentencing hearing could be affected by which judge is presiding over

the case. Kunkle stated, "Judges have reputations about the death penalty just as they do with respect to sentencing in general. A defense attorney who's in front of Judge 'A' may elect to take a bench trial on a death penalty sentencing hearing, [but] if he's in front of Judge 'B,' he'll elect to go to the jury with the same case. . . . It's a human system, so it's not going to be monolithic and perfectly numerical and objective."

The prosecutors have divergent views on the amount of personal satisfaction that they experience after a successful outcome in a capital case. Asked whether he experiences personal satisfaction after a successful capital prosecution, Kunkle responded, "Absolutely. That's one of the joys of being a prosecutor. There's a tremendous personal satisfaction in gaining an appropriate verdict and an appropriate sentence after that verdict." Kunkle contrasted his prosecutorial experience with his experience as a criminal defense attorney and stated, "As a defense lawyer, unless you truly believe you have an innocent client, which is maybe one in ten thousand cases, you have the opportunity of feeling only that you won the game in the courtroom, so to speak."⁷⁸ Conversely, Kunkle stated that as a prosecutor, "you've done justice and you've also secured some safety for the citizenry."

Asked if there is more satisfaction in a capital case than in other types of proceedings, Kunkle said, "Absolutely. Capital cases are the toughest cases to try, the cases that the other side puts the most effort into, and quite frankly the hardest case to sell to a jury. The object of a prosecutor is to move them and convince them to do something that they are very adverse to doing. Winning that case is the ultimate satisfaction of a criminal trial prosecutor."

O'Brien, on the other hand, seemed to minimize or reject the presence of any personal satisfaction and stated, "A death conviction does not bring back the victim." Rather, a death conviction acts as a "catharsis for family, society, and victim, knowing there was a need to give the ultimate penalty. Personally, the imposition of the death penalty is never a happy day. Every conviction, particularly death convictions, points out a shortcoming in our society." Asked whether victory in a death penalty case is more satisfying, O'Brien responded, "After a while you dwell less on the victory than on the relief—the relief that your inadequacies as a prosecutor did not allow them to walk free. You are glad that the case did not come out the other way."

78. Kunkle stated that others have said "[G]ood trial lawyers are simply frustrated jocks looking for a new arena in which to compete."

Madsen stated that his job with the Illinois Attorney General's Office, which represents the State in all federal habeas litigation and cases before the Illinois and United States Supreme Courts, is satisfying, but he denied that any one class of cases gives him greater personal satisfaction. He stated, "Functioning at that level of the criminal law [and] being able to discuss what the law should be, makes you feel good about being a lawyer."

Madsen related his recent experiences with the Walker litigation. "In a period of a very few days we were in federal district court, the Seventh Circuit, the U. S. Supreme Court, state circuit court, and the Illinois Supreme Court in virtual nonstop litigation. When all that was over, I wasn't pleased that I beat the other side or that I had won out as a lawyer against lawyer kind of thing. I believe that justice was served in that case."

Madsen continued, "There is not any case I'm involved in or anyone on death row that I have any kind of 'Yeah-I-want-this-guy' or 'I-want-to-move-this-guy-through' attitude." He did state, however, that "it does mean something to hear from victims, who say, 'thanks for keeping us going and thanks for finally bringing about the result that society promised us, especially after we began to doubt whether society was capable of bringing about that result.' To the extent that I am involved in the delivery of justice and can accomplish justice, then I'm proud of what I do."

Celebration after the successful conviction or execution of a defendant is distasteful to Madsen. He stated, "Someone invited me to a party after the Walker execution, and I refused to go. I thought it was a kind of pathetic suggestion." Referring to reports that prodeath supporters sang "Na, Na, Hey, Hey, Goodbye" after the Walker execution, Madsen stated that "the justice system is not well served by those kinds of spectacles surrounding an execution."

When questioned on whether the Walker case and execution will have any effect on the death penalty process, Madsen responded, "No. What's going to move death penalty cases along is the *Silagy*⁷⁹ case and cases like it that get constitutional and statutory issues resolved. Hopefully, the system will compress a little bit just as a result of that."

Kunkle also discussed the Walker litigation. Asked if he thought his representation of Walker was inconsistent with his

79. *Silagy v. Peters*, 905 F.2d 986 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1024 (1991). *Silagy* unsuccessfully challenged the constitutionality of the Illinois death penalty statute on the grounds that it contains too much prosecutorial discretion. See *supra* notes 5-33 and accompanying text.

death penalty views, Kunkle responded, "Whether it was consistent with my views or not was basically irrelevant. What was important was that my representation was consistent with his views. Judge Zagel appointed me to represent him and basically to find out what his position was on the class action suit, and I did that." If Walker had changed his mind and wanted to stop the execution during the last minutes or hours, Kunkle stated, "I would have done everything in my power to halt that execution, and quite frankly, it would have been halted. I had an agreement with the Attorney General that they would agree to an order for the Southern District of Illinois. We had the judge's private phone numbers; everything was all set up. Even if he had changed his mind right up to the last minute, we could have in fact halted the process. That was not his wish. He did not change his mind; he remained completely steadfast."

Kunkle speculated that Walker chose not to delay the execution because a reversal of the sentence was highly unlikely. Kunkle stated, "You're talking about a guy that basically confessed, that plead guilty, with little or no mitigating evidence available to him and tremendous aggravating factors. There was really nothing to review on any future appeals that hadn't been knowingly and intelligently waived."

When asked what would have happened if Walker had halted the execution, Kunkle responded, "The judge could have denied a last minute stay being fully appraised of the record. As a practical matter, I think a judge would look at it and say, 'both sides ought to brief it and we ought to look at it in a calm light of deliberation, and therefore I'm going to issue a forty-eight hour stay or a thirty day stay.' The strong probability is that you would have been in a situation where the execution would have gone forward in a relatively short period of time regardless of [Walker's] position."

Madsen, who oversaw the Walker appeals on behalf of the state, was asked whether persons other than the defendant should be able to appeal a death sentence. Madsen responded, "Attempts to intervene are necessary at some point. Traditionally, the courts have served as a vehicle for minorities—not just racial minorities, but minorities on political questions. I don't think it is unreasonable for persons in the minority on political questions to use the courts, because it is important to ensure that . . . the goals of the Constitution and the letter of the Constitution are followed. At some point, I think they become a burden on the system and a burden on society and our experience."

Kunkle, who witnessed the execution, stated, "It was very clinical. The Department of Corrections from top to bottom performed their functions very professionally and correctly. Everything worked as it was supposed to. It was plain to everyone that if anything it would best be described as a peaceful demeanor that Walker displayed, no twitching in pain, no grimacing, no outward signs of any kind of discomfort at all."

Speaking on the method of execution, lethal injection, Kunkle stated, "If the Illinois legislature's aim was to enforce the law and continue to have capital punishment in Illinois, but at the same time to do it in a humane or most humane way available, that's exactly what was done."

Kunkle then was asked whether the public or the prosecutor should witness the execution. Kunkle stated, "We hosted a young man from Korea at the State's Attorneys Office several years ago who was a prosecutor. He told us that in Korea, the prosecutor in death penalty cases is routinely, although not in every instance, required to not only attend the execution, but to pull the lever on the gallows, the premise being that if you are going to ask for the death sentence, you must be prepared to carry it out. And frankly, I think that is appropriate."

All three prosecutors believe that televising executions would not contribute to the criminal justice system or the public's knowledge. When questioned about televising executions, Kunkle stated, "I have some strong feelings about that. I think that public executions do not serve the interests of justice or deterrence or public education. There is some privacy right; that individual ought not to be displayed in the public square."

Kunkle commented on the publicity surrounding the defendant and the actual execution. "What I do not think serves society's best interests is simply publicizing the candle light parade around the penitentiary or the musings of the condemned killer. Frankly, I'm not interested in what Gary Gilmore or Stephen Judy think about life, liberty, and the pursuit of happiness or the legal system or anything else, or particularly what Ted Bundy thinks about comic books causing crime. To give them a whole lot of coverage before an execution does not serve any particularly good purpose."

Kunkle supports the first amendment, but thinks that if the "media wants something to put on TV at the time of the execution, . . . it ought to put on a re-enactment of the crimes committed by that individual." Kunkle said, "those watching can learn why it is that society has justly decided to end that individual's life for the pro-

tection of society and for the appropriate punishment for the crimes committed.”

Madsen views the question of televising executions from a practical prospective. He stated, “It would not greatly increase the deterrent value.” Madsen stated that the inmate might also have “some measure of privacy right.” Legally, Madsen stated that the ability to televise executions would come down to the “the weighing of the privacy interests of the inmate and the security interest of the institution against the [media’s] first amendment rights.”

O’Brien stated that he would be reluctant to televise executions, even if lethal injection were the method employed. Although televised executions are unlikely in his view, O’Brien favors the idea of televising trials. He pointed out that although Illinois does not televise trials, Florida has done so successfully. O’Brien stated that televising trials would give a larger segment of the population a chance to see how the process works. In this way, people “would see that it’s not like on ‘L.A. Law.’” According to O’Brien, this would allow the public to make sure that judges and attorneys “are behaving as they should.” O’Brien is not sure whether the presence of cameras would affect the proceedings in any way, but conceded that considering “human nature,” trials might be affected.

The prosecutors demonstrated a deep, personal commitment to their office and the public. Madsen expressed one common sentiment when asked whether he had any final thoughts. “There was an editorial, which said, ‘What if the two victims in Walker’s case were two drug dealers instead of two young engaged kids? Would society still put as much into the case and would they have gotten the same results?’ My approach to that hit home in a letter from an aunt of Kelvin Parley, which I read to the parole board at the clemency hearing on Walker. She asked the question I put to myself a lot, ‘What if this were one of yours?’ I ask myself, ‘If what happened to the victims of these families were to happen to my daughter, would I be satisfied to let the system deal with it?’ I am working to make the answer to that question ‘yes.’ I am making sure that answer is ‘yes,’ not only for my daughter, but for all those other victims out there.”

B. Defense Attorneys

Theresa Fehringer

The *Journal* interviewed three capital defenders regarding their views on the death penalty. Terri Mascherin is an associate with Jenner and Block in Chicago. She first became involved in death

penalty litigation when Dickie Gaines,⁸⁰ sentenced to death, wrote to Albert Jenner to request assistance in filing his federal habeas corpus petition. When the firm solicited volunteers, Mascherin responded and agreed to represent Gaines. Andrea Lyon spent fourteen years as a public defender and is currently the Director of the Capital Resource Center, a branch of the Cook County Public Defender's Office. The Center draws funds from the state and federal governments, and provides training for attorneys who represent death row inmates at the postconviction and habeas stages. David Bradford is the Director of the MacArthur Justice Center in Niles, Illinois, a not-for-profit organization devoted to human rights and civil rights causes. Chief among these causes is opposition to the Illinois death penalty. The Center is purely a litigation organization and funded entirely from private sources. Bradford has handled death penalty litigation at every level of state and federal courts, and has presented seminars and programs on death penalty litigation.

The first question asked of the defenders was whether the death penalty deters future crime. Mascherin stated that capital sentencing does not deter crime. If it did, Mascherin stated, such a deterrent effect would have reduced crime rates, a result not borne out by statistics. She does not believe that the death penalty has any redeeming qualities. Mascherin's problem with the death penalty is both moral and ethical. It is a very sensitive thing, Mascherin said, for society to set rules to regulate conduct that it considers criminal and to impose capital punishment for the killing of another human being.

Lyon agreed that capital punishment does not deter crime. She believes that if it has any effect at all, it increases crime. For example, Lyon stated that when Britain implemented public executions at the turn of the century, the country experienced its highest crime rate in history. She added that serious crimes "sky-rocket[ed] during the period of executions." Lyon indicated that jurisdictions retain the death penalty for a retributive purpose. She does not support the retribution theory as a legitimate social justification. The only purpose that retribution serves, Lyon said, is to make society more violent by freezing it in a position of anger, which results in a perpetual cycle of violence.

Bradford also agreed that the death penalty fails to deter crime. Bradford indicated that anecdotal evidence exists to support this claim. He stated that several years ago, a prison guard in Florida

80. See *infra* pages 40-51 for an interview with Dickie Gaines.

came home after an execution and killed his wife the same day. Additionally, Bradford said that a prison guard assigned to death row in California committed a series of brutal rapes just after he left his assignment on death row. In addition to these isolated instances of violence subsequent to an execution, empirical studies support the conclusion that, at least in the short run, publicized executions tend to increase violent crime.⁸¹

In discussing the theories behind capital punishment, Bradford stated that the retributive theory is the only plausible explanation for retaining the death penalty. Bradford sympathized with the view that cold-blooded murderers deserve to die. Bradford added, however, that society should do what is best for society, rather than focusing on what an offender deserves. He pointed out that an execution costs approximately two million dollars, whereas incarceration for natural life costs about four to five hundred thousand dollars. Bradford suggested that if government were to dedicate the extra cost of executing an offender to more police, more lights on the street, the prevention of child abuse, the prevention of drug abuse, and resources for the mentally retarded, communities would be safer.

Currently, seventy-five percent of Americans favor the imposition of the death penalty for capital crimes.⁸² Accordingly, the second question posed to the defenders was why Americans heavily favor the death penalty. Mascherin believes that this statistic is the result of the prevalent factor that crime plays in the lives of Americans. She added that the death penalty and crime are highly emotional issues; thus, the easiest way to respond is to say that society ought to be hard on criminals instead of looking to the reasons behind high crime rates. Both Mascherin and Bradford believe that politicians embrace the death penalty to show voters that the candidate is "tough on crime." Mascherin noted that individuals who statistically are most likely to become subject to the death penalty are those who are "disenfranchised," such as minorities and the poor. Their opinions, said Mascherin, are not considered in the political process.

Lyon believes that popular opinion strongly favors the death penalty because capital punishment is a simple answer to a complex question. Lyon, along with Bradford, cited child abuse and neglect, poverty, and racism as reasons for high national crime

81. See *supra* notes 36-46 and accompanying text discussing deterrent effect of the death penalty.

82. See *supra* text accompanying note 35.

rates. To solve the problem of crime, they believe that society needs to look more to its causes than to severe sentences such as the death penalty. Crime, said Lyon, is a symptom of an illness in our country, and communities need to eradicate its causes. Although she believes that some people are dangerous and should be kept off the streets, her solutions deal with the problems that cause large portions of our population to feel that this life holds nothing for them. She added that programs directed toward solving these problems produce less visible results than newspaper reports about a recent execution.

Bradford believes that popular support for the death penalty is high because citizens are asked, "Do you favor the death penalty?" If the question were asked, "Do you favor the death penalty or life imprisonment without parole?" Bradford believes that the percentage supporting the death penalty would be greatly reduced.

The third issue the defenders addressed was the role of race in the capital punishment process. Mascherin believes that racism affects both the trial and the sentencing processes. She feels that race bears primarily on the prosecutor's decision to seek a murder conviction and the death penalty.

Bradford reiterated Mascherin's views that race plays a significant role in whether the prosecution will opt for a capital sentence and whether the jury will impose that sentence. Bradford stated that a black defendant is much more likely to be sentenced to die than a white defendant who committed the same crime under identical circumstances. Bradford noted that nationally, not one white person who killed a black victim has been executed.⁸³

Mascherin referred to the *Gaines* case as an example of possible racism at work. In *Gaines*'s first trial, an all-white jury convicted him and sentenced him to death. Mascherin stated that by the time *Gaines* had been awarded a new sentencing hearing, *Batson v. Kentucky*⁸⁴ had been decided. As a result, the "Cook County State's Attorneys Office had [to] let go of [its] time-honored practice of automatically excluding all blacks from the jury if the defendant was black." When *Gaines* was resentenced, the jury included four blacks, and he did not receive the death penalty. Mascherin knew for a fact that all of the black jury members voted against death. Mascherin stated that based upon jury composition, one could conclude that covert racism was at work in the original *Gaines* sentencing.

83. See *supra* text accompanying note 54.

84. 476 U.S. 79 (1986).

A further concern that plagues the criminal justice system, according to Mascherin, is competent representation of indigent defendants. This concern is especially great in capital cases due to the severity of the sentence imposed. Mascherin opined that most capital defendants do not receive adequate representation. She cited scarce resources in public defenders' offices and inexperienced attorneys as the chief reasons for this inadequacy. She added that although public defenders do excellent work, their high case loads make it difficult to dedicate adequate time to each case.

Lyon also believes that inadequate representation may create a risk of error in capital cases. She surmised that eight out of ten capital defendants suffer from poor representation. The most common error of counsel, Lyon stated, is poor preparation for the sentencing hearing. Many attorneys do not know how to prepare properly for the sentencing hearing and most do not seek assistance, despite the fact that many agencies can assist attorneys in preparing a capital case.

Bradford agreed with his fellow defense attorneys that capital defendants generally receive inadequate counsel. He reported an instance of counsel falling asleep during the course of the trial and an example of a defense attorney referring to his client as a "nigger." Bradford added that in some jurisdictions, cases are appointed on a low-bid basis to the attorney who is willing to try the case for the least amount of money. These attorneys often have little experience or interest in providing adequate representation. Bradford believes that a volunteer corps of attorneys cannot adequately meet the requirements of capital defendants. Both the lack of financial incentive and disdain from colleagues or others in the community discourage defenders. He believes, therefore, that a more structured system is needed to provide adequate representation in the collateral stages after the public defender's role has been completed.

All of the defenders spoke of the incredible amounts of time and energy that must be devoted to prepare a capital defense. Mascherin described the two stages of a capital trial. In the first stage, the defender develops a defense to guilt by investigating the actual facts of the crime. During the sentencing stage, however, the emphasis shifts: the defender must present her client's life story in the most favorable light possible. The attorney must reveal to the court any available mitigating evidence. This should include the defendant's entire background, relationships, psychological make-up, physical problems, and any other helpful information. Mas-

cherin stated that this process requires tremendous devotion and resources.

Mascherin stated that in a typical case, the sentencing hearing, or "death trial," immediately follows the "guilt phase," and typically begins the next day. Mascherin believes that the capital sentencing hearing ought to last longer than the trial on guilt and innocence. She commented that representing a capital defendant is a huge undertaking for someone who is, for example, a sole practitioner appointed by the court.

Lyon agreed with Mascherin and focused her comments on the sentencing process. In order to prepare adequately for the sentencing hearing, Lyon said, the defendant must tell his attorney things that would more appropriately be addressed by a therapist. Additionally, the defendant must "expose himself to the jury in a way that is just horrendous." The purpose of the sentencing hearing, from defense counsel's perspective, is to show the jury why the client should be spared a capital sentence. To achieve this objective, the attorney must expose everything that went wrong in the defendant's life. The entire sentencing process, Lyon stated, puts an incredible amount of pressure on the lawyer, the defendant, and the defendant's family.

The *Journal* next asked the defenders to comment on the proposals for habeas reform. Recently, Congress and the American Bar Association appointed committees to study capital punishment procedural reform. These committees focused on reforming habeas corpus and recommended limiting the number of appeals available at the federal level.⁸⁵

Lyon believes that a streamlined habeas procedure will severely limit a defendant's right to an accurate result. She stressed that such reform measures typify the political use of the death penalty. "The death penalty is a political tool. That is all it is. That is all it's ever been. It's a way of deflecting attention from the real problems of this country." The public supports faster trials, Lyon said, and politicians respond, without regard for fairness or quality of representation. Lyon commented that when a politician loses popularity, he or she invariably focuses on how crime in the streets should be met with stronger death penalty laws. The death penalty merely consumes resources that the government cannot spare.

Mascherin assertively stated that a streamlined habeas procedure would be a mistake. Although she recognizes the potential

85. See *supra* text accompanying note 74.

for abuse in the existing system, she added that cases arise in which mitigating and exonerating evidence does not emerge until the habeas process.

Mascherin offered the Cornelius Lewis case as an example of how the postconviction process may reveal new evidence. Lewis was convicted of murder and sentenced to death. At trial, defense counsel incorrectly stipulated that Lewis had committed several prior felonies. The defense attorney never investigated the prior convictions. Lewis did not learn until his postconviction appeal that the prosecution knew and failed to disclose that the defendant's prior convictions were for misdemeanors, not felonies.⁸⁶ Mascherin commented that, similarly, a case could make it past the federal habeas stage without such evidence being revealed. Mascherin concluded, "Then what do you do? A defendant's certiorari petition is denied on habeas, and he discovers that the state has some pieces of information that [it] has been withholding." Accordingly, she firmly opposes reform that would limit a capital defendant's opportunity to reveal error in the process.

Bradford likewise offered an example of a case in which grave injustice would have occurred if error had not been discovered in the latter stages of habeas review. In the Dickie Gaines case,⁸⁷ the trial bailiff testified at the first sentencing hearing that Gaines had attacked him. The bailiff claimed that Gaines said, "I'm going to kill you white motherfucker." The bailiff also said that Gaines tried to kill him with a hacksaw blade. The sentencing jury heard this testimony. In the last stage of federal review, Bradford and Mascherin investigated that incident because Gaines told them that it never happened. Bradford stated that during the investigation, the bailiff admitted that he fabricated the entire incident at the urging of the prosecutor. The bailiff admitted that he tried to "pick a fight" with Gaines by racially slurring him. When Gaines refused to fight, the bailiff agreed to fabricate the incident and testify in front of the jury. Bradford reported that the prosecutor specifically told the bailiff to use the phrase "white motherfucker" because this would offend the young ladies on the jury and insure that they would issue a death sentence. Bradford stated that Gaines came very close to execution because of the bailiff's lies and

86. See *People v. Lewis*, 191 Ill. App. 3d 155, 547 N.E.2d 599 (1989), *appeal denied*, 131 Ill. 2d 563, 553 N.E.2d 399 (1990).

87. *Gaines v. Thieret*, 846 F.2d 402 (7th Cir. 1988) (trial court's admission of hearsay, which implicated defendant as the triggerman in a multiple homicide, violated defendant's confrontation rights and was sufficiently harmful to justify reversal of death sentence).

that if habeas is streamlined, defendants may lose opportunities to uncover errors.

Bradford feels that the federal habeas corpus process is absolutely critical to insure accuracy in enforcing the death penalty. Habeas, said Bradford, protects defendants from execution based on false evidence. It is the stage during which the courts can remedy grave injustice. Bradford believes that federal habeas in its current form is inadequate because sufficient resources do not exist to retain attorneys who can investigate and try these cases properly. Because the habeas reform measures currently being considered would expedite the habeas process, Bradford stated, innocent people may be executed. He believes that the public will not accept such injustice.

Lyon also voiced concern over the enormous risk of executing innocent people, even under the current habeas procedures. She believes that this risk is high because of the jury selection process. Everyone who is against the death penalty, Lyon reported, is excluded from the jury for cause; everyone who waives about it is excused peremptorily by the prosecution. "This means you have an authoritarian group of people who think that the police don't lie . . . and that where there's smoke, there's fire. . . . The jur[ors] ask[] themselves, 'How come he can't prove he didn't do it?'" Lyon believes that juries chosen in this way have the potential to render inaccurate verdicts which can cost the defendant his life.

Finally, the defenders were asked about capital punishment of juveniles and the mentally disabled. Lyon commented that a capital sentence is an inappropriate response to crime and that it should never be imposed upon a juvenile. Additionally, many capital defendants are retarded or otherwise mentally disadvantaged, Lyon stated. Often, they do not understand the judicial process. Lyon commented that in the past, she mishandled some clients until she began to learn about their disabilities. She explained that some clients became hostile when she tried to explain an aspect of their case to them. Initially, she responded with anger. She learned, however, that her clients were confused about her explanations because the concepts involved were too abstract for them to understand. They used hostility against their attorney, explained Lyon, to conceal their disabilities. Lyon believes that mentally retarded defendants are convicted at a higher rate because of this two-sided inability to understand and communicate.

Bradford agreed and stated that "people who are at that early stage of development or mentally retarded don't have the kind of

capacity to make moral judgments that allow us to hold them accountable [by] taking their life for their conduct.” Bradford believes that approximately twenty percent of the people on death row are mentally retarded. He attributes this in part to their inability to deal with the system and make intelligent choices. Bradford added that the most disturbing aspect of sentencing mentally retarded defendants to death occurs when the judge or jury has absolutely no idea that the defendant is mentally retarded.

Bradford stated that if society could choose with complete accuracy the handful of people who committed the most horrible crimes and could impose capital sentences upon only them, he would not object to capital punishment. But, he added, history proves that the system is incapable of ferreting out the handful of cases in which all would agree that the death penalty is an appropriate response. Bradford stated that Americans execute two murderers for every thousand murders committed. We are choosing, he said, those who are simply less able to defend themselves and not those who have committed the most horrible crimes. “We have wasted millions of dollars in an ineffective effort to try to find those appropriate cases, and in the process, we’ve killed a number of people who were innocent and a number of people who all of us would agree did not deserve to die. . . . We really accomplished absolutely nothing, other than perhaps to kid ourselves into thinking that we deterred some crime when we haven’t.”

Lyon is hopeful that the death penalty will be eliminated in the future. She stated that this may happen because the efforts of capital defense attorneys are making death sentences too costly and difficult to secure. Lyon speculated that one or two innocent people will be executed as a result of the shorter habeas process, and two or three years later, evidence will emerge to prove their innocence. If that occurs, particularly to a white defendant, Lyon believes that the country may change its mind about the death penalty.

In a closing comment, Bradford stated that the most substantial common denominator among death row inmates is the severe abuse that they suffered as children. Bradford stressed that his comment was not made to engender sympathy or excuse the crimes that death row inmates have committed. Bradford recounted, however, the case of a little boy, Lettie McGee, who was hung upside down in a closet by his parents every night and tortured. The little boy suffered incredible abuse and cruelty. Eventually, he died. Bob Greene, a *Chicago Tribune* columnist, pleaded for the

death penalty for the parents. Bradford stated one couldn't help but have a rush of anger and desire to hurt the parents. But what was not considered, Bradford said, was the fact that the mother had endured almost identical torture when she was a child. Bradford asked, "If that little boy, Lettie McGee, had survived that closet and had grown up and had repeated to somebody else that which had been done to him as a child, would we decide that he should be executed? . . . In large measure, I think the people we're executing are the Lettie McGees of the world and that strikes me as just horribly wrong."

C. Judges

Seth Kaberon

The *Journal* interviewed trial court judges James M. Bailey and Earl E. Strayhorn, former trial judge Louis B. Garippo, and former Illinois Supreme Court Justice Seymour Simon.

Bailey has been a Cook County circuit judge for twenty-five years, the last twenty in felony court. Previously, Bailey was an assistant United States Attorney in the criminal division, an assistant corporation counsel for the City of Chicago, and was in private practice. As a judge, Bailey has presided over fifteen cases in which death sentences were imposed and roughly thirty-five other cases in which death was a possible penalty. Bailey also teaches courses at the National Judicial College in Reno, Nevada, on how to handle death cases.

Garippo served as a Cook County circuit judge from 1968 to 1980, all in felony court. He presided over five cases in which juries voted to impose death sentences, including that of John Wayne Gacy. Prior to becoming a judge, Garippo was an assistant Cook County State's Attorney for ten and one-half years, including two-year stints as criminal division chief and as first Assistant State's Attorney. Garippo is now in private practice, with half of his work in criminal defense.

Strayhorn has been a Cook County circuit judge for twenty years, all in felony court. Previously, he spent eighteen years in private practice and four years as an assistant Cook County State's Attorney handling felony cases. Strayhorn presided over two cases in which death sentences were imposed, both times by juries.

Simon was a member of the Illinois Supreme Court from 1980 to 1988. He previously served as an Illinois Appellate Court justice, as president of the Cook County Board of Commissioners, and as a Chicago alderman. Simon is currently in private practice.

The judges were first asked about the unique aspects of death penalty cases. Bailey said death cases are different because "they are going to be looked over with a fine-tooth comb." Once a death sentence is imposed in an Illinois court, the case is automatically appealed to the Illinois Supreme Court, and a habeas corpus petition will be filed. "You know that fifty judges or so will review" the case, some of whom "will be of a mind to overturn" the death sentence, Bailey added. "You must make sure there is almost no error in the record."

Strayhorn explained that "[b]ecause of the serious consequences, the judge must be aware if there is any imbalance between the competency of the attorneys. . . . The attorneys' performance is much more critical." Having an overmatched defense attorney may cost a defendant dearly, Strayhorn said. "Generally, what the court must do is even out the playing field. . . . It's not a common problem. . . . If it doesn't happen but once, that's too much because of the consequences."

Bailey similarly observed that judges must second-guess defense attorneys, even though there is little judges can do to prevent claims of ineffective assistance against defense attorneys or prosecutorial misconduct. One step that Bailey takes is to ask defendants on the record whether they know and consent when their attorneys waive their right to testify or other rights. Bailey stressed the importance of making a record of the defendant's understanding of his counsel's work. "I ask the defendant if there is anything the defendant wanted his attorney to do that he did not."

Judges also "must worry about the media" and keep jurors from reading press accounts of trials, Bailey said. However, he added, that is "no longer that big of a problem [in Chicago] because we've had so many [capital cases]."

Death cases mean more work at every stage, including a greater number of pretrial motions, Bailey said. Prosecutors are more careful when trying death cases, while defense attorneys normally are trying to put error in the record, he added. Garippo said that defense attorneys are very careful to preserve any issue that might be viable on appeal, postconviction, or habeas corpus review. "The defense attorneys must be awake at night thinking of new issues to interject."

Picking a jury usually takes longer in death cases, in part because each side has fourteen peremptory challenges, double the number in other felony cases, Bailey said. There may also be a lot of challenges for cause "if you don't handle it right." Once a juror

finds a way to get dismissed there may be a "domino effect." Bailey said that he has eliminated this problem for the most part by questioning jurors together rather than individually. He tells the jury that they must follow the law and that the law provides for the death penalty in certain circumstances. Then he asks whether any jurors feel that they could not impose a death sentence under any circumstances.⁸⁸ Usually, two to five jurors say that they could not and are excused. No defendant has objected to this voir dire procedure, Bailey said.

"I don't think most people are against the death penalty," Bailey said. It's a subject, like abortion, on which some people have strong opinions, while many others have no real opinion one way or the other. Bailey added, "People who are against the death penalty will say so right away."

Although jurors in death cases face more extensive questioning, Strayhorn said they "don't resent it as long as they understand the process. . . . The court has to explain these things to the jury." Nonetheless, despite the greater length and potential consequences of death cases, they are "not that much different from other criminal cases," Strayhorn said. He does not approach death cases differently from other cases. As in other cases, the outcome is determined by the evidence, Strayhorn said. "I don't have any control over the evidence."

Garippo does not consider death penalty cases different from a practical standpoint. "The fact that [I was presiding over] a death penalty case made no difference. I felt I had to be careful in any case. [I] realized the stakes were higher, but the care I felt was the same." Garippo never introduced special procedures for handling death penalty cases, except for dealing with the large crowds and press contingent attending the Gacy trial.

Bailey and Garippo both felt that defense attorneys are under the most pressure among participants in death penalty cases. Defense attorneys who handle a lot of these cases suffer "burn out," Bailey said. "It's a terrible feeling for a defense attorney to have the ultimate defeat of having your client get the death penalty." Defense attorneys, Bailey added, often second guess their trial strategy for years afterward. "It lives with these people. . . . It's very, very difficult."

"The defense attorneys are not only defending their clients," Garippo said. "They're defending themselves. The case will be in

88. See *Witherspoon v. Illinois*, 391 U.S. 510, 522 n.21 (1968) (allowing exclusion of jurors who would refuse to impose a death sentence in any case).

the system for years. Who knows how many attorneys will be assigned to review the original trial attorney's actions?"

Jurors also face greater stress in death cases. Bailey brings the jurors into his chambers after each case. "After a death penalty case, they'll be crying on the couch. . . . It's a tremendous responsibility," Bailey said. "It's amazing to me that you can even get twelve people to agree on a case like that when they didn't even know each other when the case began."

Strayhorn said jurors in capital cases must make "a real life and death decision. . . . That adds significantly to the pressure that they have." He added, however, that "it's additional pressure all the way up the line," affecting all participants. "The person who has the easiest job in a death penalty case is the judge," Strayhorn explained, because the judge only has to preside. The jury bears the burden of deciding the case, and the attorneys must conduct the trial.

Jurors "go back and forth" and are not overly deferential to prosecutors' death penalty requests, Bailey said. "I think it's very difficult for [jurors] to impose [a death sentence], especially because it has to be unanimous. It's asking a lot of them." Allowing death sentences on a 10-2 vote might be better, Bailey said, but such a provision would probably double the number of condemned prisoners in Illinois. He noted that Florida, with one of the largest death row populations, allows the imposition of death sentences by a majority vote. Bailey, however, "wouldn't take it away from the jury. . . . I'd rather have twelve persons considering it than one."

When a death sentence is imposed either by a judge or jury, he added, "the facts are usually overwhelming," with a terrible crime and a terrible prior record by the defendant. "Normally, it's a bad guy and it's a bad crime." In Bailey's experience, there is no particular pattern to death sentences and no particular aspect that tends to induce jurors to impose such sentences. Jurors "follow the law. They focus on everything. They do a pretty good job."

In the Illinois Supreme Court, "death penalty cases [are] given more attention, more care," Simon said. "I always took the view that this [is] a special type of case," which requires a closer look at the performance of defense attorneys, prosecutors, and judges. Other members of the court, however, feel that death penalty cases should be treated the same as other criminal cases, Simon said. Contrary to the adage that defendants are not entitled to a perfect trial, only a fair trial, Simon believes "[w]hen it comes to a death

sentence, you're entitled to a perfect trial. . . . I would say that most of the judges [on the high court do] not take that view."

Death sentence appeals are heard first in every new court term, Simon said. "Everybody [justices, prosecutors, and defense attorneys] gear[s] up for death sentences." In conference, however, death cases are put off until the court disposes of simpler, faster cases. Simon added that the discussions in death cases are longer and more detailed than in other cases.

After the Illinois death penalty statute was declared unconstitutional by U. S. District Judge Harold Baker in *Silagy*, and prior to the Seventh Circuit's reversal,⁸⁹ the Illinois Supreme Court declared in several cases that it did not consider itself bound by the rulings of the federal district or circuit courts, Simon noted.⁹⁰ "I . . . recognize[d] their authority" because the federal district and circuit courts can issue writs of habeas corpus and can overturn state convictions and sentences. Simon added that he tried to avoid ruling in conflict with federal precedents, but he conceded that this was a minority view on Illinois' high court.

Asked about their personal views on the death penalty, the trial judges generally accepted the penalty with reservations. "I've never been a great fan of the death penalty," Garippo said. "I've never been opposed to it, though. In the proper case, I would impose it. . . . I was never satisfied it was the right thing to do."

Strayhorn said, "The death penalty is being imposed for the wrong reasons." It is ostensibly for deterrence, even though it "has never been a deterrent in the history of man," Strayhorn explained. "But it's for punishment, not deterrence." Some crimes, he said, are so severe that the public sees no adequate punishment short of death—an "eye-for-an-eye" approach. Viewing the death penalty in this manner, as a public demand, solves a moral dilemma for Strayhorn. "Morally, I have a problem with rendering a God-like verdict, deciding who should live and who should die. . . . I think the judgment of death should be imposed by a higher being. . . . But as a judge sworn to uphold the law, I must impose death in the proper circumstances." He added that he had no second thoughts

89. United States *ex rel.* *Silagy v. Peters*, 713 F. Supp. 1246 (C.D. Ill. 1989), *rev'd*, 905 F.2d 986 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1024 (1991).

90. See, e.g., *People v. Coleman*, 129 Ill. 2d 321, 349-50, 544 N.E.2d 330, 344 (1989), *cert. denied*, 110 S. Ct. 3294, *reh'g denied*, 111 S. Ct. 17 (1990); *People v. Del Vecchio*, 129 Ill. 2d 265, 296, 544 N.E.2d 312, 327 (1989), *cert. denied*, 110 S. Ct. 1540 (1990); *People v. Brisbon*, 129 Ill. 2d 200, 224, 544 N.E.2d 297, 308 (1989), *cert. denied*, 110 S. Ct. 1796 (1990).

about the two cases that he presided over in which death sentences were imposed because the circumstances were appropriate in each.

For Bailey, death cases "felt different at the beginning. But after you've tried a few of them, you just do it." He said he has no personal qualms about imposing death sentences, but those judges who do should seek transfers to other court divisions. Bailey said that one criminal court judge quietly asked not to be assigned any death cases and was accommodated. Other judges have sought transfers, added Bailey, but none have said that it was based on their feelings about capital punishment.

Bailey said that he is often asked whether he believes the death penalty is a deterrent, but that "is not an issue for a judge. It's up to the legislature. . . . I think courts interfere too much, particularly reviewing courts."

Simon, an outspoken opponent of the death penalty, said that his "biggest objection . . . is that it's impossible to apply it evenly." Uniformity is difficult in most types of cases; leaving death sentences to juries exacerbates the problem, Simon said. Judges are better equipped than juries to conduct sentencings, he added, but judges will also differ. "This is not a good way to determine life and death. . . . We can tolerate lack of uniformity in other cases because it's the best we can do. But we need better in death cases."

When asked about delays in executions, Simon said, "People wonder why it takes so long. Courts are very careful in death penalty cases, and that's the way it should be." He does not believe that this creates a bad public impression of the courts. There are about 2000 persons currently on death row nationally, and Simon predicted that eliminating that backlog within a year would create a massive public outcry. "There's no way that the people of this country are going to stand for six executions a day." Simon believes that eventually "the death penalty will fall," perhaps as a result of public revulsion over summary executions in places like Iran and Iraq.

The trial judges, however, feel that long delays in executions have undermined the courts' public standing. Garippo said that the imposition of death sentences creates "a false public impression that we have a death penalty. . . . We're fooling the public . . . Our system is not geared for enforcing the death penalty. It probably never will be."

"Courts of review should rule. That's the big thing," Garippo said. In John Wayne Gacy's case, Garippo said that he ordered immediate preparation of the trial transcript, but it still took over a

year for the defense to file its first appellate brief. According to Garippo, appellate courts should push the matter and rule quickly. Trial judges face many more issues and decide them in a fraction of the time that appellate judges take, he observed.

As a result of long delays and lack of executions, Strayhorn said, "the punishment becomes less certain." This creates a public perception problem, but, he added, "you want to make sure this is the right person. . . . [Y]ou have a dilemma."

The public perceives a problem when the penalty is on the books but no executions occur, Bailey said. Dickie Gaines was on death row for ten years before his sentence was vacated.⁹¹ At a new sentencing hearing before Bailey, the jury decided against death. Bailey said that afterward, some of the jurors felt that Gaines would never be executed "so why fool around with this? What's the sense of the death penalty when it's not being carried out?"

D. Prisoners

*William E. Meyer, Jr.*⁹²

A difficult part of this project was to obtain the view from the other side—the view of the people actually sentenced to death. No current death row inmates were interviewed due to lawyers' concerns that publication might hurt their clients' cases. The *Journal* did, however, interview two former death row inmates. One of them, Dickie Gaines, now serves a natural life sentence in Illinois. The other, Gary McGivern, from New York, is free. The interviews are presented here in question and answer format to preserve to the greatest extent possible the opinions of the two men interviewed.

1. Dickie Gaines

Dickie Gaines was sentenced to death on November 11, 1979, at the age of twenty, for a double murder. The Seventh Circuit subsequently overturned his death sentence.⁹³ Gaines was later resentenced to life in prison without the possibility of parole. He had spent more than eight years on the death rows of the Menard and Stateville Correctional Centers. The *Journal* interviewed Gaines

91. *Gaines v. Thieret*, 846 F.2d 402 (7th Cir. 1988) (state ordered to retry, resentence to a term of years, or release Gaines).

92. Melissa Widen, a student at the University of Maryland School of Law, assisted in the Gaines interview.

93. *Gaines v. Thieret*, 846 F.2d 402 (7th Cir. 1988).

on August 10, 1990, at Pontiac Correctional Center, where he is currently in disciplinary segregation.

When did you first know that the death penalty was a possibility in your trial?

I first knew it was a possibility when I was convicted. Then the state started talking about the death penalty. They were talking about aggravation and mitigation, and I didn't know what mitigation meant.

What went through your mind when the jury handed down the sentence?

Well, the jury voted to impose the death penalty. I was so young that it didn't really affect me because I didn't appreciate the severity of the situation. If a person is older and mentally mature, he'd see it was a really serious situation.

At that particular time, I was told I was going to get a new trial. That played a role in me not looking at it from a serious standpoint. But as time went on, I realized this was a serious situation.

What was the reaction of your family?

Well, I didn't really know the extent of how they really felt. I know my mother was shocked by it. As for the rest of my family, I didn't have much contact.

Were many family members in court?

My aunt came once, but that was it. And my mom was there.

What was your first day on death row like?

Well, at Stateville, the time frame was that I was real young. A lot of things didn't really register with me. I felt just like I was put in prison. I wasn't looking at the death penalty aspect of it, banking on what the attorney said. The night I went to Stateville, the captain told me that "there ain't gonna be no takeovers 'cause I'm here now." He looked at me and said, "We'll put him in with the radicals." Approximately eleven men were on death row at Stateville.

Describe death row.

It consisted of four galleries. You have upper west and lower west, upper east and lower east. Each gallery contained between

nine and ten cells. Each cell was somewhere probably sixty square feet, could'a been six by twelve, maybe a little more.

How many hours did you spend in the cell?

You came out, when I first got there, I got out once a day, three, sometimes four hours. For me, that lasted about forty days. Then I got a disciplinary report. They put me on segregation status. I spent eleven months at Stateville.

When I arrived at Menard, six guys went down. They had you handcuffed side by side with a chain through the middle. After we arrived at Menard, the warden, James Buck, gave us a talk. He said that "you guys is at Menard now. We going to treat you like men if you want to be men. We'll treat you like dogs if you want to be dogs, and we're good at treating men like dogs." When I heard that, I knew I was going to be in trouble. Then they put us in the cells.

They had a lot of rules, repressive in my eyesight. You weren't allowed to buy no soap, deodorant, food in a can, not allowed to buy no coffee or sugar. They had a rule after eight o'clock: if you talked you had a disciplinary report. There was a lot of things done along racial lines. The rules was the same for black and white, but they applied them differently. Say it's nine o'clock and me and Perry Cobb [a black formerly on death row] is talking. The guard will write up a ticket. But not if two white guys was talking. I just decided I was going to have to challenge this, so as a collective body of people we submitted written grievances. But basically, the administration totally disregarded the written grievances.

Prior to going to Menard, the ACLU had challenged to try to stop transfers from Stateville to Menard. The director made the statement that Menard would be more secure and better with a typewriter and a library. I came there June 19, 1980. There was no yard. The library had nothing about no criminal law. It was on real estate and probate. There was one typewriter. That was it. So it led me to doing other things.

What did the officers do that you didn't like?

They'd make kinda' racial slurs. One day, an officer, Bouchard, he and a guy named Yates was having some words. The officer said, "all you niggers." At this point, it became a loud uproar. Guys was entertaining the thought of doing something to this guy.

Because of the outrage, his superiors talked to him and he apologized to everybody. But I know it was just a front.

What was done to the food?

The guards would tamper with the food. For example, it was a common practice for the guards to play with each other in a homosexual sense in front of the prisoners, grabbing each others' buttocks and genitals. Then they'd serve the food. A lot of guards would come to work, you'd see dirt under their fingernails, then they'd serve the food. It was unsanitary. I had experiences like cigarette ashes, butts, and hair put in my food. I seen them spit in peoples' food.

What were the cells like at Menard?

When I got to Menard, my segregation time was wiped clear. But in my eight years at Menard, I accumulated thirty years of segregation time. The cells was six feet in width and nine feet in length, and the height was eleven feet. But they was small. The width might have been less than six feet. You could open your arms and touch wall to wall. You had a bed, a toilet, and a sink, and a fluorescent lamp as a light.

Did you then have much contact with your family?

Throughout my stay on death row, my contact with family wasn't frequent, except for my sister Kathy. Periodically I would write. Other than that it was with my sister, most by mail.

My family visited about, my mother about three or four times, my sister maybe about five times, over a period of eight years.

How far was it to travel?

About 360 miles. They'd take the bus.

It is a fact that many people who get on death row eventually get off of it without being executed. Do you think there was any focus at all on rehabilitation?

No. In terms of the prison administration providing programs, absolutely not.

How did the experience affect you emotionally?

My attitude varied from time to time. In light of the way the prison administration was managing death row, the environment

was so oppressive and things were done along racial lines that I took a radical attitude, didn't put much focus on the death sentence. As time went on, I kinda' felt that it was a hopeless situation.

Later, as my case started to get affirmed, I started to get depressed. At one point, I did decide not to appeal any further. I didn't change my mind. The court said I couldn't do it. The court sent me a "motion denied" when I filed a motion to stop appeals.

What I did was I had a cert. petition to the Illinois Supreme Court. I had to write to the U. S. Supreme Court to dismiss the cert. and wrote the Illinois Supreme Court to carry out the sentence—this is the punishment I was supposed to have, so do it. They sent me an order back. They didn't want to do it.

How did you see it affect others?

I don't know of anybody on death row that the sentence doesn't affect in some way. People might try to put up a barrier, but deep down inside a person be hurting. Like, I know another guy who came to the point where he felt his whole situation was hopeless, had family problems. He asked to abandon his case. I tried to convince him not to do it, that he'd have to condition himself to deal with it. As time went on he came around.

What ways did other people react, or how did they deal with the sentence?

Most people, when they had a sense of hopelessness, it stems from some type of family situation. If a guy is married and his wife wants to divorce him, a lot of guys may say there ain't nothing to live for. A guy was talking about hanging himself. Perry Cobb talked him out of it. Most situations involve family problems.

If you're on death row and you got good family ties and people stand beside you, it's strength. If you don't have it or lose it, it has an affect.

How did you cope with the experience?

What I used to do is to keep myself occupied, such as I started studying different areas of the law, helping guys with different legal matters. Guys who couldn't write, I helped them, did a lot of reading. That's basically how I dealt with most of the oppressive and mad environment at Menard. It's like, for instance, at Menard, when a guy came from Menard up here to Pontiac, it be like they be happy. It's just designed to drive a person insane.

How did others cope with the experience?

I seen guys cut their wrists, like a suicide thing. A guy overdosed. I mean, there's different things that affect different people. It's kinda' hard to say what makes people do things. It's, at Menard, the stuff, the way they run the prison, it makes a person want to feel of taking his own life, especially if you have no support. You need emotional support. The environment is so oppressive, it makes a person want to kill or take their own life.

I seen situations where a correction captain went in a guy's cell, picked him up, and threw him up against the wall. The other guy got the experimental drugs, like psychotic drugs, given to him against his will. They'd restrain him and shoot him up, only when he'd start acting up. I've seen guys get up at three a.m. and start calling their wife, all kind of things.

Did you ever seriously think you'd be executed?

Well, I put it this way. When I started, it was after the circuit court had denied postconviction, then I started taking a serious outlook about this situation and the penalty. I know I was in trouble, had to get a new attorney. I knew that I'd be in for it if I kept my attorney. I just knew if I didn't get rid of this guy, they'd succeed in getting me, I mean the good old State of Illinois.

What is your opinion of state-sanctioned death?

First of all, I think there should not be no death penalty. It does not serve a deterrent purpose. It's been fourteen years since it's been restored in America. If you get homicide statistics, you'll see it hasn't deterred the homicide rate. It just deters the particular person if the state succeeds in executing. Death penalty breeds violence. You have this violent type of penalty, so this is what you get: violence. There is a political and social will to maintain the death penalty statute in America, probably because every time something happens, politicians get to screaming, convince the people that this is the answer. I believe society is still protected with resort to natural life or a certain amount of years without parole. I also see the death penalty as a political tool to advance political careers. They know that when the media prints something about a case with notoriety to it, a brutal homicide, media blows it up, media calls for the imposition of the death penalty. What I see is that politicians is using it to attract votes. The governor's race in Texas this year, [the candidates ran] ads bragging about how many

people they killed. It works because most of the people in society is in favor of capital punishment.

The court is supposed to be a body to objectively review something without bowing to political and social pressure. A lot of decisions, especially out of the United States Supreme Court, decisions reflect an attitude that most people is for capital punishment, so it's not cruel and unusual punishment. So I think the U.S. Supreme Court is sending a message to the lower federal courts and the state courts to "let's get the show on the road. These guys got all the justice they got coming."

What is your opinion of those in the legal community and the community at large who would shorten the appeals process?

Again, it goes back to the United States Supreme Court decision in *Teague v. Lane*,⁹⁴ which prevents a person from benefitting from a new rule of constitutional law when he's beyond direct appeal. It reduces federal habeas corpus to a procedural formality you go through, where people used to rely on relief in federal court. The Supreme Court is telling the lower federal courts that we're returning the power to the states. There are barriers being erected to further make it hard to obtain relief at the federal level. An example of that is where the Supreme Court has granted cert. in the *McCleskey*⁹⁵ case, regarding successive habeas corpus petitions. When a person looks at the decision in *Teague*, and the procedural default doctrine, you is in a bad position. When you read these two cases and pull them together, you better follow the rules at the state level or you're in trouble. An example of the United States Supreme Court getting the show on the road is the Powell Commission, expediting the appellate process in capital cases.

Also, I just think that all of the law relating to the death penalty reflects to me what I call hypocrisy to a certain point. For instance, *Penry v. Lynaugh*,⁹⁶ a Texas case, the Court found no bar on execution of a mentally retarded person. If you're mentally retarded, how can someone say you're in control committing a crime? It illustrates a disregard for human life. Period. By the Court. But by no means am I saying that, granted most people in death row have committed atrocious crimes, but you have all types of laws protecting society without resorting to the death penalty, like natural life or twenty years before parole.

94. 489 U.S. 288 (1989).

95. *McCleskey v. Zant*, 110 S. Ct. 2585 (1990).

96. 109 S. Ct. 2934 (1989).

In *Stanford v. Kentucky*,⁹⁷ about a sixteen to seventeen year old, how can you speak about morality and civilization in one breath and apply the death penalty to a sixteen or seventeen year old? You want to deal with these people as adults, but not in other areas of life. If you sixteen years old, society won't sell you no liquor or vote, but want to deal with me and impose the ultimate penalty on me. These people isn't mature enough. A lot aren't fully developed mentally yet. Plus, at that age, there's a chance that a person can turn their life around, as opposed to a thirty year old with a twelve to thirteen year criminal history.

How old were you when you were convicted?

I was 20.

What are your feelings about Charles Walker, who refused to appeal further because he could not face the prospect of life with no parole?

I look at Charles Walker from a human standpoint. I see everybody on death row, human beings who went astray in life. In regards to him telling them to carry out that sentence, personally I tried, had a female friend who is an opponent of capital punishment to write him a letter not to persist in that course. He didn't want to do that, but continued on.

What I think is two-fold. Number one, a man's gotta' do what a man's gotta' do. Number two is that I think that it's going to cause a lot of, if the execution is carried out,⁹⁸ a lot of concern for guys on death row. People are going to become a lot more nervous, on brink of contemplating suicide. It could precipitate a lot of things. I have never talked to Charles Walker personally about that situation, so I don't know the real reason why he wants to do it. I don't really think he should do it, but I don't have no control.

What is your opinion of the public interest groups against the death penalty? Are they effective? How much are they allowed to help the inmates?

To some extent, the Coalition Against the Death Penalty is positive because they visit each death row in Illinois once every other month. Even that in itself—just to see somebody come from the

97. 109 S. Ct. 2969 (1989).

98. Walker was executed on September 12, 1990, one month after the *Journal* interviewed Gaines.

outside—is a positive aspect. You ain't looking at the green suit everyday.⁹⁹ It has a positive uplift. The Coalition helps guys to get pen pals, typewriters. But the Coalition doesn't appreciate the significance of pen pals. If you know somebody on the outside, it strengthens you. If you're abandoned, it's a whole lot of weight on your shoulders.

The Coalition is a good group. But it could be a better group. I'm in the process of attracting more people to oppose the death penalty. But I believe that a lot of people say, about Charles Walker wanting to forgo his appeal, "It will open up the flood-gates." I don't necessarily believe that.

The death penalty been in existence since 1977. So far the state hasn't been successful.¹⁰⁰ A lot of guys, their appeals are winding down now. When you look at the support for capital punishment, whether Charles Walker forgoes or not, there are going to be executions in Illinois. It's just a matter of time. If Charles Walker wasn't forgoing his appeal, it might be two to three years down the road. But it's going to happen. I do not foresee capital punishment being abandoned for a long time, as long as you have brutal murder, child killings, etc. It's going to be that.

What is your point of view on televised executions?

The only way televised executions would make people reject the death penalty is if there was a significant decline in the number of homicides that take place. You see child killing, way out stuff. There is going to have to be a decline in brutal murders or murders period.

Would it deter murder?

No. I see capital punishment in a capitalistic society as being interrelated. Everybody likes to have nice things in life. Some people don't want to work for these things. Some people don't feel they have a stake, so they take what they want. Most people under the death penalty have committed a crime for monetary gain. So a capitalistic society breeds greed. Everybody tries to climb up the ladder, so it's interrelated.

99. Illinois prison guards wear green uniforms.

100. One month later, however, on September 12, 1990, Charles Walker was executed.

What would be your preference of the method if you had to face it?

If I had to be executed, that is a tough question. I think that I'd opt for the lethal injection. I would have to opt for the lethal injection.

Do you think prosecutors get out of line in these cases?

By all means. First of all, all lawyers, particularly defense attorneys and prosecutors, they know the ground rules, they know proper comment, and arguments is supposed to be based on evidence at trial. When they get up and call guys "mutants from hell," I think things like that prejudice the guy on trial and help get a conviction. It appeals to the emotions of jurors. Jurors are fed up when they hear the word "crime." It turns them off then and there. I see in a lot of cases that the prosecution does the wrong thing seeking the death penalty. I knew a guy on death row at Menard, seventeen to nineteen years old at the time, his crime consists of murder and robbery. Let's say that you have John Doe with murder where a man got shot, not brutal. I ain't trying to denigrate a person's life. But if you just shoot, the court may look at it less than if you decapitate somebody. Let's say a guy has murder, armed robbery, no background, and he's nineteen to twenty, and let's take a guy with a fifteen year background with a murder, armed robbery, and rape, and prosecutor seeks the death penalty against him, but not the other guy. It's not right. But of course, these things happen.

What motivates the prosecution to ask for the death penalty?

Race factors come in. In certain cases, the publicity plays a factor. For instance, publicity in a case, along with the victim's status, plays a role too. What jury won't convict somebody for murdering and raping a doctor's wife?

I believe that Charles Walker is hell-bent on going that direction. Nothing will change his mind at this point. I do know from my correspondence with other guys on death row in Menard, they don't like what he's doing, they feel it will affect them in terms of their cases and in other ways. I hate to say this, but on the other hand, if Charles Walker goes through with what he's doing, it will give a whole new perspective to people and death row, especially at Menard. Even though most people may not show that they feel the effects, inwards they be hurting. But a lot of people act as if they don't take the situation seriously. If you took it seriously, you

would be involved in your case extensively to save your own life. That wasn't the case with most people at Menard. If Charles Walker goes through with the thing, attitudes will change.

Do they let you go to the library?

No. I have a miniature library in my cell. Then, if it's cases that I want, and I'm on a case with a citation, the law clerks can copy the case for me. But as far as in-depth research, I can't do it. You can't borrow no books in segregation or in the population. You have to pay for photocopying. Or they rent the photocopies out or charge you five cents for every case.

At Menard, they compelled me to do a lot of things that had adverse effects on me. I slept on a slab of steel with no mattress for two years, then they blame me for it. One other thing I'd like to say, about the lawyers, but I think that a lot of lawyers, particularly at the trial level, if appointed by the court, should take these capital cases a lot more seriously, because courts are imposing the waiver doctrine. Lawyers shouldn't accept the case without making a strong effort. Later on, what happens is that if the new attorneys come on the case, they have to raise issues extracted from the transcript and clean up the things the other attorney didn't do.

Does it help to have an incompetent lawyer at trial, so that a lot of errors are preserved for appeal or so you can argue inadequate representation?

It depends on the type of case. If the evidence is overwhelming, I'll take the incompetent lawyer at trial. It's just a natural thing. If a guy knows they got the goods on him, he wants an incompetent lawyer. A lot of guys be thinking that the people sitting on benches is stupid. They don't see the strategy. But that very question is why the courts have tightened up in areas. It makes it harder to show ineffective assistance of counsel. You need to meet two prongs in *Strickland v. Washington*.¹⁰¹

Death row is a lot more pressure, particularly when a person starts using up all their appeals. I believe that if the Supreme Court is telling the federal courts to tighten up, return power to the state courts, what I think is that guys on death row have to obtain relief at state level. I foresee the Seventh Circuit becoming like the Fifth Circuit. It's hard to obtain relief in the Fifth and Eleventh Circuits. I see danger ahead. Fortunately, my case just happened

101. 466 U.S. 668 (1984).

to be one of the first in federal court in Illinois. When the circuit court denied my postconviction, I went on a letter-writing campaign to get attorneys for my federal habeas corpus. I seen the situation as more serious. I do that for guys now. But it's kinda' hard to get an attorney. It's not a very popular cause representing somebody on death row, unless it's a case where the guys can really show that there's a factual innocence thing. How many attorneys would take a John Gacy or Ted Bundy—with a lot of notoriety? Let's be realistic.

2. Gary McGivern

In 1970, two years before the Supreme Court's decision in *Furman v. Georgia*,¹⁰² Gary McGivern was convicted of murder in New York and sentenced to death. That sentence was later reversed, however, and on retrial McGivern was sentenced to imprisonment for twenty-five years to life. At all times, his guilt was at issue, and according to McGivern, the prosecutor hid important evidence, which later disappeared prior to his last trial. Governor Mario Cuomo granted him clemency—not a pardon—and he was paroled last year after twenty-two years behind bars, several of them on death row. He spoke with the *Journal* on August 6, 1990.

Please give us your background, about how this all came about.

I was born and raised in the Bronx, in an Irish community. When I was twenty-one, I was arrested for a robbery. At that time, my arrest was a service to the community. I went to prison, where I was coming to terms with my antisocial behavior and the crime I had committed.

While I was serving the sentence. I was accused of attempting to escape and, in the course of that escape, shooting a deputy sheriff. There was two deputy sheriffs involved, and there was three inmates. We were in the Auburn prison and we were travelling from the Auburn prison in upstate New York to a court hearing in Westchester County in White Plains. During that drive from Auburn prison to White Plains, one inmate, a guy named Robert Bowerman, attempted to escape, snatched a pistol, shot the deputy sheriff. He got shot himself. He died. I got shot. My codefendant got shot in the back of the head, and there was one surviving deputy sheriff. That happened in September 1968.

The legal history goes from '68 all the way up to last year, until

102. 408 U.S. 238 (1972).

March of last year, when I was released from prison. At the trial, they accused me of doing the shooting, and the first trial commenced in September of 1969 and resulted in a hung jury. It was a case where the deputy sheriff got on the stand, testified that he seen me doing the shooting, and it wound up in a hung jury. So his credibility was not good for the jury to come in with a hung jury. I was tried six months later, convicted. I fired my attorney at the penalty phase of the trial and represented myself. I was convicted and sentenced to die.

I went to death row in February of 1971, and I stayed there until 1973, when my case was unanimously reversed by the New York State Court of Appeals. . . . A new trial was ordered. I went back to Ulster County, which is where I was tried. The new trial started the end of 1974. They offered me a plea. If I would have pleaded guilty, I would have been immediately eligible for release. I refused to take the plea, and I went to trial.

During the penalty phase of the second trial, I had represented myself and I saw a box of evidence that wasn't in my box, but which was in the prosecutor's box. The evidence was a picture of Bowerman on the morgue table, the belt he was wearing. A security belt was on, and it was cut on the right-hand side. The prosecutor's theory was that I participated in the crime and I cut Bowerman's belt. But if I was sitting in the middle of the car, the belt would have to have been cut on the left-hand side. Which side the belt was cut on was a very important piece of evidence. So I discovered this evidence that showed I couldn't have cut the belt, which blew his whole theory. The belt was used in the appeal, and I got a reversal. So when I went down for the third trial armed with this piece of evidence, . . . I was convicted again. The piece of evidence I had mentioned before disappeared, and I was convicted.

At what point in these proceedings did you know that the prosecutor was going to seek the death penalty for you?

The death penalty at that time was still in effect in New York. I was on death row when *Furman v. Georgia* came down. In the second trial, I was convicted and they pushed for the death penalty. Once the news media caught hold, the issue there was no longer guilt or innocence; it was the image of law enforcement. The crime had been committed. They wanted somebody to pay. It wasn't good enough that the guy who actually snatched the gun was killed. . . .

What was death row like to you?

It was a horror. It's a prison within a prison, and they have no rules. They can do anything they want. There was times when I used to go to sleep at night, and they'd go in the back in the cat-walk and take a bat and bang it and wake me up. I'd wake up and then get back to sleep and they'd bang it again when I went back to sleep.

Do you think the death penalty deters crime?

Absolutely not. It has no proven deterrent value. In my opinion, it's purely a symbol. It's a symbol that there's a need for it. It seems like politicians are required to give citizens an answer, a solution to crime. Rather than bring in the long-term solutions, the real solutions, like education and employment and combatting racism, they say, "well, we'll give you the death penalty and that will solve the crime problem." It's terrible. It's terrible that they're even selling it. And it's worse yet that the American people are buying it. It's like so clear.

I spent twenty-two years in prison. The people that I did time with were not the sons of lawyers and doctors. These were people who didn't know who their fathers were, who came from broken homes, drug addicts, with mothers with alcohol problems, and those are the people who populate prisons in this country and the death rows.

What did you see death row do to these people? Did you see changes in them, for better or for worse?

Death row, and capital punishment as an institution, worsened people. It brought out the worst in the guards. It was an unpleasant experience. It was a horrifying experience. I think it demeans everybody. With me, personally, I was forced to make a choice whether I would buy into this message that was being sent to me, or would I struggle against it. I obviously struggled against it.

How did your family react when you were sentenced?

Mortified. They were horrified. It was devastating. How they survived it is beyond me. But they did, and it's because I had a good family I was able to go through twenty-two years of prison experience and come out the other side undamaged.

What is your opinion as a lay person as to whether the death penalty is constitutional?

The death penalty is obviously constitutional. The United States Supreme Court said it's constitutional. That's a legal reality. There was a time when the United States Supreme Court said slavery was constitutional too, so whether it's constitutional or not is not really the issue. It's a legal reality. They've said, "yes, it's constitutional," and they go on to say that most of the people in this country want capital punishment. But most of the people in this country wanted slavery too at one point, so that isn't something that impresses me as an important factor in whether we as a society should embrace capital punishment.

I think it's a short-term kind of solution to a long-term problem. It's just giving people something because they don't want to look like they can't do anything about the problems. And that's just the nature of our system. You know, people get elected every two years and four years, and they have to have answers. They have to answer the public, give some kind of solution to these very legitimate problems. Crime is a legitimate problem. People are scared and nervous and frightened, and victims have a right to be outraged and so does the community. But I think it's dangerous to focus in on the emotional and the immediate. You have to see crime in the broader context. Who or what makes up the criminal population in this country and why? That's where you find the solution. You don't find it in saying, "look at this hideous crime that was committed." It obviously was committed by someone who felt alienated from our society. And usually, it's the throw-aways from our society who end up in the prison system or on death row.

Do you think there are innocent people on death row and that mistakes have been made and innocent people have been executed?

It's a fact, . . . but I think innocence is another limited issue. You know blacks are more likely to be executed if the victims are white, and that says something about racism in our country. And until we can take care of all the other social ills—the racism, the lack of employment, education—I think we should put the death penalty on the side until the problems in our society are responded to. I don't think we have the right to use such a grave and serious and absolute penalty when we can't be sure what the real reasons are. And that's why I'm frustrated. . . . The legal community has

this way of really taking an issue and keeping it in a box. They don't want it to get out. This person committed the crime, therefore, the penalty must be death and let's get on with it. I want to see why this guy committed the crime or why this woman committed the crime. People are not just born evil.

I think what happens is that in our interaction with society as we grow and learn, we're either nourished or damaged. It's sometimes people are damaged in a fast-moving society, and it's important to see criminal behavior in the context of the whole society. I'm really disturbed and frustrated by the limited point of view that the legal community has. And I think it does everybody a disservice. If we're really concerned with solutions, we have to look at the broader context.

What is your life like now that you are out of prison?

It's a mixture; it's a range. There's joys and there's pain. There's sadness and there's celebration. But the consistent thread is struggle. The struggle has been a long struggle. . . Now I find myself at the age of forty-five looking for a career. That's a little scary. I can't compete in the construction trades because there's a lot of younger people out there, and it just keeps me on edge a little bit. And I'd like to do writing, but I have to pay bills at the same time. So life is just a mixture. It's a challenge, but the bottom line is good. I live in a good community and I have a good family, and that's fortunate.

E. Public Interest Groups

William E. Meyer, Jr. and Patricia S. Spratt

Public interest groups play a visible role in the death penalty controversy. One such group, the Illinois Coalition Against the Death Penalty, formed in 1976 to head off then-pending death penalty legislation. Since the Illinois statute went into effect in 1977, the Coalition has worked both to abolish the death penalty and to narrow its scope. Additionally, it provides support for death row inmates and their families. The Coalition draws funding from private donations and grants, and uses office space donated by the ACLU.

The *Journal* interviewed Pat Vader, director of the Coalition. After raising her children, Vader went back to college at the age of forty to pursue a degree in criminal justice. She became interested in the Coalition through a student internship. That internship

eventually led to her heading the Coalition. She says that the Coalition "gives me what I think I need at this stage of my life—an opportunity to really work on something that I think is important." When asked why the Coalition opposes the death penalty, Vader offered several reasons beyond the Coalition's basic moral and ethical grounds of opposition. First, she stated that the penalty is a racially discriminatory punishment that does not deter potential murderers. In fact, Vader said, "studies show that it does the exact opposite. It keeps the violence going. . . . It has such a brutalizing effect on society that it's almost like a quick fix, and people believe in it as such and the state is doing it, so why shouldn't I?" Further, Vader pointed to the "copy-cat syndrome," when a person gets publicity by emulating the violent behavior of another. "[The death penalty is] a violent thing, and it has a violent effect on society," she stated.

Additionally, the Coalition opposes the death penalty because innocent people get executed. Vader said, "We've had people in Illinois¹⁰³ . . . who were released from the system after nine years, three of them spent on death row. Five trials. They were found to be innocent at their fifth trial. So there's a lot to the possibility that we may be executing innocent people."

When all of these factors come together, she sees no legitimate reason for capital punishment. "It really does nothing but make us think that it's doing something to stop crime," she stated, "and it's not doing that." Vader mentioned that although it takes far more tax dollars to execute someone than it does to keep him in prison for the rest of his life, politicians tell the public that the death penalty is needed because "that's what the public needs to hear."

The Coalition usually becomes involved after a defendant is sentenced to death, although the public defender's office often asks the Coalition to provide "court watchers" at trial, people "to sit in a court room to show support that this person not get the death penalty." Vader emphasized the importance of this role, because it minimizes some of the more blatant abuses of the system. Vader recounted one case in which the state's attorney filled the court room with people who, when the jury returned a guilty verdict, stood up and chanted, "Kill him, kill him, kill him." Vader emphasized that there has to be somebody on the other side to say, "No, don't kill him."

Most of the time, however, the Coalition does not get involved

103. Perry Cobb and Darby Tillis are the individuals to whom Vader refers.

until the person actually has been sentenced. At that point, Vader said, the Coalition starts monitoring the individual's progress through the courts. The Coalition keeps statistics on each individual and his case, so that "we have a thorough working knowledge of whoever is on death row, so we can provide support in whatever way we can."

This support involves as much personal contact as possible. Vader said that the founders of the Coalition became very involved with the Department of Corrections and finally got permission to visit. The Coalition visits the two death rows at Menard and Pontiac once a month. "What we do," Vader recounted, "is walk in the galleries and up to cells and talk to people and find out what their concerns are . . . a way of monitoring the conditions." The Coalition found that when conditions are monitored, changes frequently are made, or "at least the abuses are kept down to a minimum." Vader said that the prisons "know we're coming once a month, and they've been very good to us and they've been very good to the people on death row while we're there at least." The prisoners say that on that one day the showers are scrubbed down, and the food is a little better. "If nothing else," Vader said, "we are accomplishing one day."

Vader described death row. She sees "men caged up in little bitty cages," cells that are six by eight feet. Vader said that the inmates spend twenty-two hours a day confined to those cells, getting out only for a shower and an hour in the yard. It's difficult because "you have people who have a lot of energy stuck in this little place." The restrictions are total and rigid. Vader finds this unjust. "There are people on death row who did terrible things, and we're not going to say that they haven't. And there are people in the general population who no doubt have done terrible things—or worse in many cases—yet they're allowed to go to school, allowed to go to church. They're allowed to eat their meals in a place where they can . . . have an actual plate in front of them. These guys eat off styrofoam three meals a day."

Vader hears a wide variety of complaints from inmates: "the law library isn't adequately staffed; . . . my visitor was removed, and I don't know why; . . . could you call my mother and tell her I'm okay?" Vader stated that the Coalition does everything it can within the law to remedy those complaints. The Coalition, she said, has worked a long time to get lawyers for people who cannot afford them.

The *Journal* asked Vader about library conditions on death row.

She said that both death rows have facilities, but there is “not very up-to-date stuff in the law library.” At Menard, for example, the inmates are locked in a cell in the law library, where a librarian helps them “gets the books . . . and tries to help them to know what they mean.” Pontiac Prison converted several cells into law libraries, so the inmates can be locked in with the books and not have to wait for a librarian to get them. The effectiveness of the libraries is varied because “many of these people really don’t know even where to start.” Vader said that some prisoners become really exceptional jailhouse lawyers “because [their fellow inmates] have nobody to work with them.” Many, however, are illiterate and can write barely more than their names. Vader said that they “just sit there and vegetate because there isn’t anything else they can do.” Even though Vader thinks that everyone on death row has a lawyer at this point, “the people who do their own law work and help other people through trial and error have learned a lot because they didn’t feel their lawyers were following through with what they should have.” Illinois provides lawyers to the inmates through the state appellate process, but “up until very recently, after that, if they had other avenues of appeal, but if they couldn’t find a lawyer for free, that was it. They had to do their own work.” But the Public Defender’s Capital Resource Center now pays lawyers to work on postconviction and beyond. “So right now we’re in a better situation financially to actually find lawyers to work on these cases,” she said.

Beyond the physical conditions, the *Journal* asked Vader to describe the personalities that she sees on death row. Because over 120 people are on death row in Illinois, she found it hard to assign any particular personality. Vader said that she has seen both horrible and wonderful changes in people. “I’ve seen some people come in with really bad attitudes—really violent, hateful people. And [because] they have more time to think now than they ever had in their li[ves], I’ve seen some remarkable changes in people.” Vader has seen people adopt religion as a support and help others in the process. “Then I’ve seen people go downhill,” she said. These include “people who maybe have not lost their minds completely, but who have become so fixated and so focused on their death[s] that it has literally turned them into crazy devils.”

Vader sees a lot of remorse among the people who admit their guilt. She has heard from inmates, “God, one second in the other direction, and I wouldn’t be here. Why did I do that? How did I do such a thing?” Many people were on drugs or drunk when they

committed their crimes, Vader said. One man told her, "I must have committed murder because there was a dead body, and I was the only person there. But I can't remember." That inmate's toxicology report indicated that he was so intoxicated with drugs when he committed the murder that he should have been dead. Vader wondered how he functioned, but it occurred to her that "he didn't function. He malfunctioned and he killed someone. . . . This happens a lot. . . . If drugs or alcohol weren't involved, there probably wouldn't have been a crime of the magnitude there was." Charles Walker, for example, had been an alcoholic since the age of eight. "So it's difficult," Vader observed, "when you look at people who are sitting on death row and are clean for the first time in their lives to recognize the [people] that they must have been at some point."

Vader says that on death row, she has met some very decent people who are there because they had no economic alternative but to sell drugs. They wound up taking drugs themselves and killing someone. "Deep down," she said, "you have some really good people, some talented people, some creative people, intelligent people. You have all walks of life . . . on death row." Vader believes that if society could take drug abuse, child abuse, and poverty out of the picture, there would be something different for these people. "But that's our society," she said. "Our society is loaded with that, so we have to expect our prisons to be loaded with that. We shouldn't be surprised that they are."

The *Journal* asked Vader what else goes through her mind during a visit to death row. She said that although she has visited death row for five years, she never gets used to seeing "human beings caged up." At each visit, her first feeling is, "I don't want to do this. I can't do this anymore. It hurts too much. It's too depressing." But the people she sees are "so remarkable. One of the things that's so remarkable is that you find so much hope and caring and loving people." Inmates get to know her personally. They ask about her family and can look at her and say, "something's wrong. Tell me about it."

Vader says that inmates listen. They care enough to keep track of her family and her birthday. "Maybe that's because they have a lot of time," she said, but "when I get there, I walk out with the feeling that I've had a positive experience. I've met people who've had very little to hope for, who have a great deal of hope, and who share that." People on the Coalition, Vader said, go in "because

they need to do it, and they know that someone's got to do it. If we don't do it, who will?"

Illinois' death row contains inmates who are under twenty years old. Vader spoke about the very young on death row. Her experience indicates that most of them are there because they followed drugs and gangs, and murdered for them. She found it shocking that a jury could sentence an eighteen year old to death, saying in a way, "there's no hope." What shocks her even more is that some were college or high school graduates. "We have one man who is a football star who was being sought after by several colleges for scholarship. We have a champion swimmer who was train[ing] for the Olympics."

Death row offers no education, said Vader, because "they can't go to classes like other people who are imprisoned can." Although the prison system has mandatory classes for those who fail to read and write at a minimum level, the program does not extend to death row. Inmates may study for a GED, "but they can't go to a class as such, so they do a lot of studying on their own." Because that requires so much motivation, just a few death row inmates have gotten their GEDs while waiting to die.

Visitor access is another acute problem for death row inmates. Most of the people who are sentenced to death in Illinois are from Cook County and the surrounding area. But many death row inmates are housed at Menard Correctional Center, which is 400 miles away from Chicago. Although they are allowed four monthly visits from family and friends, many visitors cannot afford to make the trip. Families of death row inmates must either drive or take an all-night bus trip that leaves Chicago on Saturday night at midnight. Families who take the bus are allowed to stay in the prison for a few hours and then are driven back and dropped off on Sunday at midnight. The bus trip costs thirty-five dollars; even this price is out of reach for poor families. The Coalition is most involved in this problem, Vader said.

Even when families make it to the prison, Vader has found that the Department of Corrections does everything it can to discourage death row visitors. Visiting areas are limited. At Pontiac, where the general population enjoys a main visiting room with video games and vending machines, the death row inmates have a separate visiting room. Vader said, "[T]heir families, their kids come and are not supposed to play with the video games. They're not supposed to get food out. They're supposed to sit at the table,

while everyone else around them is able to move around. So even when they're inside visiting, they're restricted."

Searches done on death row visitors are much more stringent than those done on visitors to the general population. "It's hard enough for a mother to go and see her son on death row," Vader said, "let alone if she has to go through all these other things. . . . If she can afford the money to get down to see him, if she can stand the invasion of her privacy of a very thorough body search, if she can stand seeing her son sitting at a table in chains, then she's got to also be treated as if she is a death row inmate by the guards and everyone around her." Vader sees this as the most horrible thing about the access problem.

The *Journal* next asked Vader how prosecutors, judges, victims' families, and the inmates themselves perceive the Coalition. Vader responded, "I think that most people think we're bleeding hearts. You know, 'you're trying to glorify murderers and trying to say they're nice people.'" She said that the Coalition has had some really violent and ugly reactions from people. When Coalition members testify at sentencing hearings, they are "put down a lot by the prosecutors."

As for the inmates, Vader feels that those who have been around the Coalition for a while come to trust its members on some levels. Typically, she said, the inmate's first reaction is to wonder what these people are doing and what scam they are trying to pull. Inmates have asked Vader if she does it for the money or the power. But she responds that her pay is low and that she has no real power.

The *Journal* asked whether life without parole is a better or worse alternative than the death penalty. Vader responded that the Coalition does not advocate any alternative to the death penalty. She did observe, however, that the fear of a murderer killing again is no reason to support the death penalty, because life without parole is on the books in Illinois. She recognizes the valid societal concern that some criminals "have done things that are so horrible that they have probably forfeited their right to ever be out free again." But, Vader continued, "we can keep them in jail for the rest of their li[ves], and we can do it a lot cheaper than we can kill them. So I think life without parole is one of the things that we're going to have to be looking at as an alternative to the death penalty." Given that alternative, Vader believes that more people would reject the death penalty. The Coalition needs to concentrate more of its resources in this effort, according to Vader. "The death

penalty system doesn't do what it's supposed to do and it costs a lot of money. Why not get down to what really can change things, and maybe life without parole can." She pointed out that Charles Walker was more afraid of life without parole than he was of the death sentence. "He wants to die,"¹⁰⁴ Vader said, "rather than take a chance that somewhere along the line, his death sentence might get reversed, and he might get life instead."

When asked about the possibility that an inmate might kill again within the prison population, Vader responded, "Prisons are dangerous places; and I don't think we will ever stop murders in prisons. There's gang murders. There's inmates who attack guards. I don't think that's ever going to stop. I don't think the death penalty has stopped it, because we have people on death row who have killed other people." She believes that the death penalty does not deter murders either inside or outside of the prisons. "So maybe they will kill somebody," Vader said. "That's just something you'll never know."

The *Journal* asked Vader to comment on Charles Walker, who at the time of her interview in August not yet been executed. Vader first said that Walker "comes off as a very charming person." She found him to be very likeable and intelligent. Vader also offered insights into why Walker gave up fighting for his life. "What are his reasons? He's given us a lot of reasons. It would be easier on his family if he were executed. Now, every time his mother hears that there's a problem at Menard, she worries that he's involved. . . . [E]veryday that she has to think about him there, she's grieving."

Vader continued, "[H]e's been in penal institutions most of his life, so he's seen everything. He's been through everything. He's tired. He's tired of looking at the bars. He's tired of the discipline. . . . He's seen old men dying in prison, and he doesn't want to be one of those old men He's fifty, by the way."

"There's been speculation that since he's a man of faith and a man who cares about people, there's a lot of remorse there that he can't live with, a lot of guilt. He truly believes that he deserves to give his life for what he did. . . . What's inside of him, who knows? He's a person who doesn't like people to get inside of him. He doesn't want you to mess around in his head. . . . He doesn't want to really get into in depth conversations about what his real rea-

104. Vader was interviewed one month before Walker's execution on September 12, 1990.

sons are.” Vader found Walker “a real tough guy to crack,” but a person who could still contribute a lot to people’s lives.

The *Journal* asked if the same redeemability was present throughout the death row population. Vader replied that “there is no one who is completely bad,” that everyone has a good side, and “if I’ve learned anything, . . . it’s that there’s good in everybody, and there are some guys I’m having a lot of trouble finding something good in. But even in the worst, you can find intelligence, you can find their loving nature, you can find a poet, you can find an artist. So I would challenge anybody to find somebody who was completely evil and has no redeeming quality.” Of all the people on death row, she cannot find one without some redeeming quality, even if it is just a superior intellect.

Surprisingly, Vader found that there might be some value to the Coalition in making executions public. She believes that “the idea of public executions goes along with the attitude that it brings out the ugliness in people.” People who are “fence-sitters” on the issue might see one, she stated, and resolve, “I can’t support this.” Vader found an interesting phenomenon in Louisiana, where after six executions in eight weeks, juries came back more often against death. She described the horrors of botched executions and said, “maybe if the public could see this and see what they’re supporting, . . . the average person wouldn’t be able to stomach it. And maybe that’s what’s needed—not under the cover of darkness, not under the cover of prison walls, right out there for people to see. I don’t know.”

V. CONCLUSION

The death penalty raises political, social, and moral issues that range far beyond the legal debate. Inquiry into the death penalty only begins with the court cases. Whether the death penalty is a valid response to serious crimes is a real-world problem.

This project sought out diverse views from people whose lives have been influenced by the death penalty. Everyone interviewed candidly presented their unique experiences with the death penalty process. Each answered differently the question “is it right?” Each gave different reasons. The debate will remain as long as society is prepared to take any person’s life through the process of law.

