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From Lynch Mobs to the Killing State

Race and the Death Penalty in America

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New York University Press
NEW YORK AND LONDON

NEW YORK UNIVERSITY PRESS
New York and London
www.nyupress.org

Library of Congress Cataloging-in-Publication Data
From lynch mobs to the killing state :
race and the death penalty in America /
edited by Charles J. Ogletree, Jr., and Austin Sarat.
p. cm.
(The Charles Hamilton Houston Institute series on race and justice)
Includes bibliographical references and index.
ISBN–13: 978–0–8147–4021–7 (cloth : alk. paper)
ISBN–10: 0–8147–4021–9 (cloth : alk. paper)
ISBN–13: 978–0–8147–4022–4 (pbk. : alk. paper)
ISBN–10: 0–8147–4022–7 (pbk. : alk. paper)
1. Discrimination in capital punishment—United States.
2. African American criminals—Civil rights. 3. Lynching—
United States. 4. Criminal justice, Administration of—United States.
I. Ogletree, Charles J. II. Sarat, Austin. III. Series.
KF9227.C2F76 2006
364.66089'96073—dc22 2005035414

New York University Press books are printed on acid-free paper,
and their binding materials are chosen for strength and durability.

Manufactured in the United States of America

c 10 9 8 7 6 5 4 3 2 1
p 10 9 8 7 6 5 4 3 2 1

To my son Mr. B.,
with the hope that someday he will live in a world
in which justice is truly blind to race.
(AS)

This book is dedicated to my granddaughters, Marquelle and Nia Mae,
two young African-American children who, it is hoped,
will live in a society where the matters raised in this book
are part of a distant past, and the burden of race
in the criminal justice system will be eliminated.
(CO)

Chapter 8

The Rhetoric of Race in the "New Abolitionism"

Austin Sarat

> It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined. "The destinies of the two races in this country are indissolubly linked together," and the way in which we choose those who will die reveals the depth of moral commitment among the living.
>
> —Justice William Brennan[1]

Introduction

More than thirty years ago, the United States Supreme Court's *Furman v. Georgia* decision ended one period of abolitionist activity and launched another.[2] It culminated an era in which many opponents of capital punishment seized on traditional abolitionist arguments to mount legal and political challenges to the death penalty.[3] At the same time, it gave birth to the era of what I have elsewhere called "the new abolitionism."[4] In both gestures, *Furman* put race at the center of the legal and political controversy surrounding capital punishment. Yet today the place of race as a factor in the new abolitionist era is in question.

Traditionally, opposition to the death penalty has been expressed in several guises. Some have opposed the death penalty in the name of the sanctity of life.[5] Even the most heinous criminals, so this argument goes,

are entitled to be treated with dignity.[6] In this view, there is nothing that anyone can do to forfeit his or her "right to have rights."[7] Others have emphasized the moral horror, the "evil," of the state's willfully taking the lives of any of its citizens.[8] Still others believe that death as a punishment is always cruel and, as such, is incompatible with the Eighth Amendment prohibition of cruel and unusual punishment.[9]

Each of these arguments has been associated with, and is an expression of, humanist liberalism or political radicalism. Each represents a frontal assault on the simple and appealing retributivist rationale for capital punishment.[10] Each puts the opponents of the death penalty on the side of society's most despised and notorious criminals; to be against the death penalty one has had to defend the life of Sirhan Sirhan, John Gacey, or Timothy McVeigh, of cop killers and child murderers. Thus it is not surprising that although traditional abolitionist arguments have been raised repeatedly in philosophical commentary, political debate, and legal cases, none has ever carried the day in the debate about capital punishment in the United States.[11]

Nonetheless, in 1972, when the Supreme Court halted executions, many in the anti-capital-punishment movement saw it as the penultimate step in a long struggle to end state killing.[12] They were confident that the *Furman* opinions of Justices Brennan and Marshall, both of whom gave voice to traditional abolitionist sentiments, pointed the way toward an impending, judicially imposed abolition of capital punishment, and they carefully plotted the steps necessary to bring that result to fruition.[13] As Philip Kurland wrote at the time, "[O]ne role of the Constitution is to help the nation to become 'more civilized.' A society with the aspirations that ours so often asserts can't consistently with its goals, coldly and deliberately take the life of any human being no matter how reprehensible his past behavior. . . . [I]n the *Furman v. Georgia* decision the inevitable came to pass."[14] Jack Greenberg of the NAACP Legal Defense Fund expressed a similar understanding of the significance of *Furman* when he said, "[T]here will no longer be any more capital punishment in the United States."[15]

From the perspective of thirty years later, these predictions look quite naive as well as somewhat forlorn. As is now well known, after *Furman* something unexpected happened: Whereas in other Western nations the abolition of the death penalty was followed by a downturn in public interest and support for capital punishment,[16] in *Furman*'s wake a dramatic pro-capital-punishment backlash occurred. "State legislatures . . . quickly

responded to the Court's decision, but instead of conducting a thorough reevaluation of the subject, they enacted whatever statutory revisions they perceived as correcting the constitutional flaws contained in pre-*Furman* capital laws."[17] Public reaction followed a similar pattern, "with a hostile response all over the country."[18] Thus, four years after *Furman*'s limited abolition of capital punishment, the Court, in *Gregg v. Georgia*, found that "it is now evident that a large proportion of American society continues to regard . . . [capital punishment] as an appropriate and necessary criminal sanction."[19] As a result, the Court held that "the punishment of death does not invariably violate the Constitution."[20]

Since the mid-1970s, the political and legal climate for abolition of the death penalty has grown more hostile. Proponents of capital punishment responded to *Furman* with a mean-spirited revisionism.[21] Procedural guarantees once thought minimally necessary to secure fairness and reliability in capital sentencing have been openly and enthusiastically jettisoned. American society has, until very recently, seemed even more impatient with the procedural niceties and delays attendant to what many now see as excessive scrupulousness in the handling of capital cases. What good is having the death penalty, so the refrain goes, if there are so few executions?[22] Blood must be let; lives must be turned into corpses; the charade of repeated appeals prolonging the lives of those on death row must be brought to an end. In response, numerous recent decisions of the Supreme Court have eroded, not enhanced, the procedural integrity of the death sentencing process.[23] Little did abolitionists realize that *Furman* would be the legal and political high-water mark of their efforts and that, more than a quarter century later, they would be still fighting to recapture the terrain that *Furman* opened up.

Even so, *Furman*, particularly the concurring opinions of Justices Douglas and Marshall, pointed the way toward a new strategy for abolitionists, changing the direction of their arguments away from these traditional approaches and toward "the new abolitionism." The plurality in *Furman* was not moved to halt the death penalty in the United States on the basis of a frontal assault on the morality or constitutionality of state killing. Instead, the plurality mobilized arguments grounded in due process and equal protection. They found the death penalty as then administered to be unconstitutional. *Furman* held that the death penalty "may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner."[24]

Following *Furman*, abolitionists today argue against the death penalty not by claiming that it is immoral or cruel but by pointing out that it has not been, and cannot be, administered in a manner that is compatible with our legal system's fundamental commitments to fair and equal treatment.[25] They seek to provide opponents of capital punishment a position of political respectability while simultaneously allowing them to change the subject from the legitimacy of execution to the imperatives of due process. New abolitionist rhetoric enables those who oppose capital punishment to respond to the overwhelming political consensus in favor of death as a punishment;[26] they no longer have to take on that consensus frontally.

New abolitionists say that the most important issue in the debate about capital punishment is one of fairness, not one of sympathy for murderers. They position themselves as defenders of law itself, as legal conservatives. New abolitionists now concede that one can believe in the retribution- or deterrence-based rationalizations for the death penalty and yet still be against the death penalty; one can be as tough on crime as the next person yet still reject capital punishment. All that is required to generate opposition to execution is a commitment to the view that law's violence should be different from violence outside the law, as well as a belief that that difference could/should be rooted in the fairness and rationality of the violence that law does.

The questions I wish to address in this chapter involve the role of race in the public rhetoric of new abolitionism.[27] When and how do new abolitionists talk about race? How important a factor is race in their critique of capital punishment? Are they sensitive to the constitutive linkage of capital punishment and race, the ways that the use of state killing helps to demonize African-Americans and perpetuate a racial caste system?

Starting with *Furman*, I will examine four moments in the rhetorical development of the new abolitionism for what they reveal about the discourse of race in new abolitionist arguments. In so doing, I want to make several claims. First, arguments about race have been significant in the new abolitionism, though they are often subsumed under, or conjoined with, as they were in *Furman*, more general arguments about arbitrariness.[28] Second, even as evidence about racial discrimination in the application of the death penalty piles up,[29] the rhetorical center of abolitionist argument has come to focus less on race and more on claims of actual innocence.[30] The unreliability of the death penalty's administration, rather than its discriminatory effect, is today the most powerful ammunition in

the abolitionist's rhetorical arsenal. Whereas discussion of race divides and polarizes, opposing wrongful conviction universalizes the conversation about capital punishment. One need have no fixed commitments about race to oppose executing the innocent. Thus the place of race in the new abolitionism is, I suggest, no longer certain.

Third, when new abolitionists do talk about race, they do so in a way that takes racial difference as a given, and they assume that the linkage of race and capital punishment is best seen through the lens of discrimination.[31] When race is brought into the discourse of the new abolitionism, it appears in a narrow guise. New abolitionists avoid, or ignore, the role of capital punishment in constituting racial difference itself, in demonizing blacks, and in contributing to the maintenance of a racial caste system.[32] The effect of this discursive tendency is to occlude somewhat the constitutive effects of capital punishment on race in the United States. Yet as Stuart Banner rightly notes,

> When we think about the death penalty, we think, in part, in race-tinged pictures—of black victims lynched by white mobs, of black defendants condemned by white juries, of slave codes and public hangings. For centuries capital punishment was, among other things, a method of racial control, particularly in the South but often in the North as well. These practices have almost entirely disappeared today, but they linger on in our memories, exerting their influence on the instinctive, pre-rational decision-making that drives most of the death penalty debate.[33]

For new abolitionists, the current challenge is twofold: to keep race at the center of their critique of capital punishment and, at the same time, to change the way they talk about the relationship of race and state killing. Criticism of capital punishment should focus on the work it does as a living embodiment of the legacy of lynching[34] and the system of white privilege that it expressed.[35] Abolition politics should, I contend, be linked to a deeper critique of race privilege in the United States.

The Rhetorical Origins of the "New Abolitionism"

If *Furman* was a bridge between traditional and new abolitionism, it was Justices Douglas and Marshall who gave the latter its first public announcement. Douglas used his *Furman* opinion to insist that the issue

that the Court had to confront was not what state statutes authorizing capital punishment prescribed but, rather, "what may be done with the law in its application."[36] At the heart of his argument was a conception of cruelty focused not on the method of execution but, rather, on the manner through which the choice of who received the death penalty was made. He claimed that "the basic theme of equal protection is implicit in 'cruel and unusual' punishments."[37] The "desire for equality," Douglas wrote, "was reflected in the ban against 'cruel and unusual punishments' contained in the Eighth Amendment,"[38] and he noted that "a penalty should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily."[39]

Arbitrary or discriminatory application of the death penalty was, in Douglas's view, made possible by "a system of law and justice that leaves to the uncontrolled discretion of judges and juries the determination whether defendants . . . should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die," he continued, "dependent on the whim of one man or of 12."[40] These laws "enable" the selective application of capital punishment, and it was this selective application that was, for him, most worrisome.[41] Statutes that leave the decision on who lives and who dies to the unfettered discretion of judges or juries are "pregnant with discrimination."[42]

Douglas saw the issue of race and racial discrimination as crucial in determining whether the United States could impose death sentences in a way that did not undermine its basic commitments to fairness and equal treatment. "Prejudice" rather than rational judgment drove the administration of capital punishment.[43] Douglas found ample evidence that the death penalty was being applied "selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board."[44]

Yet Douglas takes as a given the question of who is an outcast or how one becomes part of an outcast group. For him, the evil of capital punishment is found not in its contribution to the creation of outcasts on whom society can vent its pent up fears and rage.[45] The evil of capital punishment is its racial application not its racial impact, its disproportionate use against African-Americans not its disproportionate impact on America's racial culture.

Although much of his *Furman* opinion reiterated traditional abolitionist arguments, Justice Marshall emulated Douglas's new abolitionist stance

as well as his way of conceptualizing the race–capital punishment linkage. Marshall's embrace of the new abolitionism, the abolitionism that pointed to deficiencies in the administration of capital punishment rather than in its philosophical or legal justifications, came as a strategic response to the fact that a majority of the population supported capital punishment. He argued that the public's support for capital punishment was grounded in ignorance or misinformation and that if people knew the facts about the death penalty they would reject it.[46] Crucial in this regard were three facts that Marshall treated as incontestable, namely, that "capital punishment is imposed discriminatorily against certain identifiable classes of people; that there is evidence that innocent people have been executed before their innocence can be proved; and the death penalty wreaks havoc with our entire criminal justice system."[47] These facts, he said, "would serve to convince even the most hesitant citizens to condemn death as a sanction."[48]

In this threefold critique of the death penalty system, Marshall laid the groundwork for the new abolitionism that would unfold with particular intensity in the 1990s. In his version, race played an important part in the story he thought needed to be told. Yet like Douglas's story, the story that Marshall offered about race in the death penalty was a limited one.

On race, Marshall, like Douglas, focused on disparate treatment of minority groups and on law's existing prohibitions against discrimination. He argued that giving "untrammeled" discretion to juries to decide on the death penalty was "an open invitation to discrimination."[49] Looking at the recent history of capital punishment reveals "that Negroes were executed far more often that whites in proportion to their percentage of the population. Studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination."[50]

Turning from race to the potential for executing the innocent, Marshall noted that our system of proof in criminal cases is "not foolproof."[51] No matter "how careful courts are, the possibility of perjured testimony, mistaken or dishonest testimony, and human error remain all too real."[52] Finally, Marshall concluded that the death penalty " 'tends to distort the course of the criminal law.' "[53] It does so by sensationalizing trials and bedeviling "the administration of justice all the way down the line."[54] Putting this together with the facts about racial discrimination and the risk of executing the innocent, the "average citizen would . . . find it shocking to his conscience and sense of justice."[55]

After Furman: Race in New Abolitionist Rhetoric

Since Douglas and Marshall, there has been a steady development of new abolitionist rhetoric, but new abolitionists continue to talk about race in a manner that is quite continuous with the agenda set by Douglas and Marshall. Spurred by repeated statistical demonstrations of racial disparities in capital sentencing, by the DNA revolution and the release of large numbers of inmates from death row, and by vivid examples of prejudice, incompetence, and politicization in the death penalty process, new abolitionism has gained some traction.[56] It offers a vehicle through which citizens might give voice to concerns about capital punishment firmly anchored in the American mainstream. It has achieved some success in reversing the rhetorical field in the debate about capital punishment,[57] even though it has yet to make dramatic progress in ending the death penalty.

Harry Blackmun's Refusal to "Tinker with the Machinery of Death"

In February 1994, twenty years after *Furman*, Justice Harry Blackmun announced, "From this day forward I no longer shall tinker with the machinery of death."[58] The announcement marked a major milestone in the development of new abolitionist rhetoric and quickly became a touchstone to which new abolitionists would make regular recourse. His dramatic proclamation capped his own evolution from longtime supporter of the death penalty to tinkerer with various procedural schemes and devices designed to rationalize death sentences to outright abolitionist.

Twenty-two years before his abolitionist announcement, Blackmun dissented in *Furman v. Georgia*, refusing to join the majority of his colleagues in what he labeled the "legislative" act of finding execution, as then administered, cruel and unusual punishment.[59] Four years after *Furman*, he joined the majority in *Gregg v. Georgia*, deciding to reinstate the death penalty in the United States.[60] However, by the time of his abolitionist conversion, Blackmun had left a trail of judicial opinions moving gradually, but inexorably, away from this early embrace of death as a constitutionally legitimate punishment.[61] As a result, the denunciation of capital punishment that he offered in 1994 was as categorical as it was vivid—"I will no longer tinker with the machinery of death." It was most significant as a moment in the transformation of abolitionist politics, as an example

of abolition as a kind of legal conservatism, and as an indicator of the anxiety that abolitionists seek to cultivate in the face of the continued popularity of the most dramatic instance of law's violence.

Blackmun's abolitionism was firmly rooted in the mainstream legal values of due process and equal protection. He did not reject the death penalty because of its violence, argue against its appropriateness as a response to heinous criminals, or criticize its futility as a tool in the war against crime. Instead, he shifted the rhetorical grounds.

Harkening back to *Furman*, as if rewriting his opinion in that case, he focused on the procedures through which death sentences were decided.[62] "[D]espite the efforts of the States and the courts," Blackmun noted, "to devise legal formulas and procedural rules . . . , the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. . . . Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death . . . can never be achieved without compromising an equally essential component of fundamental fairness—individualized sentencing."[63]

For Blackmun, the post-*Furman* era was an experiment, an effort to devise ways of reconciling capital punishment and constitutional values. As he put it, "For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor."[64] In *Callins* he announced the results of these efforts. "Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies."[65]

Two things stand out in Blackmun's argument. First, he acknowledges law's effort to purge death sentences of any taint of procedural irregularity. As he sees it, after *Furman* the death penalty is constitutional only if it *can be* administered in a manner compatible with the guarantees of due process and equal protection. Here Blackmun moves the debate away from the question of whether capital punishment is cruel or whether it can be reconciled with society's evolving standards of decency.

Second, Blackmun identified a Constitutional conundrum in which consistency and individualization—the twin commands of the Supreme Court's post-*Furman* death penalty jurisprudence—could not be achieved simultaneously. As a result, Blackmun concluded that "the death penalty cannot be administered in accord with our Constitution."[66] Blackmun's language is unequivocal; after more than twenty years of effort, Blackmun said, in essence, "enough is enough."

Like Marshall and Douglas, Blackmun put race front and center in his critique of capital punishment and, like them, he framed the question of race as a question of discrimination, linking racial discrimination to the "arbitrariness inherent in the sentencer's discretion to afford mercy."[67] Two decades after *Furman*, Blackmun observed, echoing the arguments of Douglas and Marshall, "race continues to play a major role in determining who shall live and who shall die."[68] Calling *McCleskey v. Kemp* "a renowned example of racism infecting a capital-sentencing scheme,"[69] Blackmun chided the Supreme Court for turning its back on what he called "staggering evidence of racial prejudice infecting Georgia's capital-sentencing scheme" and suggested that there was no reason to believe that the problem of race prejudice documented in *McCleskey* is "unique to Georgia."[70]

Blackmun argued that under *Gregg*'s guided discretion formula, "the biases and prejudices that infect society . . . influence the determination of who is sentenced to death."[71] He said that "where a morally irrelevant—indeed, a repugnant—consideration plays a major role in the determination of who shall live and who shall die, it suggests that the continued enforcement of the death penalty . . . is deserving of a 'sober second thought.' "[72] The result of such a reconsideration, he suggested, should be recognition of "the fact that the death penalty cannot be administered in accord with our Constitution."[73]

The new abolitionism that Blackmun championed presents itself as a reluctant abolitionism, one rooted in an acknowledgment of the damage that capital punishment does to central legal values and to the legitimacy of the law itself. It finds its home in an embrace, not a critique, of those values. Those who love the law, in Blackmun's view, must hate the death penalty for the damage that it does to the object of that love. Arbitrariness, error, and discrimination could not, in his view, be disentangled. Following Marshall's trilogy, Blackmun concluded that nothing can "save" capital punishment, a conclusion spoken both from within history, as a report of the result of an "experiment," and also from an Archimedean point in which the failure of the death penalty is "self-evident" and permanent.

The American Bar Association: Race in the Call for a Death Penalty Moratorium

Just three years to the month after Blackmun's dissent in *Callins*, the American Bar Association called for a complete moratorium on executions in the United States.[74] Taking us back to *Furman*'s condemnation of the death penalty as "then administered," the A.B.A. proclaimed that the death penalty as "currently administered" is not compatible with central values of our Constitution. Since *Furman*, the effort to produce a constitutionally acceptable death penalty has, in the view of the A.B.A., been to no avail. Thus the American Bar Association

> calls upon each jurisdiction that imposes capital punishment not to carry out the death penalty until the jurisdiction implements policies and procedures . . . intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent people may be executed.[75]

The language of the A.B.A. resolution, unlike Blackmun's language in *Callins*, seems conditional and contingent in its condemnation of death as a punishment. Even as it calls for a cessation of executions, it appears to hold out hope for a process of reform in which the death penalty can be brought within constitutionally acceptable norms. As if to leave little doubt of its intention, the A.B.A. resolution concluded by stating that the Association "takes no position on the death penalty."[76]

Yet the A.B.A. recommendation, whatever its explicit refusal to take a position on the ultimate question of the constitutionality of capital punishment, amounted to a call for the abolition, not merely the cessation, of capital punishment. It does the work of Blackmun's new abolition without his overt and categorical renunciation. If one takes seriously the conclusions of the report accompanying the A.B.A.'s recommendation, then the largest association of lawyers in the United States asked Americans to avert further damage to the law by ending the death penalty. In so doing, the A.B.A. provided a striking response to the continuing anxiety that attends law's embrace of the state's ultimate violence.[77] Just as rushing a fresh contingent of troops into a battle going badly may reinvigorate those grown weary even if ultimately it does not stem the tide, so too the A.B.A.'s action provided symbolic capital for the anti-death-penalty community, legitimation to the new abolitionism, and the basis for a nationwide moratorium movement.[78]

The A.B.A. report provides three reasons for its call for a moratorium on executions, each a crucial component of the new abolitionism.[79] First, is the failure of most states to guarantee competent counsel in capital cases. Because most states have no regular public defender systems, indigent capital defendants frequently are assigned a lawyer with no interest, or experience, in capital litigation.[80] The result often is incompetent defense lawyering, lawyering that has become all the more damaging in light of new rules requiring that defenses cannot be raised on appeal or in habeas proceedings if they are not raised, or if they are waived, at trial.[81] The A.B.A. itself calls for the appointment of "two experienced attorneys at each stage of a capital case."[82] Although, in theory, individual states could provide competent counsel in death cases, and although there is ample evidence to suggest the value of skilled lawyers in preventing the imposition of death sentences,[83] the political climate in the United States as it touches on the crime problem suggests that there is, in fact, little prospect for a widespread embrace of the A.B.A.'s call for competent counsel.

The second basis for the A.B.A.'s recommended moratorium is the erosion in postconviction protections for capital defendants. Even though the A.B.A. says that "the federal courts should consider claims that were not properly raised in state court if the reason for the default was counsel's ignorance or neglect and that a prisoner should be permitted to file a second or successive federal petition if it raises a new claim that undermines confidence in his or her guilt or the appropriateness of the death sentence,"[84] the direction of legal change has been, as I already have noted, in the opposite direction. Today courts in the United States are prepared to accept that some innocent people, or some defendants who do not deserve death, will be executed.[85] As Justice Rehnquist observed in *Herrera v. Collins*, " '[D]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.' "[86]

And for Rehnquist what is true in the general run of criminal cases is also true in death cases. If a few errors are made, a few innocent lives taken, that is simply the price of a system that is able to execute anyone at all. In Rehnquist's view, finality in capital cases is more important than an extended, and extremely frustrating, quest for justice.[87] For him, and oth-

ers like him, the apparent impotence of law, its inability to turn death sentences into executions, is more threatening to its legitimacy than a few erroneous, undeserved deaths at the hands of the state. The A.B.A. rejected this position, insisting that the risk of executing the innocent was a major and crippling defect in the system of state killing.

The third reason for the A.B.A.'s call for a moratorium was found in the "longstanding patterns of racial discrimination . . . in courts around the country,"[88] patterns of discrimination that have repeatedly been called to the attention of the judiciary and cited by anti-death-penalty lawyers as reasons that the death penalty violates the Fourteenth Amendment guarantee of equal protection. The A.B.A. report cited research showing that defendants are more likely to receive a death sentence if their victims are white rather than black,[89] and that in some jurisdictions African-Americans tend to receive the death penalty more than do white defendants.[90] The report called for the development of "effective mechanisms" to eliminate racial prejudice in capital cases, yet did not identify what such mechanisms would be.[91] Indeed, it is not clear that there are any such mechanisms.

The pernicious effects of race in capital sentencing are a function of the pervasiveness of racial prejudice throughout the society combined with the wide degree of discretion necessary to afford individualized justice in capital prosecutions and capital trials. Prosecutors with limited resources may be inclined to allocate resources to cases that attract the greatest public attention, which often means cases in which the victim is white and his/her assailant black. Participants in the legal system—whether white or black—demonize young black males, seeing them as more deserving of death as a punishment because of their perceived dangerousness.[92] These cultural effects may not be remediable. As Blackmun noted in *Callins*, "[W]e may not be capable of devising procedural or substantive rules to prevent the more subtle and often unconscious forms of racism from creeping into the system. . . . [D]iscrimination and arbitrariness could not be purged from the administration of capital punishment without sacrificing the equally essential component of fairness-individualized sentencing."[93]

What does all of this say about the meaning and significance of the A.B.A.'s recommendation? In my view, even though it appeared that the A.B.A. was still willing to tinker with the machinery of death, in fact, the A.B.A.'s indictment of the system of capital sentencing was pervasive and damning. No well-intentioned reformism can save that system. Taking its recommendation and report seriously reminds us that the post-*Furman* effort to rationalize death sentences has utterly failed; it has been replaced by a policy that favors execution while trimming away procedural protection for capital defendants. This situation only exacerbates the incompatibility of capital punishment and legality.

Like Douglas, Marshall, and Blackmun, the A.B.A. embraced the new abolitionism, eschewing a direct address to state violence and relying instead on an indirect, though nonetheless devastating, critique. Echoing Marshall's three-part critique, it spoke openly and directly about racial discrimination, advancing it as a bold fact the presence of which undermined the legitimacy of capital punishment. But, like its new abolitionist predecessors, it did not reverse its angle of vision to consider how the death penalty itself perpetuates prejudice, discrimination, and racial subordination.

George Ryan's Clemency

On January 11, 2003, Governor George Ryan of Illinois emptied that state's death row by exercising his clemency powers under the state constitution, first pardoning four condemned inmates and then commuting 167 condemned inmates' sentences in the broadest attack on the death penalty in decades.[94] Ryan's act was the single sharpest blow to capital punishment since the United States Supreme Court declared it unconstitutional in1972 with the result that approximately six hundred death sentences across the nation were reduced to life in prison. It was also a powerful expression of the new abolitionism, drawing its roots from Blackmun's *Callins* opinion.

Although he offered a complex explanation for his decision,[95] Governor Ryan drew particular attention to systemic problems afflicting the administration of the death penalty, what he called "the sorrowful condition of Illinois' death penalty system."[96] Speaking of the relative rarity of capital punishment, he said,

> There were more than 1000 murders last year in Illinois. There is no doubt that all murders are horrific and cruel. Yet, less than 2 percent of those murder defendants will receive the death penalty. Where is the fairness and equality in that? The death penalty in Illinois is not imposed fairly or uniformly because of the absence of standards for the 102 Illinois State Attorneys, who must decide whether to request the death sentence. Should geography be a factor in determining who gets the death sentence? I don't

> think so but in Illinois it makes a difference. You are 5 times more likely to get a death sentence for first degree murder in the rural area of Illinois than you are in Cook County. Where is the justice and fairness in that, where is the proportionality?[97]

Where is the justice, fairness, and proportionality? Here Ryan firmly locates his critique of capital punishment in the rhetoric of the new abolitionism. "Our capital system," Ryan said, "is haunted by the demon of error, error in determining guilt, and error in determining who among the guilty deserves to die."[98] This is a stunning, though by now familiar, indictment of a system in which decisions about who gets the death penalty and who does not are made without reference to "objective standards." Ryan finds arbitrariness deeply enfolded in the operations of the death penalty system, pointing to the influence of irrelevant factors like geography and the fact that offenders committing the same acts end up with radically different sentences. Yet the issue that drew his most intense attention, and that marks the recent evolution of the new abolitionism, is the issue of actual innocence.[99]

Talking about the post-*Gregg* history of the death penalty in Illinois, Ryan said, "We had the dubious distinction of exonerating more men than we had executed. 13 men found innocent, 12 executed." He continued,

> As I reported yesterday, there is not a doubt in my mind that the number of innocent men freed from our Death Row (now) stands at 17. . . . That is an absolute embarrassment. 17 exonerated death row inmates is nothing short of a catastrophic failure. But the 13, now 17 men, is just the beginning of our sad arithmetic in prosecuting murder cases. During the time we have had capital punishment in Illinois, there were at least 33 other people wrongly convicted on murder charges and exonerated. Since we reinstated the death penalty there are also 93 people where our criminal justice system imposed the most severe sanction and later rescinded the sentence or even released them from custody because they were innocent. How many more cases of wrongful conviction have to occur before we can all agree that the system is broken?

Today it is the problem of wrongful convictions and the specter of executing the innocent that provides new abolitionists with their most potent rhetorical weapon and a springboard to other issues. Whereas Marshall's new abolitionist sentiments grouped three issues together, in Ryan's

rhetoric, wrongful conviction, not race, became the central element. It is from this element that he moved to consider race:

> I started with this issue concerned about innocence, but once I studied, once I pondered what had become of our justice system, I came to care above all about fairness. Fairness is fundamental to the American system of justice and our way of life. . . . If the system was making so many errors in determining whether someone was guilty in the first place, how fairly and accurately was it determining which guilty defendants deserved to live and which deserved to die? What effect was race having? What effect was poverty having?[100]

In fact, Ryan had relatively little to say about race. Unlike Douglas, for whom race was central to the new abolition, or Marshall, Blackmun, and the A.B.A., for whom it was an equal and important part of a complex array of issues speaking to fairness in the administration of capital punishment, for Ryan it was a distinctly subsidiary concern. What he did say linked the concern about racial discrimination in capital punishment to "the great civil rights struggles of our time." And, he noted, "Our own study showed that juries were more likely to sentence to death if the victim were white than if the victim were black—three-and-a-half times more likely to be exact. We are not alone. Just this month Maryland released a study of their death penalty system and racial disparities exist there too."

Ryan's relative disinterest in race is, I believe, symptomatic of the status race in today's new abolitionist arguments. Yet in his rhetorical movement from the individual to the system and in his reference to the effect of race on state killing, Ryan inverts the logic of the Supreme Court's decision in *McCleskey v. Kemp*.[101] Presented with a wholesale challenge to Georgia's death penalty system, the Court refused to inquire into systemic problems that might undermine confidence in decisions at the "heart of the criminal justice system."[102] Unlike the Court, which refused to move from the particular to the general,[103] this is exactly what Ryan's commutation statement insists must be done.

Instead of a system finely geared to assigning punishment on the basis of a careful assessment of the nature of the crime and the blameworthiness of the offender, Ryan, quoting Justice Blackmun, concluded that " 'the death penalty remains fraught with arbitrariness, discrimination, caprice and mistake.' "[104] Staying with Blackmun, Ryan continued,

> In 1994, near the end of his distinguished career on the Supreme Court of the United States, Justice Harry Blackmun wrote an influential dissent in the body of law on capital punishment. 20 years earlier he was part of the court that issued the landmark Furman decision. The Court decided that the death penalty statutes in use throughout the country were fraught with severe flaws that rendered them unconstitutional. Quite frankly, they were the same problems we see here in Illinois. . . . Because the Illinois death penalty system is arbitrary and capricious—and therefore immoral—I no longer shall tinker with the machinery of death.

With these words Ryan revisited and reinvigorated *Furman*'s new abolitionism, only this time with race moved to the margins and wrongful conviction occupying pride of place in his distinctive new abolitionist rhetoric.

Conclusion

Over the course of thirty years, from *Furman* to Governor Ryan's mass commutation, there is both continuity and change in the place of race in new abolitionism's public rhetoric. Continuity comes in the ways race is conceptualized in that discourse. From *Furman* to Ryan, the problem of race in capital punishment is seen as a problem of discrimination, of failed fairness. This way of talking about race, I have argued, neglects the deeper, constitutive linkages of capital punishment and America's racially organized social system.

Change has been registered in the diminished importance of race in new abolitionist rhetoric. In this sense, Ryan's focus on wrongful conviction at the expense of race is, I suggest, not just a function of the particular history of the death penalty in the post-*Gregg* era in Illinois. It is symptomatic of a broader evolution in the new abolitionism. The rhetoric of race divides, creating anxieties, conveying accusations of prejudice that makes many uncomfortable. On the other hand, to say that it wrong to execute the innocent speaks, or so it seems, to a practice so repugnant as to transcend the usual political and ideological divides.

Franklin Zimring provides a useful explanation and overview of this change in new abolitionist rhetoric and what he calls "the explosive prominence of wrongful death sentences attained by the late 1990s . . . [and] the rise to centrality of questions of conviction of innocent defendants and the risk of wrongful execution."[105] In his view, "science, scandal, and politics" came together to produce this result. The science was, of course, DNA matching, which seemed to provide an absolutely reliable way of identifying perpetrators of certain crimes. As Zimring says, "[C]areful DNA work was acquiring a reputation as a gold standard for establishing guilt or innocence."[106] The scandals involved dramatic and well-publicized instances in which innocent persons were convicted and sentenced to death in the face of improper police or prosecutorial conduct, tainted testimony, or unreliable eyewitness identification. The cluster of cases of wrongful conviction suggested "that entire systems were malfunctioning."[107] Together, DNA and scandal provided the material out of which public officials could make political capital.

In this context race cannot compete. Racism and racial discrimination in criminal justice is hardly a new or dramatic story. Retelling it offers no immediate political benefit.[108] Moreover, to talk about racial discrimination in the death penalty is as often as not to talk about unfairness in the way we punish the *guilty* rather than the much more galvanizing cases of mistreatment of the *innocent*.

Today, new abolitionists face a twofold challenge. First, they must resist the temptation to further marginalize the discourse of race in their rhetoric and politics. They must do so because no critique of state killing in the United States is, or can be, adequate if it neglects or marginalizes race. And, at the same time, they must change the way they talk when they do talk about race, using the practices of capital punishment to highlight the role that the state has played, and continues to play, in the constitution of race relations.

Here I think Timothy Kaufman-Osborn gets it right when he says, "[A] critique of capital punishment in terms of the workings of prejudice is at best insufficient and at worst productive of a sort of inattentiveness that may simply reinforce the racial polity."[109] As Kaufman-Osborn puts it,

> Implementation of remedies that draw their sense from the fourteenth amendment and, more specifically, the equal protection clause requires a more complete rationalization of the liberal state, for example, through unambiguous demarcation of the law's method of killing from those employed by those whom the law punishes, as well as through unambiguous segregation of the official sphere from its unofficial counterpart. Such triumphs . . . are ambivalent at best insofar as they produce their own forms of blindness and amnesia, which then occlude more subtle ways through

which the racial polity in the United States is produced and sustained. A more promising route must first acknowledge that the administration of capital punishment in the United States, like the practice of lynching, is one of the state practices by means of which the racial polity is reproduced; second, offer a detailed analysis of the specific ways it contributes to this end, for example, by creating spaces for the underlaw to do its work under the cover of law; and, finally, ask how that work . . . is obscured by its . . . thoroughgoing institutionalization of the normative principles articulated by the liberal social contract.[110]

Whether new abolitionists can meet these challenges and do the work Kaufman-Osborn describes remains to be seen. If they cannot, then it may be time for opponents of capital punishment to seek a newer and different public rhetoric through which to make their case. If they can, then opposition to capital punishment may provide a particularly promising way to talk about some of the most profound and troubling injustices that today mark the American condition.

NOTES

1. *McCleskey v. Kemp Georgia,* 481 U.S. 279, 312.

2. *Furman v. Georgia,* 408 U.S. 405 (1972).

3. See Michael Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment.* New York: Random House, 1973. Also Eric L. Muller, The Legal Defense Fund's Capital Punishment Campaign: The Distorting Influence of Death, 4 *Yale Law & Policy Review* (1985), 158.

4. Austin Sarat, *When the State Kills: Capital Punishment and the American Condition.* Princeton: Princeton University Press, 2001, chapter 9.

5. See Albert Camus and Arthur Koestler, *Reflections on the Guillotine.* Paris: Calman-Levy, 1958.

6. Hugo Adam Bedau, *Death Is Different: Studies in the Morality, Law, and Politics of Capital Punishment.* Boston: Northeastern University Press, 1987.

7. See *Furman,* 257, Justice Brennan concurring.

8. George Kateb, *The Inner Ocean: Individualism and Democratic Culture.* Ithaca: Cornell University Press, 1992, 191–192.

9. Bedau, *Death Is Different.*

10. For one example of the retributivist rationale, see Walter Berns, *For Capital Punishment: Crime and the Morality of the Death Penalty.* New York: Basic Books, 1979.

11. Franklin Zimring and Gordon Hawkins, *Capital Punishment and the American Agenda.* Cambridge: Cambridge University Press, 1986.

12. See, for example, Hugo Adam Bedau, "Challenging the Death Penalty," 9 *Harvard Civil Rights-Civil Liberties Law Review* (1974).

13. Stuart Banner, *The Death Penalty: An American History.* Cambridge: Harvard University Press, 2002, chapter 9.

14. Philip Kurland, "1971 Term: The Year of the Stewart-White Court," 1972 *Supreme Court Review* (1972), 296–297.

15. Quoted in Meltsner, *Cruel and Unusual,* 291.

16. Zimring and Hawkins, *Capital Punishment and the American Agenda,* chapters 1 and 2.

17. *Id.,* 41.

18. *Id.,* 42.

19. See *Gregg v. Georgia* 428 U.S. 153, 179 (1976).

20. *Id.,* 169.

21. See Lewis Powell, "Commentary: Capital Punishment," 102 *Harvard Law Review* (1989), 1035, 1038. For an illuminating discussion of this mean spirited revisionism, see Anthony Amsterdam, "Selling a Quick Fix for Boot Hill: The Myth of Justice Delayed in Death Cases," in *The Killing State: Capital Punishment in Law, Politics, and Culture,* Austin Sarat, ed., New York: Oxford University Press, 1998.

22. For an interesting argument about the execution rate, see Samuel Gross, "The Romance of Revenge: Capital Punishment in America," 13 *Studies in Law, Politics, and Society* (1993), 71.

23. For example, *Teague v. Lane,* 489 U.S. 288 (1989) and *Penry v. Lynaugh,* 492 U.S. 302 (1989).

24. Godfrey v. Georgia, 446 U.S. (1980), 420, 427.

25. See Austin Sarat, "Recapturing the Spirit of *Furman*: The American Bar Association and the New Abolitionist Politics," 61 *Law and Contemporary Problems* (1998), 5.

26. Phoebe Ellsworth and Samuel Gross, "Hardening of Attitudes; Americans' Views on the Death Penalty," 50 *Journal of Social Issues* (1994), 48. Also see Samuel R. Gross, Update: American Public Opinion on the Death Penalty—It's Getting Personal, 83 *Cornell Law. Review* (1998) 1448, and Jeffrey M. Jones, "Support for the Death Penalty Remains High at 74%: Slight Majority Prefers Death Penalty to Life Imprisonment as Punishment for Murder," *The Gallup Organization* (May 19, 2003), http://www.deathpenaltyinfo.org/article.php?scid=23&did=592.

27. According to Stuart Banner, "The emphasis on racial disparity is often more a rhetorical tactic than a substantive criticism. But it is a rhetorical tactic that plays very well, probably better than the straightforward moral argument against capital punishment, because it can draw on our collective memory of three

and a half centuries of American history." See Stuart Banner, "Traces of Slavery: Race and the Death Penalty in Historical Perspective," in Charles J. Ogletree, Jr., and Austin Sarat, eds., *From Lynch Mobs to the Killing State*, chapter 3, 107

28. As Banner notes, "[I]t was race that lurked beneath the Court's 1972 opinion in *Furman v. Georgia*, finding capital punishment unconstitutional." *Id.*, 108.

29. For example, David C. Baldus, George Woodworth, Catherine M. Grosso, and Aaron M. Christ, "Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973–1999)," 81 *Nebraska Law Review* (2002), 486; Glenn Pierce and Michael Radelet, "Race, Region, and Death Sentencing in Illinois, 1988–1997," 81 *Oregon Law Review* (2002), 39; and Raymond Paternoster et al., "An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction" (January 2003), http://www.urhome.umd.edu/newsdesk/pdf/finalrep.pdf.

30. See Jim Dwyer, Peter Neufeld, and Barry Scheck, *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted*. New York: Doubleday, 2000.

31. For an important critique of the antidiscrimination paradigm in the context of race, see Kimberlé Crenshaw, "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law," 101 *Harvard Law Review* (1988), 1331. Also Kimberlé Crenshaw, "Colorblind Dreams and Racial Nightmares: Reconfiguring Racism in the Post–Civil Rights Era," in Toni Morrison and Claudia Lacour, eds., *Birth of a Nationhood: Gaze, Script, and Spectacle in the O. J. Simpson Case*. New York: Random House, 1997.

32. For a analysis of the role of imprisonment in maintaining the racial caste system, see Loic Wacquant, "Deadly Symbiosis: Rethinking Race and Imprisonment in Twenty-First-Century America," *Boston Review* (April/May 2002) http://bostonreview.net/BR27.2/wacquant.html.

33. Banner, "Traces of Slavery," 97.

34. "The death penalty," declares Stephen Bright, director of the Southern Center for Human Rights, "is a direct descendant of lynching and other forms of racial violence and racial oppression in America." See Stephen Bright, "Discrimination, Death, and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty," *Santa Clara Law Review* 35 (1995), 439. For a different view of the relationship of lynching and capital punishment, see Timothy Kaufman-Osborn, "Capital Punishment as Legal Lynching," in Charles J. Ogletree, Jr., and Austin Sarat, eds., *From Lynch Mobs to the Killing State*. As Kaufman-Osborn argues, "[C]onflation of these two practices draws attention away from the ways that capital punishment, as now conducted in the United States, occludes what lynching accomplished all too well, i.e., its production of the color-coded bodies that are a crucial ingredient of the reproduction of racial subordination. The analogy to lynching, in other words, deflects inquiry from the means by which the contemporary practice of capital punishment contributes to much the same end, but without provoking the outrage once incited by its extra-legal counterpart" (p. 23).

35. On white privilege, see Cheryl Harris, "Whiteness as Property," 106 *Harvard Law Review* (1993), 1707. As Benjamin Steiner says, "In other words, possessing white skin color (and thus disproportionately possessing middle or upper class status) has become a ubiquitous part of public understandings of and expectations for what, for example, it means to be hardworking, law-abiding, and or trustworthy. In short, as markers of white suburban privilege, one's skin color and material or social capital (e.g., cars, clothing, education) are in effect, prerequisite for dominant group membership." See Benjamin Steiner, "Death in 'Whiteface': Modern Race Minstrels, Death Penalty Judgments, and the Culture of American Apartheid,' in Charles J. Ogletree, Jr., and Austin Sarat, eds., *From Lynch Mobs to the Killing State*, 152.

36. See *Furman v. Georgia*, 242.

37. *Id.*, 249.

38. *Id.*, 255.

39. *Id.*, 249.

40. *Id.*, 253.

41. *Id.*, 255.

42. *Id.*, 259.

43. *Furman*, 249.

44. *Id.*, 245.

45. See William Connolly, "The Desire to Punish," in *The Ethos of Pluralization*. Minneapolis: University of Minnesota Press, 1995. See also George H. Mead, "The Psychology of Punitive Justice," 23 *American Journal of Sociology* (1917), 577, and Joseph E. Kennedy, "Monstrous Offenders and the Search for Solidarity Through Modern Punishment," 51 *Hastings Law Journal* (2000), 829.

46. *Id.*, 363. For a discussion and test of Marshall's hypothesis, see Austin Sarat and Neil Vidmar, "The Public and the Death Penalty: Testing the Marshall Hypothesis," 1976 *Wisconsin Law Review* (1976), 145.

47. *Id.*, 364.

48. *Furman*, 363–364.

49. *Id.*, 365.

50. *Id.*, 364.

51. *Id.*, 366.

52. *Id.*, 367.

53. *Id.*, 368.

54. *Id.*

55. *Id.*, 369.

56. Alan W. Clarke et al., "Executing the Innocent: The Next Step in the Marshall Hypothesis," 26 *N.Y.U. Review of Law & Social Change* (2001), 309.

57. As Wayne Logan notes, "For opponents of capital punishment, these would appear promising times. Not since 1972, when the Supreme Court invalidated the death penalty as then administered, has there been such palpable concern over its use." See Wayne Logan, "Casting New Light on an Old Subject: Death Penalty Abolitionism for a New Millennium," 100 *Michigan Law Review* (2002), 1336.

58. See *Callins v. Collins,* 510 US 1141 (1994).

59. *Furman,* Justice Blackmun dissenting.

60. *Gregg v. Georgia,* 428 U.S. 153 (1976).

61. See Jeffrey King, "Now Turn to the Left: The Changing Ideology of Justice Harry A. Blackmun," 33 *Houston Law Review* (1996), 297, 296. Also Randall Coyne, "Marking the Progress of a Humane Justice: Harry Blackmun's Death Penalty Epiphany," 43 *University of Kansas Law Review* (1995), 367.

62. See Carol Steiker and Jordan Steiker, "Sober Second Thoughts: Reflections on Two decades of Constitutional Regulation of Capital Punishment," 109 *Harvard Law Review* (1995), 355.

63. *Callins,* 1141.

64. *Id.,* 1130.

65. *Id.*

66. *Id.,* 1143.

67. *Id.,* 1153.

68. *Id.*

69. *Id.,* 1153.

70. *Id.,* 1154.

71. *Id.,* 1153.

72. *Id.,* 1156.

73. *Id.*

74. Recommendation 107, A.B.A. House of Delegates, February 3, 1997. The argument in this section is taken from Sarat, "Recapturing the Spirit of *Furman.*"

75. Recommendation 107.

76. *Id.*

77. This anxiety arises because that violence, as both a linguistic and physical phenomenon, as fact and metaphor, is integral to the constitution of the modern state. See Austin Sarat and Thomas R. Kearns, "A Journey Through Forgetting: Toward a Jurisprudence of Violence," in *The Fate of Law,* Austin Sarat and Thomas R. Kearns, eds. Ann Arbor: University of Michigan Press, 1991. That state is built on representations of aggression, force, and disruption lurking just beyond its boundaries. In large measure, the state seeks to authorize and legitimate its bloodletting as a lesser or necessary evil and as a response to our inability to live a truly free life without external discipline and restraint. Yet the proximity of the modern state to, and its dependence on, violence raises a nagging question and a persistent doubt about whether it can ever be more than violence or whether the violence law condones, is truly different from, and superior to, what lurks beyond its boundaries. Jacques Derrida, "The Force of Law: The 'Mystical Foundation of Authority,'" 11 *Cardozo Law Review* (1990), 921.

78. Jeffrey L. Kirchmeier, "Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States," 73 *University of Colorado Law Review* (2002), 1.

79. The report and recommendation also called for a permanent halt to the execution of juveniles and the mentally retarded.

80. Stephen Bright, "Counsel for the Poor: The Death Sentence Not for the Worst Crime, But for the Worst Lawyer," 103 *Yale Law Journal* (1994), 1835.

81. Charlotte Holdman, "Is There Any *Habeas* Left in this *Corpus*?" 27 *Loyola University of Chicago Law Journal* (1996), 524.

82. *Report of the A.B.A. Submitted with Recommendations* 107, 5.

83. See Austin Sarat, "Speaking of Death: Narratives of Violence in Capital Trials," 27 *Law & Society Review* (1993), 19.

84. *Report,* 11.

85. See Michael Radelet et al., *In Spite of Innocence: Erroneous Convictions in Capital Cases.* Boston: Northeastern University Press, 1992.

86. See *Herrera v. Collins,* 113 S. Ct. 860 (1993).

87. *Id.,* 869.

88. *Report,* 13.

89. David Baldus, George Woodworth, and Charles Pulaski, *Equal Justice and the Death Penalty: A Legal and Empirical Analysis.* Boston: Northeastern University Press, 1990.

90. See Samuel Gross and Robert Mauro, *Death and Discrimination: Racial Disparities in Capital Sentences.* Boston: Northeastern University Press, 1989.

91. *Report,* 14.

92. Judith Butler, "Endangered/ Endangering: Schematic Racism and White Paranoia," in *Reading Rodney King/Reading Urban Uprising,* Robert Gooding-Williams, ed. New York: Routledge, 1993. Also Jerome G. Miller, *Search and Destroy: African-American Males in the Criminal Justice System.* Cambridge: Cambridge University Press, 1997.

93. *Callins,* 3549.

94. Ryan commuted 164 death sentences to life without parole. The previous day he pardoned four death row inmates. Another three inmates had their sentences shortened to forty-year terms.

95. See Austin Sarat and Nasser Hussain, "On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life," 56 *Stanford Law Review* (2004), 1307.

96. See Governor George Ryan, "I Must Act," January 11, 2003, 2. Speech at the Northwestern University College of Law. Found at http://www.deathpenaltyinfo.org/article.php?scid=13&did=551.

97. Ryan, "I Must Act," 6, 10.