

THE COLLATERAL ANTI-THERAPEUTIC EFFECTS OF THE DEATH PENALTY

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I. INTRODUCTION

Therapeutic jurisprudence does not require that all state-imposed punishments for criminal behavior be free from anti-therapeutic effects.¹ Such a position would be untenable since there are anti-therapeutic consequences to all state-imposed punishments, and the therapeutic effect of a punishment for a community may significantly outweigh the anti-therapeutic effect on an individual.²

However, therapeutic jurisprudence does bend toward well-being.³ Thus, its adherents should accept the anti-therapeutic consequences of a punishment as justified only if the legitimate state and community interests cannot be accomplished in a less anti-therapeutic manner.⁴ Applying this premise to the ultimate punishment, the death penalty would need to have significant societal value not attainable with the next most severe punishment, life without the possibility of parole. One can easily make the case that the death penalty fails this test. However, I will not make that case here, because in the end, it adds little to existing arguments on the necessity of the death penalty.⁵

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¹ See Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184, 185 (1997) (explaining the focus of therapeutic jurisprudence to be determining whether the anti-therapeutic effects from inevitable social forces can be lessened).

² Jeffrey L. Kirchmeier, *A Tear in the Eye of the Law: Mitigating Factors and the Progression Toward a Disease Theory of Criminal Justice*, 83 OR. L. REV. 631, 638-39 (2004).

³ See, e.g., Winick, *supra* note 1, at 188-89 (“Therapeutic jurisprudence suggests that, *other things being equal*, positive therapeutic effects are desirable and should generally be a proper aim of law, and that anti-therapeutic effects are undesirable and should be avoided or minimized.”) (footnote omitted).

⁴ See *id.* at 188; see also Kirchmeier, *supra* note 2, at 638-39.

⁵ Hugo Adam Bedau makes a similar case based on fundamental democratic values. Coined the “minimal invasion argument,” Bedau argues that “[g]iven a compelling

Rather, this Essay is a study of the human costs of the death penalty as measured by the anti-therapeutic impact of the punishment on those *other* than the condemned prisoner—costs the public debate over the death penalty rarely acknowledges.⁶ The number of people collaterally affected is not small. From 1977 to 2005, 6940 persons—some of them actually innocent—arrived on America’s death rows.⁷ Of this number, states executed 1004 men and women while appellate court decisions, commutations, and natural death removed 3062 individuals from death row.⁸ From 2006 to October 24, 2009, states executed an additional 173 persons.⁹ As of January 1, 2009, there are 3297 prisoners on America’s death rows.¹⁰

In my experience, death penalty cases necessarily involve:

state interest in some goal or purpose, the government in a constitutional democracy built on the principle of equal freedom and human rights for all must use the least restrictive means sufficient to achieve that goal or purpose. More expansively, the principle . . . holds that if individual privacy, liberty, and autonomy (or other fundamental values) are to be invaded and deliberately violated, it must be because the end to be achieved is of undeniable importance to society, and no less severe interference will suffice.” Hugo Adam Bedau, *An Abolitionist’s Survey of the Death Penalty in America Today*, in *DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? THE EXPERTS ON BOTH SIDES MAKE THEIR BEST CASE* 15, 32 (Hugo Adam Bedau & Paul G. Cassell eds., 2004). Therefore, argues Bedau, because long-term imprisonment is less severe and is sufficient to achieve valid social goals, the death penalty should be abolished. *Id.* at 32-34.

⁶ As Bruce Winick, one of the founding fathers of therapeutic jurisprudence, wrote in 1997, “[a] sensitive policy analysis of law should seek to measure and weigh all of the various costs and benefits of legal rules. One important but previously neglected aspect of this policy calculus is the therapeutic impact of law. Therapeutic jurisprudence accordingly calls for a systematic study of law’s therapeutic or anti-therapeutic effects. These are not the only effects worth studying, but they should not be ignored.” Winick, *supra* note 1, at 188.

⁷ TRACY L. SNELL, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BULLETIN, CAPITAL PUNISHMENT, 2005, at 8 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp05.pdf>.

⁸ *Id.*

⁹ Death Penalty Information Center, Executions by Year, <http://www.deathpenaltyinfo.org/executions-year> (last visited May 6, 2010).

¹⁰ Death Penalty Information Center, Death Row Inmates by State and Size of Death Row by Year, <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year> (last visited May 6, 2010).

- lawyers to defend the prisoner¹¹—at trial, on appeal, in postconviction litigation, and in clemency proceedings—and who get to know the client, his life, and his family and friends intimately;
- prosecutors who argue at every stage of a case that the inmate is among the worst of the worst and deserves to die—even if the prosecutor believes otherwise;¹²
- experts who are willing to examine the inmate or the gruesome evidence, thus assisting the death penalty machinery whether or not they support it;¹³
- jurors who are able to vote to execute another human being, without any appreciation of the personal strain they may suffer;¹⁴
- trial judges and court staff who oversee lengthy capital trials full of emotion. Also, state and federal appellate judges and their clerks who must spend a disproportionate amount of time pouring through murder trial transcripts, exhibits, and briefs;¹⁵
- a process that drags family members through repetitive court proceedings for years, forcing them to hear the facts of the murder of their loved one over and over again, as well as arguments as to why the court should overturn the death sentence and start over—and sometimes the process does start over;¹⁶

¹¹ See, e.g., *Faretta v. California*, 422 U.S. 806, 807 (1975).

¹² See Peter A. Joy, *Prosecution Clinics: Dealing with Professional Role*, 74 MISS. L.J. 955, 956-57 (2005) (noting the often unchecked power and influence held by prosecutors).

¹³ See Dan S. Levey, *Balancing the Scales of Justice*, 89 JUDICATURE 289, 291 (2006) (explaining the number of experts used in death penalty cases often exceeds that of other trials).

¹⁴ See *id.* at 290.

¹⁵ See Michael Hintze, *Tinkering with the Machinery of Death Capital Punishment's Toll on the American Judiciary*, 89 JUDICATURE 254, 254 (2006).

¹⁶ See Levey, *supra* note 13, at 290.

- decisions made by the family and friends of the accused as to how much involvement they can stand;
- prison employees who guard the death row inmate, escort him to appointments, provide him with psychiatric and medical care for years, and then, execute him;¹⁷
- a governor (or the president) who must make a final life or death call after hearing the emotional pleas for life and death;¹⁸
- ministers who respond to the inmate's spiritual needs throughout the ups and downs of capital litigation and relationship crises, one of whom must help the inmate die with some degree of peace;¹⁹
- witnesses to the execution—those whose job requires them to watch, such as law enforcement and journalists—and those who feel they must witness, such as defense counsel, the family or friends of the condemned inmate and, in some cases, the victim's family hoping to find the illusive sense of closure;²⁰ and
- finally, the inevitable scores who stand outside the prison gates and elsewhere in protest of the execution and others who just mourn the death of another prisoner killed by their government.²¹

¹⁷ *Id.*

¹⁸ See generally Cathleen Burnett, *The Failed Failsafe: The Politics of Executive Clemency*, 8 TEX. J. C.L. & C.R. 191, 191 (2003).

¹⁹ See generally Felicia R. Lee, *His Life With the Deaths that the State Carried Out*, N.Y. TIMES, May 27, 2009, at E1.

²⁰ See Op-Ed., *Witnesses To an Execution*, N.Y. TIMES, Apr. 13, 2001, at A16, available at <http://www.nytimes.com/2001/04/13/opinion/witnesses-to-an-execution.html>.

²¹ See Jennifer McMenamin, *Death Penalty Opponents Rally Demonstrators Assemble in Annapolis a Week Before Scheduled Execution of Evans*, BALT. SUN, Jan. 29, 2006, at 3B, available at http://articles.baltimoresun.com/2006-01-29/news/0601290090_1_death-row-row-inmates-death-penalty-opponents.

Given this expansive web of those involved in death cases, the almost seven thousand individuals who landed on America's death rows since 1977²² translates into tens of thousands of persons who potentially suffered collateral trauma from an execution.

The harm from this trauma is significant—not only in quantity, but in quality. According to the American Psychiatric Association, when a person is exposed to “an extreme traumatic stressor involving direct personal experience of an event that involves threatened death . . . ; or witness[es] an event that involves death . . . ; or learn[s] about [the] . . . violent death . . . [of] a family member or other close associate[],” that person may experience post-traumatic stress symptoms.²³ The list of these symptoms is long and includes “recollections, dreams, flashbacks or reexperiences of [the] traumatic event” and “feelings of hopelessness, anger, grief, isolation, and confusion.”²⁴ For a person who witnesses or learns of the death of a loved one, the diagnosis is secondary traumatic stress, which is the companion diagnosis to post-traumatic stress disorder (PTSD).²⁵

This Essay examines evidence of the psychological devastation caused by the death penalty on those who the lawmakers do not intend to be the target of death penalty laws. Legislators are responsible for assessing the value of the death penalty and to that end, the extent of the harm that capital punishment causes. Their ultimate question is: Given the trauma caused by the death penalty, when considered with the other policy implications of the death penalty, should the government retain the death penalty? Or if abolishing the death penalty is not an option, to what extent is the government responsible for addressing the collateral trauma suffered as a result of capital punishment?

For thirteen years I represented men and women on North Carolina's death row in postconviction proceedings.²⁶ During this time, the

²² SNELL, *supra* note 7, at 8.

²³ REBECCA NAPIER & SHARMIN DEMOSS, *THE CAREGIVER'S GUIDE TO SECONDARY TRAUMATIC STRESS: A MANUAL FOR THOSE WHO WORK WITH SURVIVORS OF TORTURE AND SEVERE TRAUMA* 16 (2004).

²⁴ *Id.* at 17, 19.

²⁵ *Id.* at 16-18.

²⁶ Postconviction proceedings of death row prisoners occur at all levels of state and federal court, as well as before the Governor.

State of North Carolina executed thirty-eight prisoners.²⁷ I assisted with almost all of these prisoners' cases to some degree. I directly represented five men who the State ultimately executed: Zane, Willie, Ernest, Timmy, and Steve. I was present at four of their executions. I knew all of these men for at least four years; I knew one for ten.

Lawyers are storytellers. Death row lawyers are keepers of stories waiting to be told—both to forward justice and to counter the anti-therapeutic effects of the death system on themselves.²⁸ This Essay focuses on four affected groups: death row lawyers,²⁹ family members of the condemned and executed,³⁰ murder victim family members,³¹ and the execution team.³² My hope is that the few stories offered here push open a window through which empathy and understanding can enter, realizing that the opening is just a crack—these stories comprise only the tip of the iceberg of the collateral damage of the death penalty.

II. DEATH ROW LAWYERS

I have found no study of the trauma suffered by lawyers whose clients are executed, despite the fact I know it exists, having witnessed (and experienced) this trauma. Given the thirty years of executions in this country,³³ the fact that there is no study of this experience for law-

²⁷ In total, forty-two men and one woman have been executed by the State of North Carolina. N.C. Dep't of Corr., Executions Carried Out Under Current Death Penalty Statute, <http://www.doc.state.nc.us/DOP/deathpenalty/executed.htm> (last visited May 6, 2010). The first of these individuals that I got to know was David Lawson, executed June 15, 1994.

²⁸ Storytelling is a therapeutic tool for aiding recovery from trauma. *See, e.g.*, Nancy L. Cook, *The Sky in a Box: Reflections on Prisons, Preachers, Storytelling and Salvation*, 3 FLA. COASTAL L.J. 135, 135 (2002) (Cook borrows "from the growing field of Therapeutic Jurisprudence, [to] propose the utilization of creative writing strategies as a means of better attaining [salvation and redemption within the American penal system]").

²⁹ *See infra* Part II.

³⁰ *See infra* Part III.

³¹ *See infra* Part IV.

³² *See infra* Part V.

³³ In 1976 the Supreme Court reinstated capital punishment following the revision of states' administration laws and procedures. SNELL, *supra* note 7, at 3; John W. Poulos, *Liability Rules, Sentencing Factors, and the Sixth Amendment Right To a Jury Trial: A Preliminary Inquiry*, 44 U. MIAMI L. REV. 643, 645 (1990) (describing the

yers is curious. Perhaps it is because no one cares about what happens to lawyers, particularly criminal defense lawyers. More likely, it is because lawyers—especially criminal defense lawyers—avoid talking about feelings. To be reminded of a traumatic event is only to relive the event, and reliving a traumatic event can be debilitating.³⁴ To keep moving forward, death row lawyers push feelings down.

Attorneys who work with domestic violence victims have been studied. One study found that “work with traumatized clients, especially when attorneys grapple with high caseloads and a frustrating system, creates a significant risk of secondary trauma and burnout.”³⁵ This information is a starting place, but reflects only part of the experience of death row lawyers.

Death row lawyers read about and listen to, usually repeatedly, the stories of trauma experienced by their client and others in the family. These stories involve violent incidents experienced by their client and committed by their client.³⁶ Interviews of the client’s family mem-

Supreme Court’s invalidation of every state’s capital punishment statute through the decision of *Furman v. Georgia*, and the revitalization of the death penalty through the creation of new statutes in 1976).

³⁴ NAPIER & DEMOSS, *supra* note 23, at 17, 19.

³⁵ See Andrew P. Levin, *Secondary Trauma and Burnout in Attorneys: Effects of Work with Clients Who are Victims of Domestic Violence and Abuse*, A.B.A. ENEWSLETTER (ABA/Commission on Domestic Violence, Washington, D.C.), Winter 2008, <http://www.abanet.org/domviol/enewsletter/pdfs/LevinWinter2008.pdf>.

³⁶ Actually, not every inmate sentenced to death has committed or participated in a violent act. As of November 3, 2009, one hundred and thirty-nine death row inmates have been exonerated. Death Penalty Information Center, Innocence and the Death Penalty, <http://www.deathpenaltyinfo.org/innocence-and-death-penalty#inn-st> (last visited May 6, 2010). Attorneys who believe in the innocence of their death row client suffer under a particularly difficult strain. Some are never able to prove their client’s innocence. With the clock ticking, only a few will find relief from a judge or governor. In North Carolina, at least three men with strong claims of innocence—Anson Maynard, Charles Alston, and Charles Walker—came within hours of execution before intervention. Maynard and Alston are serving sentences of life without the possibility of parole; Walker is serving a thirty year sentence. N.C. Dep’t of Corr., Persons Removed from Death Row, <http://www.deathpenaltyinfo.org/innocence-and-death-penalty#inn-st> (last visited May 6, 2010).

bers can be traumatic for the person being interviewed and vicariously for the lawyer.³⁷

A complicating factor is that the death row lawyer uniquely experiences the vicarious trauma within a system that is bent on killing her client—unless she and her team can stop the death train coming down the tracks. The experience is a recurring cycle of hope and despair, hope and despair, hope and despair. Sometimes, a loss may seem to be the lawyer's fault, compounding the despair with guilt—or cocounsel may appear to be at fault, adding strain to the work relationship. And winning legal battles does not necessarily translate into less trauma. The death row lawyer may have a relationship with her client that lasts years, even decades, not knowing when or if the client will be executed. During these years the lawyer has the responsibility—a task that is hopefully shared—of keeping her client as sane and connected as possible, while doing the same for herself.

When the execution date is set, life becomes surreal for the death row lawyer. The focus is both on saving her client's life and on keeping her client's (and his family and friend's) hopes up. But the lawyer does not want her client's hopes too high because he must prepare for death. There is no manual for a lawyer on how to fight for your client's life while helping him die.

Michael Mello, a former Florida death row lawyer, has written the most extensively about death work.³⁸ He has written about his clients, the ups and downs of the work, and about quitting—or as he put it, becoming “a conscientious objector in the death wars.”³⁹ Mello's public resignation stunned the death penalty community. As one journalist wrote, “After nearly 15 years inside the machine, [Mello] tossed a wrench into the works and came out screaming as the gears groaned and

³⁷ See Elizabeth Beck et al., *Seeking Sanctuary: Interviews With Family Members of Capital Defendants*, 88 CORNELL L. REV. 382, 397 (2003).

³⁸ Mello died in November 2008 at the age of fifty-one while writing.

³⁹ Michael Mello, *Dead Reckoning: The Duty of Scholarship and the Ethics of Conscientious Abstention from Death Row Representation*, 35 CRIM. L. BULL. 478, 478 (1999).

seized. Plenty of people who watched this spectacle concluded that Mello is reckless and maybe nuts.”⁴⁰

Shortly after throwing in the wrench, Mello wrote a ninety-five page, rambling letter to his fiancé about himself.⁴¹ The South Texas Law Review later published the letter—perhaps the only time a law review board provided an explanation in the text immediately following an article as to why they published it. The law review board wrote:

The opinions expressed in this article are those of the author, Michael Mello, and are not necessarily the opinions of South Texas Law Review or of South Texas College of Law. Although this article occasionally may verge on the inflammatory, and its descriptions are often graphic, South Texas Law Review believes that it offers important insights on the stresses of post-conviction capital defense practice, and their effect on the life and psyche of a lawyer.⁴²

Indeed, Mello’s personal and revealing letter provides a glimpse of the effect of the trauma experienced by death row lawyers.

‘Why do you represent the condemned? Isn’t it depressing? What about the victims?’ Particularly when I was a public defender I was asked such questions so often, by so many people with different degrees of seriousness, that I have tried to find some pat answers, or at least one pat answer suitable for wine glass repartee. These attempts have been unsuccessful. This is not because I am ashamed of what I do, or because I am unwilling to debate the merits of the death penalty, or because I fail to appreciate the impact of the violent crimes committed by most of my clients; casual chatter about death work is

⁴⁰ David Von Drehle, *Foreword* to MICHAEL A. MELLO, *DEAD WRONG: A DEATH ROW LAWYER SPEAKS OUT AGAINST CAPITAL PUNISHMENT*, at x (1999). Drehle added “his problem (if that’s what it is) is that he sees the whole thing too clearly.” *Id.*

⁴¹ Michael Mello, *A Letter on a Lawyer’s Life of Death*, 38 S. TEX. L. REV. 121, 124, 129 (1997).

⁴² *Id.* at 224 n.d.

awkward because I have been unable to find a way to express succinctly, in a sound byte, the intensity, the breathtaking emotional highs and sometimes heart-breaking, savage lows, of working for people who are litigating for life itself; the virtually existential angst that comes with burying our dead—people we represent

. . . .

As I said, I am not complaining. Working in Florida was a blast Black humor is a big part of life in any environment where adrenalin freaks and work addicts run for months on end on their own chemistry, and are swollen each day with a kind of hubris that comes when you have the (illusion of?) power of life or death. Part of the reason our office often reverberated with laughter was just the old saw: laughing to keep from crying, or from going out to buy a second-amendment-protected Uzi.

. . . .

The more I think about this, digging through the archeological levels of memory . . . , the more I appreciate Tim O'Brien's meditations on the Vietnam war As O'Brien wrote of soldiers at war, we used a hard vocabulary to contain and mask a terrible softness. Fried, we'd say. Burned, zapped, greased, offed. It wasn't cruelty, just stage presence. We were actors. When someone died—a client or a colleague—it wasn't quite dying, because in a curious way it seemed scripted, and because we all had our lines mostly memorized, irony mixed with tragedy, and because we called it by other names, as if to encyst and destroy the reality of death itself. Death work brought out the best, and the worst, in us The memory of my days in Florida is like a nail in the eye. The pain goes away but the wound stays forever. The scar

never quite heals over, and whenever it seems like it is going to, you pick at it.⁴³

Mello later wrote the book *Dead Wrong: A Death Row Lawyer Speaks Out Against Capital Punishment*. In his “Sort of Introduction” he explained,

This is a book I never wanted to write, and I am squeamish about the thought that strangers will read it. This book is angry and bitter in places, rife with exhausted sadness. Sadness for our dead. Sadness for those killed by my clients. Sadness for the waste beyond measure. Sadness, most of all, for the manifold ways capital punishment has deformed our law and the people who practice it, and sadness that our criminal justice system and the law itself, so noble in theory, are so shabby and seedy in practice. Because I’m a lawyer, and because this is the aspect of capital punishment I have experienced most intimately, all I can see, at the end of the day, is how the death penalty is eating away at the moral foundations of law with the lethal tenacity of a cancer.⁴⁴

III. FAMILY MEMBERS OF THE CONDEMNED AND EXECUTED

Until recently, there was little research on the psychological impact of a death sentence on a capital defendant’s family.⁴⁵ If discovered at all, the stories were left to languish in the attorney or court files. Now, thanks in large part to the work of social work professor Elizabeth Beck,⁴⁶ we have social science data on this important group.

Beck and her associates express well what most have never considered: “the cumulative effect of the[] harms [caused by a death sentence] produces trauma responses within families of capital offenders

⁴³ *Id.* at 158, 161, 164-65. The most enlightening passages on Mello’s mental state at the time are his descriptive paragraphs that run-on for as many as nine pages.

⁴⁴ MELLO, *supra* note 40, at 12.

⁴⁵ Beck et al., *supra* note 37, at 383-84.

⁴⁶ Associate Professor and Director of the Center for Collaborative Social Work at Georgia State University.

that are similar to the experiences of murder victims' families."⁴⁷ The physical and psychological responses are similar. The differences arise from the layers of trauma laid upon the capital offender family from

the underlying offense, notification that the State is seeking the death penalty, institutional failures [to help their loved one], their community, the media, the court, defense attorneys, visitation with their incarcerated family member, notice of execution, and the execution itself.⁴⁸

One could call the effect murder victim trauma plus.

A psychological assessment of twelve parents and a sibling of death row inmates revealed that eleven had been diagnosed with major depression and that all "had symptoms consistent with PTSD."⁴⁹ Another study analyzed the experiences of twenty-six death row family members and found these families suffer a unique and destructive grieving process, marked by both nonfinite loss and disenfranchised grief.⁵⁰

"Nonfinite loss refers to those situations in which losses are slowly manifested over time."⁵¹ The conditions under which most people experience this type of grief are when the loss is continuous, when developmental expectations cannot be fulfilled, and when one's hopes and dreams are lost.⁵² For death row families, the grieving is continuous, marked by reoccurring feelings of extreme loss at each stage of the case: arrest, conviction, sentencing, multiple failed appeals, setting of execution dates, and the execution itself.⁵³ These episodes can also be triggered by the actions of others, such as court personnel, inept defense attorneys, and the media.⁵⁴ The triggering events usually extend over

⁴⁷ Beck et al., *supra* note 37, at 386.

⁴⁸ *Id.* at 398.

⁴⁹ *Id.* at 406.

⁵⁰ Sandra J. Jones & Elizabeth Beck, *Disenfranchised Grief and Nonfinite Loss as Experienced by the Families of Death Row Inmates*, 54 OMEGA J. DEATH & DYING 281, 282 (2007).

⁵¹ *Id.* at 284.

⁵² *Id.* This type of grieving is experienced, for example, by parents of the mentally challenged. *Id.*

⁵³ *Id.* at 286-87.

⁵⁴ Beck et al., *supra* note 37, at 397.

many years.⁵⁵ Family members grieve the loss of what their loved one brought to the family and would have brought over time.⁵⁶ They put aside their hopes and dreams and may become disillusioned with their country, their god, and other family members who react differently.⁵⁷ They may even grieve “the changes within their own identity.”⁵⁸

“Disenfranchised grief occurs when a loss cannot be openly acknowledged, publicly mourned, or socially supported.”⁵⁹ It is an understatement that society stigmatizes those who have a family member on death row.⁶⁰ Family members may try to keep the fact a secret, but with media coverage it is often impossible.⁶¹ In small communities, the reaction is often negative and hard to avoid.⁶² At critical times in the defendant’s case, hostility may become overt. Death row family members often become socially isolated.⁶³ Normal grieving is not an option.⁶⁴

To illustrate this unique trauma, I share the story of the family of one of my clients, Ernest Basden.⁶⁵ Ernest was convicted of shooting and killing a local insurance salesman, Billy White, in rural Eastern

⁵⁵ As an example, in my clients’ cases, the mean time spent on death row was 8.5 years. The shortest was seven years, served by Daniel Brian Lee who died of natural causes at the age of thirty; the longest was twenty-six years, served by Michael Pinch who finally received judicial relief in 2005 and a sentence of life plus fifty years in 2006.

⁵⁶ See Jones & Beck, *supra* note 50, at 291.

⁵⁷ See *id.* at 290.

⁵⁸ *Id.* at 291.

⁵⁹ *Id.* at 285.

⁶⁰ *Id.* at 291.

⁶¹ See *id.*

⁶² *Id.* at 291-92.

⁶³ Rachel King, *No Due Process: How the Death Penalty Violates the Constitutional Rights of the Family Members of Death Row Prisoners*, 16 B.U. PUB. INT. L.J. 195, 209 (2007) [hereinafter King, *No Due Process*]; see also Rachel King, *The Impact of Capital Punishment on Families of Defendants and Murder Victims’ Family Members*, 89 JUDICATURE 292 (2006) [hereinafter King, *Impact of Capital Punishment*].

⁶⁴ See Jones & Beck, *supra* note 50, at 292 (“As a result, the families of these men on death row are essentially disenfranchised from their grief.”).

⁶⁵ Additional stories supporting the Beck studies can be found in: RACHEL KING, CAPITAL CONSEQUENCES: FAMILIES OF THE CONDEMNED TELL THEIR STORIES (2005); ELIZABETH BECK ET AL., IN THE SHADOW OF DEATH: RESTORATIVE JUSTICE AND DEATH ROW FAMILIES (2007).

North Carolina.⁶⁶ Billy's wife, Sylvia White, wanted her husband dead.⁶⁷ Ernest's nephew, Lynwood Taylor, agreed to get the job done.⁶⁸ Ernest, who was chronically depressed and a heavy user of alcohol and drugs, lived with Lynwood.⁶⁹ Lynwood and Sylvia devised a plot, but Lynwood, a small-town drug dealer and police informant, wanted someone else to pull the trigger.⁷⁰ He plied Ernest with drugs and alcohol, and after initially resisting, Ernest was convinced to help him kill Billy.⁷¹

Under false pretenses, Lynwood arranged for Billy to meet him at a deserted plot of land late at night.⁷² Lynwood and Ernest drove to the designated spot and waited.⁷³ When Billy arrived, Lynwood introduced himself and then excused himself.⁷⁴ Ernest got out of the car, picked up a shotgun, and shot Billy twice.⁷⁵

Ernest had nine brothers and sisters. Several of the siblings assisted Ernest's trial attorneys with his defense. The attorneys relied heavily on one sister, Rose Clark, to do the leg work for the case. She worked tirelessly, securing medical, psychological, and other records and documents to help in Ernest's defense. She located defense witnesses, secured their attendance in court, and gathered letters of good character for her brother. But her work seemed all in vain. The attorneys did not use any of the records she obtained nor did they prep the witnesses she secured.⁷⁶ Rose felt completely overwhelmed and frus-

⁶⁶ *State v. Basden*, 451 S.E.2d 238, 241 (N.C. 1994).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 242.

⁷⁰ *Basden v. Lee*, 290 F.3d 602, 606, 609 (4th Cir. 2002).

⁷¹ *See State v. Basden*, 451 S.E.2d at 241, 246, 248 (recounting the facts adduced at trial and analyzing defendant's arguments of incapacity and domination).

⁷² *Id.* at 241.

⁷³ *Id.*

⁷⁴ *Id.* at 241-42.

⁷⁵ For evidence presented at trial, see *id.* Ernest never received an evidentiary hearing on the information discovered after trial. *See Basden v. Lee*, 290 F.3d at 614 n.5 (noting the district court did not err in failing to grant a hearing).

⁷⁶ Ernest's lead attorney, who was court-appointed, became increasingly ill with cancer during trial preparation. He had to remove himself from the case and soon thereafter died. The family liked the attorney, but he held on to the case too long, leaving just a short period of time for the new legal team to finish the work that

trated. She was only further disappointed when she got on the stand and the court did not allow her to tell the jury much of what she intended to say.

Ernest was sentenced to death on Good Friday, March 15, 1993.⁷⁷ Rose and her siblings were devastated. Given more lenient treatment by the local district attorney's office, Sylvia White and Lynwood Taylor avoided the death penalty.⁷⁸

Once Ernest's body and mind cleared of alcohol and drugs, he was a new man. On death row, Ernest became a liturgist for the Christian worship services.⁷⁹ During his ten years on the row, many of Ernest's family and friends wrote and visited.⁸⁰ He developed a large network of friends, sending out seventy-five cards his last Christmas.

Someone from his family visited him every week, only missing five or six visits over ten years, despite the two-hour drive and the harsh visiting conditions, with concrete and Plexiglas separating the visitor

needed to be done. *See* Ernest West Basden, Executed December 6, 2002 by Lethal Injection in North Carolina, <http://www.clarkprosecutor.org/html/death/US/basden812.htm> (last visited May 6, 2010) [hereinafter Clarkprosecutor.org] (compiling several articles and other public documents surrounding the case).

⁷⁷ *State v. Basden*, 451 S.E.2d at 241.

⁷⁸ As the Fourth Circuit Court of Appeals pointed out: "Moreover, notwithstanding (or indeed perhaps because of) the greater cunning of Taylor and Sylvia White, they have been treated much more leniently than Basden. The State did not bring Taylor to trial until four years after Billy White's murder, and then permitted Taylor to plead guilty to first-degree murder; he received a sentence of life imprisonment. Similarly, the State did not seek to try Sylvia White for almost four years after the murder of her husband and then allowed her to plead guilty to conspiracy to commit murder and second-degree murder; she too received a sentence of life imprisonment. Prior to that conviction, the State tried and convicted Sylvia White for the 1973 unrelated murder of her stepson (Billy White's son and namesake) whom she suffocated with a plastic bag when he was four years old; the State did not seek the death penalty for that murder and White received a life sentence for that crime too." *Basden v. Lee*, 290 F.3d at 612 n.3 (citing *State v. White*, 457 S.E.2d 841 (N.C. 1995)).

⁷⁹ Clarkprosecutor.org, *supra* note 76.

⁸⁰ Patrick O'Neill, *Two Families Plead for Relatives' Lives*, INDEP. WKLY. (Durham, N.C.), Dec. 4, 2002, <http://www.indyweek.com/gyrobase/PrintFriendly?oid=oid%3A18696>.

from the prisoner in a small closet-sized room.⁸¹ One brother, Guy Basden, described the visits as a “‘labor of love [Ernest’s] very presence penetrates the space between us’ during the noncontact visits. ‘It penetrates so it’s like this wall is not there.’”⁸²

Rose, her husband Denny, and their daughter Sonya made the trip religiously.⁸³ Sonya, who began visiting her uncle when she was ten-years-old, described her relationship with her uncle to a local reporter prior to his execution: “‘He’s the best uncle in the world,’ Sonya said in Kinston, recalling the way they tease each other because she is a Duke sports fan and Ernest roots for UNC. ‘I believe in him so much. He’s just a good man.’”⁸⁴

At both the appellate and postconviction levels, Rose was a worker bee, making sure the lawyers had all the information they needed.⁸⁵ For all involved, the postconviction process was a roller-coaster ride of hope and despair, hope and despair, hope and despair.⁸⁶ After ten years on the row, Ernest exhausted his appeals with no relief.⁸⁷ His execution date was set for December 6, 2002.⁸⁸ Clemency became his last hope.⁸⁹

The legal team believed that Ernest had a very strong case for clemency.⁹⁰ A large group of Ernest’s family members, friends, and

⁸¹ *See id.* (“Six Basden siblings have spent the last decade taking turns driving the approximately 75-mile trip down U.S. 70 so Ernest can get a weekly visit.”).

⁸² *Id.*

⁸³ *See id.* (describing briefly the efforts of Rose and her family over the decade up to Ernest’s execution).

⁸⁴ *Id.*

⁸⁵ *See id.* (“Rose . . . spearhead[ed] the family’s support for Ernest.”).

⁸⁶ *See id.* (“Rose Clark says the decade-long effort to support Ernest has been ‘consuming—it never leaves you. You’re always aware of it.’”).

⁸⁷ *See State v. Basden*, 451 S.E.2d 238, 241 (N.C. 1994) (appealing the sentence of death entered on March 15, 1993); *see also Basden v. Lee*, 537 U.S. 980 (2002) (denying certiorari).

⁸⁸ Press Release, N.C. Dep’t of Corr., Execution Date Set for Ernest Basden (Nov. 6, 2002), http://www.doc.state.nc.us/NEWS/2002/releases/basden_date.htm.

⁸⁹ Clarkprosecutor.org, *supra* note 76.

⁹⁰ *See id.* (“Given Basden’s relative culpability, his remorse, his lack of a violent past and other mitigating factors, basic fairness demands that his sentence be commuted to life. Otherwise, the state [sic] of North Carolina risks further erosion of public

others met with the legal team at the Broken Eagle Eatery in Kinston, North Carolina, to discuss the clemency campaign.⁹¹ Rose could tell the story of the injustices in Ernest's case like no one else. Though she had no public speaking experience, Rose agreed to embark on a speaking tour of Eastern North Carolina.⁹² She never declined an opportunity to talk about Ernest's case.

At each stop, Rose would rise, introduce herself, and begin the heart-wrenching story of her brother's case, pushing through the tears streaming down her face. Her audience was always spellbound. Sonya, then eighteen, spoke at each stop of the tour about her friendship with her uncle.⁹³ The letters poured into the governor's office in support of clemency for Ernest Basden.

At the clemency meeting with Governor Michael Easley, Rose did not hesitate. She stepped up to the governor and told him why her brother deserved clemency. After the meeting, at a press conference on the steps of the North Carolina Capitol Building, Rose described how she pleaded with the governor for mercy.⁹⁴ Ernest's brother, Leonard Basden, added, "I begged him for mercy The judicial system in this just hasn't been fair. The man without money is the one on death row."⁹⁵

The family and lawyers finally got their contact visit with Ernest, beginning about sixteen hours⁹⁶ prior to the appointed time of execution, 2:00 a.m. In the dark of the night, the phone call from the governor's counsel finally came in: there would be no clemency.⁹⁷ The shock was palpable.

confidence in its ability to apply the death penalty with any semblance of consistency.").

⁹¹ O'Neill, *supra* note 80.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See Clarkprosecutor.org, *supra* note 76.

⁹⁵ *Id.* (internal quotes omitted).

⁹⁶ Unfortunately, for the family and lawyers, these hours were during a major ice storm—a story for another day. See *id.* ("Basden . . . spent his last hours Thursday visiting with relatives and his attorneys in the prison's visiting area Outside, about a dozen protesters braved the cold weather for a vigil outside Central Prison.").

⁹⁷ See *id.*

Soon thereafter, Rose sat just a few feet from her brother. Between them was a wall with a large viewing window with Ernest on a gurney pushed up against one side of the wall and Rose sitting with her knees touching the other side. On either side of her were two of Ernest's lawyers.⁹⁸

After the execution, Rose looked like she was about to explode. Surprisingly, she wanted to speak to the media stationed in the guardhouse. Her pain was obvious as she approached the podium at the 2:30 a.m. press conference. The State of North Carolina had not hurt her brother, she said; he was in heaven. Pointing to her red, puffy face, she added, "this is who the State hurt; they have created more victims." Rose also told the crowd not to forget her face, promising they would see more of it.

One year later at an event in Ernest's memory, Rose spoke, choking back tears:

"As I reflect back, I wonder who do I need to forgive[.]" She listed judges, prosecutors and investigating agents who she said didn't handle her brother's case properly and went after him because he didn't have money or influence Then she described the people [Ernest] helped in prison. "The death penalty reaches so much farther than we can comprehend," she said, adding that it has created a system which leaves people with resentment and hate. "I miss Ernest terribly. His life had worth."⁹⁹

⁹⁸ These attorneys were John Loftin and Matthew Martin. Ernest is the one client for whom I did not witness his execution. Rather, I waited with the family, minus Rose, downstairs in the prison's mailroom. Ernest is the only client, however, who I buried.

⁹⁹ Virginia Bridges, *Death Penalty Foes Bring Grieving Families Together; Executed Killers' Relatives Share Emotions with Kin of Murder Victims*, HERALD-SUN (Durham, N.C.), Dec. 7, 2003, at C1.

IV. FAMILY MEMBERS OF MURDER VICTIMS

A common misconception is that the death penalty exists to bring justice and closure to the families of murder victims.¹⁰⁰ From a public policy perspective, the death penalty is a punishment exercised as an expression of a community's moral outrage at the commission of a crime and the person who committed it.¹⁰¹ A retributive and revenge-driven punishment, capital punishment proceedings focus on the offender not the murder victim.¹⁰²

Family members of murder victims are negatively affected by the death penalty.¹⁰³ The impact varies, depending in part on which group the victim's family falls into: (1) those in cases in which prosecutors did not seek the death penalty (by far the majority of murder cases), (2) those that support the death penalty and the prosecutor who

¹⁰⁰ See M.D. COMM'N ON CAPITAL PUNISHMENT, FINAL REPORT TO THE GENERAL ASSEMBLY 55 (2008) [hereinafter FINAL REPORT], available at <http://www.scribd.com/doc/8948491/Maryland-Death-Penalty-Commission-Final-Report> (explaining that many victims' family members oppose the death penalty).

¹⁰¹ See Sandra R. Acosta, *Imposing the Death Penalty Upon Drug Kingpins*, 27 HARV. J. ON LEGIS. 596, 603 (1990) ("Justice requires that a criminal receive a punishment commensurate with his crime, one that he 'deserves' - the concept of retribution.").

¹⁰² "Kathy Garcia, who served as a victim's advocate on the New Jersey Death Penalty Commission, testified that the survivors' post-traumatic stress disorder symptoms are often the result of their exposure to the criminal justice system, which focuses all of its attention on the accused, and leaves survivors feeling helpless and shut out of the process. Moreover, this helplessness is compounded as the family is forced to hear details of the murder in the courtroom time and again, essentially forcing them to relive the trauma." FINAL REPORT, *supra* note 100, at 56. This focus on the offender stands in contrast to restorative justice systems, which make the victim's needs paramount. For more information, see the website of the Capital Restorative Justice Project, an organization founded in memory of Ernest Basden. Capital Restorative Justice Project, <http://www.capitalrestorativejustice.org> (last visited May 6, 2010).

¹⁰³ The Maryland Commission found "that regardless of whether or not a survivor supports an execution, years of court dates, reversals, appeals and exposure to the killer is harmful to the family members of murder victims." FINAL REPORT, *supra* note 100, at 59; see also, Beck et al., *supra* note 37, at 393 (adding that victim family members who do not support the death penalty are especially traumatized).

secured a death sentence in their loved one's case, and (3) those that oppose the death penalty.¹⁰⁴

With the death penalty deemed the ultimate punishment, value judgments are placed on the worth of the victims—particularly from the perspective of the first group, family members in non-capital murder cases.¹⁰⁵ Was their loved one not worthy of the ultimate punishment? Or rich enough? Or white enough?¹⁰⁶

Murder victims' family members who support the death penalty and obtain it may not appreciate the trauma the sentence will bring to them.¹⁰⁷ The death penalty process, accompanied with lengthy but necessary appeals, forces family members of the victim to repeatedly relive their painful loss.¹⁰⁸ Murder victims' family members who oppose the death penalty feel the criminal justice system pervasively discriminates against them.¹⁰⁹ They feel they have less of a voice and receive fewer services.¹¹⁰

Sometimes the family members of the murder victim and the family members of the offender on death row are one in the same. Five

¹⁰⁴ See FINAL REPORT, *supra* note 100, at 55-59 (explaining the impact on the various groups).

¹⁰⁵ Rachel King spent years collecting the stories of murder victim family members who oppose capital punishment. See King, *Impact of Capital Punishment*, *supra* note 63. These families reported the corrosive effect of the death penalty to include the creation of "a hierarchy of victims where some lives are valued more than others[,] resulting in "a class of 'good' victims and 'bad' victims[,] often causing family members to turn against each other. *Id.* at 292. These families' stories can also be found in RACHEL KING, DON'T KILL IN OUR NAMES: FAMILIES OF MURDER VICTIMS SPEAK OUT AGAINST THE DEATH PENALTY (2003) and MURDER VICTIMS' FAMILIES FOR RECONCILIATION, NOT IN OUR NAME: MURDER VICTIMS' FAMILIES SPEAK OUT AGAINST THE DEATH PENALTY (Susannah Sheffer et al. eds., 4th ed. 2003).

¹⁰⁶ Since 1976 the racial breakdown of the victims of the offenders executed is: 79% white, 14% black, 5% Hispanic, and 2% other. Death Penalty Information Center, Race of Death Row Inmates Executed Since 1976, <http://www.deathpenaltyinfo.org/race-death-row-inmates-executed-1976> (last visited May 6, 2010).

¹⁰⁷ See FINAL REPORT, *supra* note 100, at 59.

¹⁰⁸ See *id.* at 56-57.

¹⁰⁹ See generally ROBERT RENNY CUSHING & SUSANNAH SHEFFER, DIGNITY DENIED: THE EXPERIENCE OF MURDER VICTIMS' FAMILY MEMBERS WHO OPPOSE THE DEATH PENALTY 8-10 (2002).

¹¹⁰ See *id.*

of my cases involved this complicated family relationship. I share the story of one of the families, the family of Steve McHone.

In 1991, in the town made famous by *Mayberry R.F.D.*, Steve McHone was sentenced to death for the murders of his mother and stepfather.¹¹¹ At the time of the killing, Steve had just turned twenty and lived at home.¹¹² An alcoholic since the age of twelve,¹¹³ Steve participated in Alcoholics Anonymous (AA).¹¹⁴ He was sober for several months, but recently had relapsed.¹¹⁵

On the night of June 2, 1990, Steve came home from a party highly intoxicated.¹¹⁶ He had fought with his girlfriend and a boy at the party and was agitated. When he arrived home, he argued with his parents and threatened suicide.¹¹⁷ Steve's mother said he was in the worst shape she had ever seen him.¹¹⁸ Steve went to his room,¹¹⁹ drank more, and called his AA sponsor crying and pleading for help.¹²⁰ The sponsor did nothing.¹²¹

Steve's mother was concerned about Steve's condition and knew there were guns around the house.¹²² Steve did not remember how he came to be in the backyard with a gun, nor how his mother ended up in the backyard. But in the darkness of the night, he shot her.¹²³ Steve's stepfather, Wesley Adams, Sr. (Wes, Sr.), ran out of the house. Beating Steve, he dragged him upstairs as Steve resisted.¹²⁴ Steve found another gun, and during the struggle he shot his stepfather before being subdued

¹¹¹ *State v. McHone*, 435 S.E.2d 296, 298 (N.C. 1993).

¹¹² *Id.* at 298, 309.

¹¹³ *Id.* at 301.

¹¹⁴ See Affidavit of Tina Adams Walker at para. 13 (Oct. 25, 2005) (on file with author).

¹¹⁵ See *State v. McHone*, 435 S.E.2d at 307.

¹¹⁶ *Id.* at 300.

¹¹⁷ *Id.* at 298.

¹¹⁸ Affidavit of Randall Adams at para. 11 (Nov. 6, 2005), http://extras.journalnow.com/clemency/RandyAdams_affidavit.pdf.

¹¹⁹ *Id.*

¹²⁰ Affidavit of Tina Adams Walker, *supra* note 114.

¹²¹ *Id.*

¹²² *State v. McHone*, 435 S.E.2d at 298-99.

¹²³ *Id.* at 299.

¹²⁴ *Id.*

by his brother, Wesley Adams, Jr. (Wes, Jr.).¹²⁵ Steve begged his brother to kill him, but he refused.¹²⁶

Steve's four siblings were understandably devastated by their parents' deaths. They were angry at Steve, and as his sister put it, "sometimes felt hatred for him."¹²⁷ The only person who stood by him at trial was his alcoholic father.¹²⁸ The jury sentenced Steve to death based on a very incomplete record of what happened that fatal night.¹²⁹

Throughout his thirteen years on death row, Steve struggled with major depression, anxiety attacks, and numerous health problems. He was haunted by what he had done to his family, particularly his mother. He missed her greatly. He missed his family greatly. He hoped that at least one of his sisters would reconnect with him. The family, however, made clear they did not want anything to do with him.

When Steve's execution date was set for November 11, 2005,¹³⁰ a defense-based victim outreach specialist contacted Cheryl McMillian, Steve's closest sister. She learned that Cheryl had forgiven Steve. Cheryl then contacted her brother, Randy Adams, and her sister, Tina Walker. They had not spoken in a very long time and never spoke of Steve. Cheryl discovered that Randy and Tina each had independently forgiven Steve.¹³¹

¹²⁵ *Id.*

¹²⁶ See *McHone v. Polk*, 392 F.3d 691, 714 (4th Cir. 2004). Many of these facts were not presented at trial. The prosecutor withheld significant evidence going to lack of culpability that defense counsel (one of whom was later disbarred) did not discover.

¹²⁷ Affidavit of Cheryl Renee Adams McMillian at para. 5 (Oct. 27, 2005) (on file with author).

¹²⁸ See *State v. McHone*, 435 S.E.2d at 301. Steve's father could never get off the bottle, and died several years before Steve faced execution.

¹²⁹ *Id.* at 298.

¹³⁰ Press Release, N.C. Dep't of Corr., Execution Date Set for Steven Van McHone (Oct. 13, 2005), http://www.doc.state.nc.us/NEWS/2005/releases/mchone_dateset.htm.

¹³¹ Wes, Jr., the only other sibling had not forgiven Steve, however, and was openly in support of the execution. David Ingram, *3 Siblings Ask Easley for Clemency for McHone; A Half Brother Says That He Deserves To Die for Killings*, WINSTON-SALEM J. (Winston-Salem, N.C.), Nov. 2, 2005, at B1, available at <http://www.ncmoratorium.org/News.aspx?li=2329>.

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One source of the sibling's ability to forgive was their mother's mother. She urged them to forgive Steve and to love him as their mother did. As Randy explained,

I was raised by my maternal grandmother [She] told me and my siblings the day after Steve killed our parents that we needed to forgive him and find again our love for him. She made Steve a part of all our family Christmas gatherings for all the years of her life. She was an immensely strong woman. She taught me that all things happen for a reason.¹³²

For Tina, her strength came from an additional source. She had watched the movie *Dead Man Walking* and then attended a presentation by Helen Prejean, the nun whose ministry the movie was based on.¹³³ She even spoke personally with Sister Prejean who inspired her to forgive her brother.¹³⁴

At first, the siblings were not sure whether they wanted to see Steve. After all, reconciliation does not necessarily follow forgiveness. However, they soon decided they would visit. The reunion at the maximum security prison in Raleigh—just a few weeks before the scheduled execution date—went very well. They laughed and cried. Then and there, all three siblings decided they did not want Steve executed. They agreed to ask the governor for clemency.

The governor, however, refused to meet with these victims' family members. Instead, the siblings met with the governor's counsel and gave him their statements to give to the governor. Tina wrote, *inter alia*,

My dad and step-mom devoted themselves the best they knew how to helping Steve while they were alive. Their deaths will have been in vain if Steve doesn't get to receive the support and love his family has for him. Please do not let their lives end in vain.

¹³² Affidavit of Randall Adams, *supra* note 118, at paras. 13-14.

¹³³ Affidavit of Tina Adams Walker, *supra* note 114, at paras. 5-6.

¹³⁴ *Id.* at para. 6.

My parents are not here today to have their voices heard. I know what they would be saying if they were here. They would implore you to allow their son to live. They would trust that he has not finished his work on this earth. They would sacrifice their lives so their children might live.¹³⁵

These siblings not only wanted Steve to live, they felt they *needed* him to live for their own wholeness. Tina felt they needed “more time as a family to come together once more.”¹³⁶ Cheryl said “[Steve] shares the memories that I share that no one else on this earth has.”¹³⁷ She pleaded with the governor, “Show Stevie mercy. He deserves mercy. He has had too little of it in his lifetime. Show me your mercy too. I have had little in my lifetime as well. Let us have one another to the date of the natural end of our lives.”¹³⁸ Randy added,

Executing Steve will not bring back our mom and dad. It does not let me and my daughter have the relationship that I want us both to have with Steve for the rest of the days of our natural lives. It does not honor my wants. It does not honor my grandmother’s wants. It does not honor what our mom or dad would have wanted. They and I want forgiveness from you for Steve.¹³⁹

Randy, Cheryl, and Tina spent Steve’s last day visiting him in a room with no walls separating them. Photos were snapped of smiling faces. Their time together was rich. Then came the word from the governor’s office: clemency denied.¹⁴⁰ They were devastated.

¹³⁵ *Id.* at paras. 16-17 (referred to in Ingram, *supra* note 131).

¹³⁶ *Id.* at para. 16.

¹³⁷ Affidavit of Cheryl Renee Adams McMillian, *supra* note 127, at para. 10.

¹³⁸ *Id.* at para. 16.

¹³⁹ Affidavit of Randal Adams, *supra* note 118, at para. 17.

¹⁴⁰ North Carolina Department of Correction, Steve McHone-Chronology of Events, http://www.doc.state.nc.us/DOP/deathpenalty/mchone_chronology.htm (last visited May 6, 2010).

Steve's brother, Wes, Jr., was the only sibling to witness Steve's execution.¹⁴¹ From the gurney in the execution chamber, Steve mouthed to this brother, with tears in his eyes, "I'm so sorry."

Less than a month later, Tina protested on the eve of another man's execution.¹⁴² Driven by her pain, she became an outspoken opponent of the death penalty. In her words,

My father and step mother were killed by my step brother, Steve. I oppose the death penalty as it only gave me another death to grieve. It did not change my situation, it only reminded me how painful and upsetting a death can be when it is in the forefront of your life. When Steve was executed, it provided no peace for me; it only brought back a deep sadness that I had to overcome once more. It did not bring back my father and step mother. It did not provide closure. It only stopped the healing process while opening more emotional wounds. The death penalty did not help me at all, it only made matters worse.¹⁴³

V. THE EXECUTION TEAM

Few things run with greater precision in America than an execution. Trained execution teams in which every member has a job—some members with a designated limb to tie down—carry out executions.¹⁴⁴

¹⁴¹ Press Release, N.C. Dep't of Corr., Witnesses Named for Steven Van McHone Execution (Nov. 9, 2005), http://www.doc.state.nc.us/NEWS/2005/releases/mchone_witness.htm.

¹⁴² Scott Sexton, *Execution of Half Brother Leads Woman into a Protest*, WINSTON-SALEM J. (Winston-Salem, N.C.), Dec. 4, 2005, at B1, available at <http://www.capitalrestorativejustice.org/fls/Executionofhalfbrother.pdf>. Tina told a reporter that she wanted her voice to be heard. She felt "shortchanged because Gov. Mike Easley would not allow her to attend [her brother's] clemency hearing. 'I don't know what I would have said . . . I would have talked of love and forgiveness. I might have questioned his faith. He took my platform that day. He won't any more.'" *Id.*

¹⁴³ MURDER VICTIMS' FAMILIES FOR RECONCILIATION, NOT IN OUR NAME NORTH CAROLINA 4, <http://www.mvfr.org/wp-content/uploads/nion-nc-2007.pdf> (last visited May 6, 2010).

¹⁴⁴ See Sara Rimer, *In the Busiest Death Chamber, Duty Carries Its Own Burdens*, N.Y. TIMES, Dec. 17, 2000, at 1, <http://www.deathpenaltyinfo.org/node/581>.

Executions are practiced. Every step is set to occur at a designated time—down to the minute—and generally every step does. It is the routine that helps the team members stay focused and cope with what they are doing.¹⁴⁵

Most death penalty states guard their procedures with the strictest secrecy.¹⁴⁶ Among the execution team members that have revealed information about their work, there is a consistent report of feeling detached from the process and feeling numb afterwards.¹⁴⁷ A psychiatrist who studied the phenomenon states the detachment is necessary because “[i]t violates a profound human reluctance to kill, and [the executioners] must overcome it”¹⁴⁸

When executions resumed in 1977,¹⁴⁹ death penalty states had to pull their electric chairs out of storage and clear the cobwebs out of their gas chambers.¹⁵⁰ No one knew how to operate the devices or get replacement parts.¹⁵¹ As a consequence, over the next decade (and in a few states the next two decades) there were some horrifying execution incidents.¹⁵² The short version is that with electric chairs, some inmates’ flesh literally fried, some burst into flames.¹⁵³

¹⁴⁵ *Id.*

¹⁴⁶ John W. Whitehead, *Killing in Secret: Death by Lethal Injection*, HUFFINGTON POST, April 29, 2008, http://www.huffingtonpost.com/john-w-whitehead/killing-in-secret-death-b_b_99142.html.

¹⁴⁷ See Rimer, *supra* note 144.

¹⁴⁸ *Id.* (quoting Robert Jay Lifton, co-author of ROBERT JAY LIFTON & GREG MITCHELL, *WHO OWNS DEATH? CAPITAL PUNISHMENT, THE AMERICAN CONSCIENCE, AND THE END OF EXECUTIONS* (2002)).

¹⁴⁹ See *supra* note 33 for more on the United States Supreme Court’s role in stopping and restarting executions.

¹⁵⁰ IVAN SOLOTAROFF, *THE LAST FACE YOU’LL EVER SEE: THE PRIVATE LIFE OF THE AMERICAN DEATH PENALTY* 6 (2001).

¹⁵¹ *Id.*

¹⁵² See, e.g., Michael L. Radelet, *Some Examples of Post-Furman Botched Executions*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions> (last visited May 6, 2010).

¹⁵³ See SOLOTAROFF, *supra* note 150, at 7.

Asphyxiation by lethal gas was just as, if not more, visually disturbing.¹⁵⁴ A report in 1992, of Arizona's first execution in thirty years stated:

A Tucson television reporter sobbed uncontrollably during [Donald Eugene] Harding's ten-minute execution; two other reporters "were rendered walking 'vegetables' for days"; the attorney general vomited halfway through; a prison staff member who ran the execution likened it to watching a man suffer a series of heart attacks; and the prison's pro-penalty warden said he'd resign if the state told him to run another asphyxiation.¹⁵⁵

Mississippi is one of the states that has been the most open about its execution process,¹⁵⁶ and it is from that state we have learned the most about the trauma suffered by executioners. The Mississippi State Penitentiary in Parchman houses the male death row and contains the death house.¹⁵⁷ This arrangement means the men who conduct the execution usually know the inmate they are executing. It took only one execution to mark the beginning of the end of the gas chamber in Mississippi.

In 1983 Jimmy Lee Gray was the first inmate scheduled for execution since reinstatement.¹⁵⁸ He was chosen, at least in part, because he was a child killer and not well liked by the prison staff.¹⁵⁹ Such an execution should have garnered little public concern.

Gray's execution, however, was botched. He fought death for at least eleven minutes, banging his head repeatedly against a steel pole as witnesses watched helplessly.¹⁶⁰ The scene was gruesome. One reporter wrote afterwards "that the execution gave him flashbacks to the

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *See, e.g., id.* at 26.

¹⁵⁷ Mississippi Department of Corrections, Division of Institutions State Prisons, http://www.mdoc.state.ms.us/division_of_institutions%20State%20Prisons.htm (last visited May 6, 2010).

¹⁵⁸ SOLOTAROFF, *supra* note 150, at 75-77.

¹⁵⁹ *Id.* at 74-76.

¹⁶⁰ *Id.* at 89-90.

Mekong Delta [in Vietnam], that he couldn't separate those two deltas in his mind now, but that what he witnessed last night was worse in its way than anything he'd seen in Vietnam."¹⁶¹

Donald Hocutt was the lieutenant in charge of the execution team; Donald Cabana, a warden from Missouri, was a witness.¹⁶² A year later, Cabana became the superintendent at the Mississippi State Penitentiary.¹⁶³ He had worked in corrections since the late 1960s and had a reputation for being a law and order man.¹⁶⁴ No one else was scheduled for execution until 1987. That unlucky soul was Edward Earl Johnson.¹⁶⁵ The prisoners on the row unanimously believed Johnson was innocent—a rare point of agreement among the prisoners.¹⁶⁶ Cabana led the execution team on which Hocutt served,¹⁶⁷ but Cabana began to have doubts about Johnson's guilt himself.¹⁶⁸ He hoped that at least Johnson would die quickly, but the execution took an excruciating fourteen minutes.¹⁶⁹

Another execution was scheduled just two months later, that of Connie Ray Evans.¹⁷⁰ Cabana had become close friends with Evans; now he would have to execute him.¹⁷¹ Cabana struggled to say good-bye to Evans.¹⁷² It took Evans fifteen minutes to die.¹⁷³ When Cabana walked out of the death house at 1:00 a.m., he said "I don't want to do this anymore," and he didn't.¹⁷⁴

Hocutt lasted longer. But when he was reassigned to lighter duty in 1992, he fell apart.¹⁷⁵ Though he had never been seriously sick

¹⁶¹ *Id.* at 96.

¹⁶² *Id.* at 88.

¹⁶³ *Id.* at 127.

¹⁶⁴ *Id.* at 127-30.

¹⁶⁵ *Id.* at 145.

¹⁶⁶ *Id.* at 148.

¹⁶⁷ *Id.* at 151-52.

¹⁶⁸ *Id.* at 148.

¹⁶⁹ *Id.* at 162.

¹⁷⁰ *Id.* at 163.

¹⁷¹ *See id.* at 168.

¹⁷² *Id.*

¹⁷³ *Id.* at 170.

¹⁷⁴ *Id.* at 170-71.

¹⁷⁵ *See id.* at 184-85.

before, Hocutt developed multiple physical and mental problems.¹⁷⁶ He told psychiatrists that:

[H]e felt like the shittiest human being in the world, of feeling hounded, and he spoke of a “constant negative draw” that felt like it was sucking the life out of him. One psychopharmacologist gave him mood elevators; another told him he was bipolar and prescribed lithium. Another told him to get used to an episodic life until the Prozac or Paxson cured or stabilized the depression, or whatever it was.¹⁷⁷

What about execution by lethal injection? While the relatively calm appearance of the inmate lessens the grotesqueness of executions,¹⁷⁸ it does not remove the reality of killing another human being. Dennis O’Neill was the assistant warden and warden at two Florida death row prisons for over nine years.¹⁷⁹ He participated in a dozen executions before leaving the correctional system to become an Episcopal priest.¹⁸⁰ O’Neill explained his decision:

For years, I told myself it was the law of the land, and went along with it But several things really got to me: the arbitrary nature of who was executed. The fact that the person strapped in the chair or gurney often showed genuine, heartfelt change and was rarely the same person who committed the crime. And, my realization that antiseptic killing is as bad as raw and naked killing.¹⁸¹

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 185.

¹⁷⁸ Death by lethal injection involves apparent suffering in some cases. *See* Order at 3, *Brown v. Beck*, No. 5:06-CT-3018-H, 2006 WL 3914717, (E.D.N.C. Apr. 7, 2006), available at <http://www.law.berkeley.edu/clinics/dpclinic/LethalInjection/LI/documents/courtorders/ncarolina/2006.04.07%20Brown%20Order.pdf> (challenging the conditions of Brown’s execution based, in part, on affidavits regarding evidence of suffering by inmates during lethal injection executions).

¹⁷⁹ Meg Laughlin, *His Turn for Turning the Other Cheek*, ST. PETERSBURG TIMES, Nov. 23, 2006, at 1A, available at 2006 WLNR 20335368.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

In 1995 Cabana testified before the Minnesota Legislative Committee considering the reinstatement of the death penalty in the state.¹⁸² His message was not about *how* the executed die, but the fact that they are killed. He said in part,

I empathize with the [murder] victims, better than most, because I know them better than most. But there are other victims, too. I have watched the victims that we make out of the families of these men and women. And we forget that they come from real families, too. . . . [W]hen [Johnson's] mother turned to me, when it was time to tell her that the final visit was over, what is [] this big, burly, tough guy, maximum security warden, [] to say to a mother when she says, "Please don't kill my baby. Don't take my child from me. If he's done wrong, my heart aches for the other child's mama, but how will this make it better?" Now . . . I tell you that little anecdotal story simply so you'll understand: hidden behind the prison walls, is all of the emotion, all of the pain that no one else ever sees, and it is a most painful process for those people who are involved.¹⁸³

VI. CONCLUSION

These are just a few of the stories that serve as evidence of the traumatic effects of the death penalty on those other than the condemned—the unintended victims left in the punishment's wake. More research is needed to fully understand the extent of the anti-therapeutic, or therapeutic, effects of the death penalty.

In 2005 Matthew B. Johnson, associate professor of psychology at the John Jay College of Criminal Justice at City University of New York (CUNY), testified on the secondary trauma associated with state executions at a hearing before the State of New Jersey Department of

¹⁸² Donald Cabana, Professor of Criminal Justice, Univ. of S. Miss., Testimony Before the Judiciary Committee of the Minnesota House of Representatives (Dec. 7, 1995), http://www.mnadvocates.org/sites/608a3887-dd53-4796-8904-997a0131ca54/uploads/Cabana_2.pdf.

¹⁸³ *Id.*

Corrections (NJDOC).¹⁸⁴ The impetus for the testimony was comments made to a rule proposal regarding lethal injection.¹⁸⁵ Among those comments were “[t]hat counseling should be offered to those who participate in killing the person sent to death [and] that the NJDOC should reduce the secrecy surrounding executions”¹⁸⁶

Doctor Johnson provided the legislature an overview of the available research on the reactions of journalists and correctional officers involved in a single execution, jurors who served in a capital trial, and family members of both the victim and the offender.¹⁸⁷ He also described the stories of trauma contained in memoirs and anecdotal accounts of individuals involved in the death penalty system, such as Cabana and Hocutt.¹⁸⁸ His conclusion: the evidence is accumulating that the detrimental effects of an execution “are not limited to the condemned citizen and . . . create ‘another set of victims.’”¹⁸⁹

Doctor Johnson’s recommendation: “Press and public access to the entire state execution process is essential to insure that the full extent of the human costs are known and recorded to fully assess the effects.”¹⁹⁰ In 2007, after extensive public hearings, the New Jersey Legislature abolished the death penalty.¹⁹¹

Governments have enormous power over the lives of their residents. Legislatures that utilize the death penalty have a moral responsibility to make sure the administration of the punishment is fair and just. This responsibility should include attention to the harm caused by the death penalty to those other than the condemned prisoner. These harms must be fully assessed. To accomplish this goal, governments who kill must provide greater access to execution events. In the meantime, death penalty jurisdictions must provide needed psychologi-

¹⁸⁴ Amanda Gil et al., *Secondary Trauma Associated with State Executions: Testimony Regarding Execution Procedures*, 34 J. PSYCHIATRY & L. 25 (2006).

¹⁸⁵ *Id.* at 26.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 25.

¹⁸⁸ *Id.* at 32.

¹⁸⁹ *Id.* at 33.

¹⁹⁰ *Id.*

¹⁹¹ *New Jersey Abolishes Death Penalty*, CBS NEWS, Dec. 17, 2007, <http://www.cbsnews.com/stories/2007/12/17/national/main3624792.shtml>.

cal services—long before and long after an execution—for all those directly affected by death sentences and executions. These steps would be the right therapeutic jurisprudential response to a pervasively anti-therapeutic state-sanctioned punishment.