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## Articles

### TESSIE HUTCHINSON AND THE AMERICAN SYSTEM OF CAPITAL PUNISHMENT

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#### INTRODUCTION

*Tessie Hutchinson was in the middle of a cleared space by now, and she held her hands out desperately as the villagers moved in on her. "It isn't fair," she said. A stone hit her on the side of the head. Old Man Warner was saying, "Come on, come on, everyone." Steve Adams was in the front of the crowd of villagers, with Mrs. Graves beside him. "It isn't fair, it isn't right." Mrs. Hutchinson screamed, and then they were upon her.*<sup>1</sup>

If you are not familiar with Shirley Jackson's harrowing short story, *The Lottery*, you are undoubtedly wondering what Tessie Hutchinson did to command her fate. On the other hand, if you know the story you understand that Mrs. Hutchinson's only sin was to live in a village that celebrated the 27th of June each year with a communal stoning of one of its inhabitants. In either case, as one reader put it shortly after the story's debut in the June 26, 1948 issue of *The*

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1. Shirley Jackson, *The Lottery*, in FIFTY YEARS OF THE AMERICAN SHORT STORY 390, at 397 (William Abrahams ed., 1970). For on-line access to this story go to <<http://newark.rutgers.edu/~lcrew/lottery.html>>.

*New Yorker*, the mental image the passage evokes has the power to make one "want to put [one's] head under water and end it all."<sup>2</sup>

Notwithstanding any gnawing sensation that may linger after reading *The Lottery*, we can take comfort in the fact that it is fiction after all, far removed from the realities of our existence. Or is it? While the process that condemned Tessie Hutchinson to die is worlds apart from what goes on in American courtrooms wherein the fate of capital defendants is decided, there are troubling parallels between Ms. Jackson's story and our American system of capital punishment.<sup>3</sup> In fact, it is far too easy to draw comparisons between the events of June 27th in Ms. Jackson's fictional village and how we<sup>4</sup> send a selected few of our fellow citizens to their death.

In the pages that follow I will suggest some ways that the life of our death penalty mirrors the art of *The Lottery*. Specifically, in order of appearance, I will share comments on the masking of evil, the execution of the innocent, the arbitrariness in selecting those who die, the search for justification, and the brutality of the death penalty. Although Ms. Jackson's story is not the perfect mirror for all of the problems that plague America's system of capital punishment, on these five issues her disturbing tale offers insight into the practice of killing our own.

## I. MASKING THE EVIL

*There was a great deal of fussing to be done before Mr. Summers declared the lottery open. There were the lists to make up—of heads of*

2. JUDY OPPENHEIMER, PRIVATE DEMONS: THE LIFE OF SHIRLEY JACKSON 131 (1988) (internal quotation marks omitted). A number of other readers had a different reaction to the story. Some wrote to Ms. Jackson to find out where the lotteries were being held so that they could go watch. See *id.* at 129 (noting that some readers wanted to know if *The Lottery* described "a current custom" while others inquired as to "the locale and the year of the custom").

3. See generally LENEMAJA FRIEDMAN, SHIRLEY JACKSON 67 (1975) (concluding that "the lottery may be symbolic of any of a number of social ills that mankind blindly perpetrates").

4. The actions of our state and federal governments are ultimately our own. As De Tocqueville explained:

In America . . . direction really comes from the people, and though the form of government is representative, it is clear that the opinions, prejudices, interests, and even passions of the people can find no lasting obstacles preventing them from being manifest in the daily conduct of society.

In the United States, as in all countries where the people reign, the majority rules in the name of the people.

ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 159 (J.P. Mayer & Max Lerner eds., George Lawrence trans., Harper & Row 1966) (1835). Alexis de Tocqueville's writings can be viewed on-line at <<http://xroads.virginia.edu/2hvprr/detoc/home.html>>.

*families, heads of households in each family, members of each household in each family. There was the proper swearing-in of Mr. Summers by the postmaster, as the official of the lottery; at one time, some people remembered, there had been a recital of some sort, performed by the official of the lottery, a perfunctory, tuneless chant that had been rattled off duly each year; some people believed that the official of the lottery used to stand just so when he said or sang it, others believed that he was supposed to walk among the people, but years and years ago this part of the ritual had been allowed to lapse. There had been, also, a ritual salute, which the official of the lottery had had to use in addressing each person who came up to draw from the box, but this also had changed with time, until now it was felt necessary only for the official to speak to each person approaching. Mr. Summers was very good at all this; in his clean white shirt and blue jeans, with one hand resting carelessly on the black box, he seemed very proper and important as he talked interminably to Mr. Graves and the Martins.*<sup>5</sup>

The most intriguing and brilliant aspect of Ms. Jackson's story is that even the most attentive reader can fail to see the evil that is unfolding on the page until well into the story, or even until its very end. This was a phenomenon that was well known to Ms. Jackson as evidenced by her comment after publication that "[t]he number of people who expected Mrs. Hutchinson to win a Bendix washer at the end would amaze you."<sup>6</sup> At least part of the explanation for this is that Ms. Jackson artfully hides the evil behind the bureaucratic niceties of the process. Ms. Jackson gives us Mr. Summers, the story's agent of death, fussing with lists and exchanging pleasantries with those around him.<sup>7</sup> Later, just before the drawing commences, Mr. Summers formally questions Janey Dunbar about the need for her to draw for her household, notwithstanding that we are told that Mr. Summers and everyone in the village knew the answer "perfectly well."<sup>8</sup> Thereafter, once the lottery is underway, Mr. Summers, ever

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5. Jackson, *supra* note 1, at 392.

6. OPPENHEIMER, *supra* note 2, at 131 (internal quotation marks omitted) (quoting Jackson in a letter she wrote to a newspaper columnist).

7. Jackson, *supra* note 1, at 391-92 (describing Mr. Summers "as the official of the lottery").

8. *Id.* at 393. What it is that everyone in the village knew "perfectly well" is not clear. Is it that everyone knows that Mr. Dunbar is laid up at home with a broken leg and the eldest Dunbar son is not of age to select for his family, as the story suggests? Or is it, as has been proposed elsewhere, that there used to be an older son, but he fell victim to the lottery in a previous year? See Helen E. Nebeker, "The Lottery": *Symbolic Tour de Force*, 46 AM. LITERATURE 100, 104-05 (1974) (hypothesizing that Mr. Dunbar may have deliberately broken his own leg to avoid the painful experience of attending the ritual at which his son was previously killed).

the good civic leader,<sup>9</sup> makes a point of greeting each person as they draw their lot, and very publicly calls out his own name at the appropriate time and steps forward precisely to select his slip from the box.<sup>10</sup>

Even before Tessie Hutchinson is reduced to begging all of those with whom she has shared her life not to stone her to death, there are clues that all is not well in the village. In the second and third paragraphs of the story, Ms. Jackson calls attention to the reaction of the gathering men to a pile of stones,<sup>11</sup> hinting that something is amiss.<sup>12</sup> Further into the story, the reader is offered glimpses of the unease that the lottery seems to cast over many of the villagers,<sup>13</sup> an unease that is inconsistent with the opportunity to win a new washing machine. In the end, once the picture is painted all too clearly, the reader learns a lesson about the banality of evil, and it is this same lesson that can also be taken from our system of capital punishment.

In many ways, the ultimate fact of the death penalty—that we are killing our fellow human beings—is hidden by the process that surrounds the event. The most obvious example of this is that executions take place behind prison walls and locked doors, so that we do not have to bear witness to the spectacle.<sup>14</sup> Removing executions from the public view creates the tendency for the sanction to fall into the “out of sight, out of mind” category of events,<sup>15</sup> which encourages us to avoid confronting the moral consequences of our actions.<sup>16</sup>

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9. See Jackson, *supra* note 1, at 391 (describing Mr. Summers as a man “who has time and energy to devote to civic activities” such as square dances, the teenage club, and the lottery).

10. See *id.* at 393-96.

11. See Jackson, *supra* note 1, at 397 (“Soon the men began to gather surveying their own children, speaking of planting and rain, tractors and taxes. They stood together, away from the pile of stones in the corner, and their jokes were quiet and they smiled rather than laughed.”).

12. Cf. Nebeker, *supra* note 8, at 102 (“By the end of just two paragraphs, Jackson has carefully indicated the [summer] season, time of ancient excess and sacrifice, and the stones, most ancient of sacrificial weapons.”).

13. For example, as the men of the village waited for everyone to draw for the lottery, they held their lottery slips in their hands, “turning them over and over *nervously*.” Jackson, *supra* note 1, at 394 (emphasis added).

14. See THE DEATH PENALTY IN AMERICA 13 (Hugo Adam Bedau ed., 3d ed. 1982) (explaining that the last public execution in the United States took place in Galena, Missouri, on May 21, 1937).

15. See Thomas W. Laqueur, *Crowds, Carnival and the State in English Executions, 1604-1868*, in THE FIRST MODERN SOCIETY 305, 355 (A.L. Beier et al. eds., 1989) (“As execution becomes ever more private and untheatrical it becomes ever more irrelevant.”).

16. See Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1477 (1997) (noting that, in general, both the public and capital jurors are “systematically misinformed about many . . . [death

Although the veil of exclusion that surrounds individual executions may be the most obvious masking effort of the American system of capital punishment, it is not the only one. There are other means by which we hide the full impact of the death penalty from ourselves in an effort to salve our collective conscience. Two of the most significant efforts are the bureaucratization of executions and the inclusion of the learned professions (i.e., lawyers, medical doctors, and the clergy) throughout the system.

In carrying out a modern day execution, very little is left to chance by the bureaucrats in charge. Every step of the effort is managed and every participant's role is scripted; with the result being that personal responsibility is minimized throughout the process.<sup>17</sup> For example, in Washington State there is a manual that details exactly what kind of rope is to be used and how it is to be prepared for those condemned men<sup>18</sup> who chose hanging over lethal injection.<sup>19</sup> An ex-warden of the Mississippi State Penitentiary has described how green clip-on cards were issued to execution team members while official witnesses got yellow cards,<sup>20</sup> and how his staff practiced upcoming executions, complete with a stand-in that would be strapped into the gas chamber chair and hooked-up to an EKG monitor.<sup>21</sup> In Texas, the bureaucratic death ritual takes over about two weeks before the execu-

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penalty] issues and kept from confronting the truth about the lethal process that proceeds in their name"). Professor Haney further contends that "the modern state carefully regulates the private nature of the execution ritual to ensure that its citizens learn just enough (but not too much) about it." *Id.* at 1478.

17. See ROBERT JOHNSON, *DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS* 50 (2d ed. 1998) (explaining that the "*point* of the modern execution procedure is to *suppress* any real-life human reactions on the part of the prisoners or their executioners" and noting that "displays of character or faith—would interfere with the efficient administration of the death penalty and indeed draw unwanted attention to the violence of the proceedings").

18. The masculine noun is used here and throughout this Article due to the fact that the overwhelming majority of persons who have been executed in the United States have been males. See KEITH HARRIES & DERRAL CHEATWOOD, *THE GEOGRAPHY OF EXECUTION: THE CAPITAL PUNISHMENT QUAGMIRE IN AMERICA* 18 (1997) (noting that 97.4% of the 13,329 persons executed between 1786 and 1985 were male).

19. See *Campbell v. Wood*, 18 F.3d 662, 683 (9th Cir. 1994) ("Under the Washington protocol, the rope must be between three-quarters and one-and-one-quarter inches in diameter. The rope is boiled and then stretched to eliminate most of its elasticity. The rope is then coated with wax or oil so that it will slide easily." (internal citations omitted)).

20. See DONALD A. CABANA, *DEATH AT MIDNIGHT: THE CONFESSION OF AN EXECUTIONER* 158 (1996) (describing the planning process for the 1987 execution of Edward Earl Johnson and noting that people without such cards could not access death row).

21. See *id.* at 161-63 (noting that the purpose of the practice session was "to make certain there were no mechanical problems or human errors"). Mississippi has since adopted lethal injection as its method of execution except for inmates sentenced to death before July 1, 1984. See MISS CODE ANN. § 99-19-51 (Supp. 1999).

tion, and covers such items as selecting witnesses for the event, securing telephone contact with the governor's office, and notifying a Huntsville funeral home to make arrangements for removal of the body.<sup>22</sup> Depending upon whether the method of execution is by firing squad or lethal injection, in Utah one member of the execution team is assured of either firing a blank or releasing a harmless solution, so that no one knows who actually caused the prisoner's death.<sup>23</sup>

The net effect of this bureaucratization of executions is to give those who carry them out, and the rest of us who receive reports of the same, a sense of sterility and mundaneness that should never settle on the state's killing its own.<sup>24</sup> It allows everyone within the system, from the clerk who inventories the condemned prisoner's few worldly possessions, to the executioner who starts the toxic mix of drugs flowing into the prisoner's veins, to say, "I'm only doing my job. I'm just a cog in the wheel. I didn't kill him."<sup>25</sup> Thereafter, when the rest of us hear what the prisoner had for his last meal or how long he visited with his family, we are encouraged to take comfort in the belief that we did not kill him either, rather some omnipotent process did. On occasion, however, that process is not so omnipotent and executions do not go according to plan, such as when a prisoner is burned to death in Florida's electric chair.<sup>26</sup> At those times the bureaucratiza-

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22. See JAMES W. MARQUART ET AL., *THE ROPE, THE CHAIR, AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923-1990*, 234-40 (1994) (transcribing the Texas Department of Corrections' post-1974 procedures for executing death-row inmates).

23. See JOHN D. BESSLER, *DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA* 149-50 (1997) (noting that, in Utah, only 4 of the 5 members of a 1977 firing squad shot real bullets and only 1 of the 2 executioners in a 1992 lethal injection delivered the lethal drug); see also JOHNSON, *supra* note 17, at 48-49 (recreating the execution protocol for San Quentin penitentiary in California).

24. See Helen Prejean, *Walking Through the Fire*, *THE OTHER SIDE*, September-December 1997, at 49 ("[T]he protocol of an execution is clinical and controlled. Emotions are not expressed. Witnesses are to be completely silent."). This article can be read on-line at <<http://www.theotherside.org/archive/sep-dec97/prejean.html>>. See also JOHNSON, *supra* note 17, at 47 (observing that "execution procedures smack of a mechanized, mindless 'nihilism'").

25. See Haney, *supra* note 16, at 1475 (observing that by dividing the execution process into discrete, seemingly benign tasks and then repeatedly performing these tasks, execution team members are allowed "to distance themselves from the final consequences of their collective, coordinated actions"). See generally Editorial, *Texas Death House Massacre*, *WASH. POST*, Dec. 10, 1998, at A30 (offering the following quotes from Texas prison officials: "we have it down to a science"; "we have the drill down"; and, "when we do it, we do it right" (internal quotation marks omitted)).

26. See *Execution Flames Renew Debate*, *TAMPA TRIB.*, Mar. 26, 1997, at 1 (describing how in the Florida execution of Pedro Medina, "there was a small flicker on the right side of the mask [covering Medina's face] and then orange and blue flames up to a foot long erupted out of the side and burned for about 10 seconds," filling the witness room with acrid smoke); see also CABANA, *supra* note 20, at 10, 167 (describing how in Mississippi's first

tion efforts fail, and we are forced to sit up and take notice of what is happening in our execution chambers,<sup>27</sup> just as Shirley Jackson forces us to sit up and take notice that Tessie Hutchinson is being stoned to death by her family, friends, and neighbors.

Like the role played in *The Lottery* by the civic-minded Mr. Summers in his "clean white shirt and blue jeans,"<sup>28</sup> the role of the learned professions in our system of capital punishment contributes mightily to the ability of the sanction to hide behind a patina of legitimacy. Notwithstanding image problems that plague these professions from time-to-time, our opinion leaders are very often attorneys, doctors and members of the clergy, and the participation of these men and women throughout the death penalty chain gives us the peace of mind that our best and brightest are in charge, so everything must be okay.

Since our American system of capital punishment at least attempts to be grounded in the rule of law, lawyers are distributed throughout that system. A large number of the legislators and executives who champion death penalty statutes are lawyers, and many of these are not timid about letting the public know that they believe the death penalty is a necessary and appropriate punishment.<sup>29</sup> Furthermore, all of the judges who preside over death penalty cases at trial and hear these cases on appeal are lawyers, and in fulfilling these

execution by gas chamber, the lethal mixture was improperly mixed due to human error and Gerald Gallego did not die until a half hour after the first attempt); MARQUART ET AL., *supra* note 22, at 147 ("In Stephen McCoy's case, on May 24, 1989, the reaction to the drugs induced a violent choking, gasping and writhing on the gurney—so much so that one witness fainted."); Michael L. Radelet, *Post-Furman Botched Executions* (updated by the Death Penalty Information Center) (visited Feb. 12, 2000) <<http://www.essential.org/dpic/botched.html>> (cataloging some of the botched executions).

27. Regrettably, these momentary pangs of discomfort either quickly recede or, worse yet, are offered up as some perverse satisfaction of a job well done. See *Execution Flames Renew Debate*, *supra* note 26, at 1 ("Attorney General Bob Butterworth said Medina's gruesome end would be a deterrent. 'People who wish to commit murder, they better not do it in the state of Florida because we may have a problem with our electric chair.'").

28. Jackson, *supra* note 1, at 392.

29. See Stephen B. Bright, *The Death Penalty as the Answer to Crime: Costly, Counterproductive, and Corrupting*, 35 SANTA CLARA L. REV. 1211, 1212-16 (1995) (discussing politicians' pro-death penalty rhetoric and the measures some of them have taken to make death a more frequently imposed punishment); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 875 B.U. L. REV. 759, 769-76 (1995) (examining how a politician's position on the death penalty has become a litmus test for elected officials at all levels; resulting in a race to claim responsibility, by way of prosecution or signing a death warrant, for as many executions as possible); Alan Berlow, *The Wrong Man*, ATLANTIC MONTHLY, Nov. 1999, at 78 ("Television advertising in recent election campaigns has often featured candidates trying to persuade voters that they're 'tougher' with respect to the death penalty than their opponents.").



functions, these professionals convey to the public that the system is stable and working properly. In addition to sending this far-reaching message through their actions and presence, trial and appellate judges more immediately enable capital sentencing jurors to avoid confronting the full impact of what it means to condemn another human being to death.

When trial judges preside over a capital case in accordance with the accepted legal rules and procedures, they, at least implicitly, convey a message to the jurors that death is the lawfully preferred sanction and that the jurors should not feel personally responsible for selecting that result. First, by administering and enforcing the death-qualifying procedures that are employed in the voir dire of capital jurors,<sup>30</sup> trial judges "may seem to convey the message that the legitimate and favored position in the legal system is one supporting . . . [death]."<sup>31</sup> This message, in turn, may lead capital jurors to believe they are personally obligated and legally bound to "follow the law" by choosing capital punishment over the other available alternatives.<sup>32</sup> Second, by adhering to the dominate restrictive view of what constitutes mitigating evidence,<sup>33</sup> trial judges deny the defense the opportunity to impress upon the jurors the full weight of the moral decision that confronts them.<sup>34</sup> By not allowing capital sentencing jurors to

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30. See *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (holding that the proper standard for excluding a juror because of his views on capital punishment is whether these views will "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" (internal quotation marks omitted) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980))). It has been argued that this death qualifying standard for capital juries skews the fairness of the overall process by excluding citizens who oppose capital punishment. See, e.g., Susan Raedker-Jordan, *A Pro-Death, Self-Fulfilling Constitutional Construct: The Supreme Court's Evolving Standard of Decency for the Death Penalty*, 23 HASTINGS CONST. L.Q. 455, 537-44 (1996).

31. Haney, *supra* note 16, at 1482.

32. See *id.* at 1482-83 (internal quotation marks omitted) (asserting that, during the jury-selection process, "depending on how death-qualifying questions are posed, they may seem to imply that the law actually *requires* jurors to reach death verdicts").

33. See *People v. Fudge*, 875 P.2d 36, 66 (Cal. 1994) (en banc) (concluding that a trial judge may exclude evidence of how executions are carried out and what life on death row and in prison without the possibility of parole is like because this evidence does "not aid the jury in making an individual assessment of the crucial issue whether the death penalty is appropriate for the particular defendant on trial"); Earl F. Martin, *Towards an Evolving Debate on the Decency of Capital Punishment*, 66 GEO. WASH. L. REV. 84, 125-28 (1997) (describing the current view in the federal courts that mitigation evidence be limited to information regarding the defendant's character, prior record, or the circumstances of his offense).

34. See Haney, *supra* note 16, at 1478-79 (observing that by not "requir[ing] capital jurors to be sensitized to the fact that the defendant may have family, friends, and other people who care about him and who will also be victimized by his execution[,] . . . [the system denies jurors] the opportunity to weigh all of the potentially relevant moral consid-

hear about the despair and stress of life on death row, the impact that state-sponsored executions have on the lives of condemned men's families, and the horrors of the executions themselves, trial judges prevent jurors from having the information they need to understand fully and to appreciate the consequences of their decision.<sup>35</sup> Third, the confusing and complicated sentencing instructions that are part of a capital case have a tendency to encourage jurors to see their role as one of applying a legal formula instead of rendering a moral decision.<sup>36</sup> "[T]hese badly framed and poorly understood instructions seem to provide jurors with a protective shield that enables them to avoid a sense of personal responsibility for their decisions,"<sup>37</sup> by rationalizing that their death verdict is "not really . . . [their] decision, it's the law's decision."<sup>38</sup>

In addition to contributing to our collective ease towards capital punishment by providing additional levels of review for death penalty cases, appellate judges also provide "cover" for capital sentencing jurors when they are required to choose between life and death. Believing that others up the line will subject their verdict to a searching review allows jurors to "further distance themselves from the moral implications of . . . [their] awesome responsibility by maintaining the belief that *someone else*—typically appellate judges—will ultimately decide the [the defendant's fate]."<sup>39</sup> Paradoxically, "the very judges on whom capital jurors rely to review and 'correct' their decisions also defer to and rely on the *jury's* decision to insulate themselves from the

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erations in their decisionmaking"); Martin, *supra* note 33, at 124-25 ("By allowing a defendant to litigate these matters, jurors would be required to face the full impact of capital punishment, and thus they would be more prepared to determine if the case warrants such a severe result."); Austin Sarat, *Violence Representation and Responsibility in Capital Trials: The View from the Jury*, 70 IND. L.J. 1103, 1124 (1995) (noting that the absence of visual evidence, such as images of the prospective execution site or depictions of the violence of executions, means that a capital juror is not able "to understand what he [is] being asked to authorize").

35. See *supra* note 34 and accompanying text.

36. See WELSH S. WHITE, *THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* 69 (1987).

37. Haney, *supra* note 16, at 1484. The most inviting opportunity for capital jurors to respond in this fashion is when the trial judge, in select jurisdictions, tells the jurors that their verdict is only a "recommendation" which the judge is free to accept or reject. See Joseph L. Hoffman, *Where's the Buck?—Juror Misperceptions of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137, 1146-48 (1995) (discussing this practice in Indiana and jurors' responses to "recommendation" instructions).

38. Craig Haney et al., *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death*, 50 J. SOC. ISSUES 149, 166 (1994) (internal quotation marks omitted) (quoting a capital juror interviewed for the authors' study).

39. Haney, *supra* note 16, at 1481.

moral issues posed by death verdicts.”<sup>40</sup> In the end, though the interplay in capital cases between jurors, trial judges, and appellate judges gives the appearance of a system that squarely faces the gravity of its task, the diffusion of responsibility between these actors enables them, and us, to avoid having to experience fully the monumental decision to kill another human being.<sup>41</sup>

At the level of the litigants in a capital case, the prosecutors who seek and secure the death penalty for defendants, and who frequently speak publicly in favor of the sanction are all lawyers. Through their actions and words, these opinion leaders allow us to rest assured that trusted public officials are in charge and are making sure that only the “right” defendants are being put at risk of death.<sup>42</sup> Additionally, at trial these attorneys, consistent with the dominant paradigm,<sup>43</sup> employ legal rules and procedures to present the defendant as nothing more than the heinous crime that has brought him into the courtroom facing the possibility of death.<sup>44</sup> By doing this, prosecuting at-

40. *Id.* (citing Joan W. Howarth, *Deciding to Kill: Revealing the Gender in the Task Handed to Capital Jurors*, 1994 WIS. L. REV. 1345, 1410-11). These same appellate judges also frequently pass some of the moral weight of the decision to the executive and the clemency power that accompanies that office. In a capital punishment case where the Court held that a claim of actual innocence based on newly discovered evidence is not grounds for federal habeas relief, Chief Justice Rehnquist, who wrote for the majority, stated that executive clemency is the “fail-safe” of our criminal justice system. See *Herrera v. Collins*, 506 U.S. 390, 415 (1993). However, while often citing the sanctity of the jury process and thus closing the loop, see Berlow, *supra* note 29, at 80, Governors have only granted clemency for humanitarian reasons to forty-one death-row inmates since 1976. See Death Penalty Information Center, *Facts About Clemency*, (visited Feb. 14, 2000) <<http://www.essential.org/dpic/clemency.html>>. During this same period of time, 611 executions have taken place in the United States. Death Penalty Information Center, *Executions* (visited Feb. 14, 2000) <<http://www.essential.org/dpic/facts.html#Executions>>.

41. See Howarth, *supra* note 40, at 1411 (“[J]ury capital sentencing could be seen as a paradigm of collectivity as diffusion of and thus escape from responsibility.”).

42. The exercise of prosecutorial discretion in making these selections has generated a great deal of criticism. See, e.g., Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 LAW & CONTEMP. PROBS. 125 (1998); Debate, *The Modern View of Capital Punishment—the Honorable Alex Kozinski vs. Professor Stephen Bright*, 34 AM. CRIM. L. REV. 1353, 1371-72, 1377-78 (1997).

43. A paradigm, at both the guilt and capital penalty phase, that seeks to keep attention focused on “weapons and wounds, instrumentalities and effects.” Haney, *supra* note 16, at 1469 (internal quotation marks omitted).

44. As Professor Haney explained:

In the typical capital trial, prosecutors encourage jurors to make their ultimate sentencing decision on the basis of isolated, albeit tragic and horrible, moments of aggression that they offer, in the absence of any other information, to represent the defendant’s entire life and worth as a person. This perfectly understandable and highly effective strategy is employed by advocates of death sentences to project the alleged essence of the defendant into the snapshot that has been taken of his violence.

*Id.* at 1456.

torneys contribute mightily to the ability of capital jurors, and the public at large, to disengage from the accused and come to see him as something different from themselves.<sup>45</sup> Once this view is established, feelings of empathy for the accused become highly unlikely, thus lessening the jurors' burden in choosing death over life, and the public's burden in supporting that choice.<sup>46</sup>

Like the prosecutors who champion the case for death, except in those rare instances of a pro se defendant, all of those who advocate in court against the imposition of the sanction in specific cases are lawyers.<sup>47</sup> To the extent that these attorneys, for whatever reason, fail to present a mitigation case in sentencing,<sup>48</sup> they, like the prosecutors who demonize the defendant, make it easier for a juror to "morally disengag[e] from the defendant's humanity" and render a verdict for death.<sup>49</sup> Furthermore, while the efforts of defense attorneys do not offer an endorsement for capital punishment, those efforts do contribute to the sanction's patina of legitimacy,<sup>50</sup> just as do the efforts of legally trained legislators, executives, judges, and prosecutors. Since defense counsel are cast in the role of keeping the system honest and

45. See *id.* ("The prolonged period of time during which the jury is encouraged to perceive the defendant only as an autonomous agent of violence acting outside of any historical context dehumanizes him . . .").

46. See *id.* at 1461 ("The more we can designate a person as fundamentally different from ourselves, the fewer moral doubts we have about condemning and hurting that person." (quoting Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 692 (1989))).

47. Cf. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 YALE L.J. 1835, 1845 n.56 (1994) (noting that a Mississippi capital defendant was represented by a third-year law student and an attorney).

48. Reasons for this failure may include a lack of resources, inexperience, or incompetence. See Bright, *supra* note 47, at 1836.

49. Haney, *supra* note 16, at 1458; see also Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 317-20, 334-39 (1983) (discussing the defense counsel's duty to present mitigating evidence and identifying the first element of an effective mitigation case as the portrayal of "the defendant as a human being").

50. See MICHAEL A. MELLO, *DEAD WRONG: A DEATH ROW LAWYER SPEAKS OUT AGAINST CAPITAL PUNISHMENT* 200-04 (1997) (suggesting that defense counsel might refuse to represent capital defendants in response to what the author sees as a critically defective and unfair capital punishment system). After fourteen years of representing death row inmates in postconviction proceedings, Michael Mello went on strike as a form of conscientious objection. *Id.* at 3. Stephen Bright has taken issue with the suggestion that defense attorneys should cease representing capital defendants:

The machinery of death will grind on whether we participate or not. The experiences of the last 20 years demonstrate that there is an endless supply of uncaring lawyers who will take capital cases and help whisk their clients along to the executioner. The courts have made it clear that death sentences will be carried out even if those lawyers were asleep or drunk.

See *Death Penalty Debate*, 20 CHAMPION 20, at 20 (Nov. 1996).

faithful, they add to the ability of the system to maintain its respectability as it moves men along to their deaths.<sup>51</sup>

The two most controversial ways that doctors participate in the American system of capital punishment are in the treatment of the insane condemned and by attending at actual executions.<sup>52</sup> The Supreme Court has held that the Eighth Amendment prohibits the death penalty from being carried out upon a prisoner who is insane.<sup>53</sup> Therefore, before the state can execute a condemned man that has lapsed into insanity it must make him sane, and that means employing medical professionals to cure the mental affliction, if they can.<sup>54</sup> If the man is made sane and ultimately executed, then a medical professional will frequently be on hand to certify the time of death,<sup>55</sup> and in some instances, may even participate in administering the mix of drugs necessary to accomplish death by lethal injection.<sup>56</sup>

51. See generally Jack Stark, Shirley Jackson's "The Lottery," in NICHOLAS J. KAROLIDES ET AL., CENSORED BOOKS: CRITICAL VIEWPOINTS 358, 359 (1993) (discussing *The Lottery*). Stark noted:

One of her story's major ironies is that an activity leading to a triumph of antisocial forces over civilized restraint is carried out very meticulously according to "*laus*." That is, the methods used to choose the victim are codified, although not in writing, and have the force of society behind them. That irony emphatically makes the point that *law* not only does not guarantee safety but also can be used to threaten safety. . . .

Veneration of tradition, ritual and *law* causes the villagers to feel that their actions are inevitable. That feeling in turn results in a denial of responsibility.

*Id.* (emphasis added).

52. See Christina Michales, *Medical Ethics and the Execution Process in the United States of America*, 16 MED. & L. 125, 126-27 (1997).

53. See *Ford v. Wainwright*, 477 U.S. 408, 409-10 (1986) (reasoning that executing the insane has no retributive or deterrent value and "simply offends humanity").

54. See, e.g., CAL. PENAL CODE § 3704 (West 1982) (noting that if a defendant is found insane, his execution is suspended and he is committed to a medical facility for treatment until such time when he recovers his sanity); FLA. STAT. ANN. § 922.07(4) (West 1996 & Supp. 1998) (same); MISS. CODE ANN. § 99-19-57(2)(a) (1972) (same).

55. See, e.g., FLA STAT. ANN. § 922.11(2) (West 1996); GA. CODE ANN. § 17-10-41 (1997); MISS. CODE ANN. § 99-19-55(3) (Supp. 1999); VA. CODE ANN. § 53.1-233 (Michie 1998); see also *Doctor—Not Executioner: Physician Participation in Executions is a Line That Can't be Crossed*, AM. MED. NEWS, Apr. 11, 1994, Vol. 37, No. 14 (noting that almost two-thirds of the thirty-six death penalty states require a physician's presence to pronounce the time of death); MARQUART ET AL., *supra* note 22, at 239 (describing the Texas requirement that physicians be present at executions to determine whether the inmates are dead (citing post-1974 Texas Department of Corrections Procedures for the execution of death-sentenced inmates)).

56. See *Doctor—Not Executioner*, *supra* note 55 ("In a twisted parody of medical treatment, doctors have determined where to place the lines for lethal injection, and even on occasion set them."); Michales, *supra* note 52, at 132 (reviewing state regulations that require the participation of physicians in lethal injection executions); see also LeeAnn Lodder, *Who Will Aid The Executioner? In Missouri, Nurses Have Been Called in to Replace Doctors*, AM. MED. NEWS, Mar. 1, 1993, at 2 (highlighting the active role nurses play in the

The carrying out of any of these tasks has caused great controversy within the medical profession,<sup>57</sup> and it is not the purpose of this Article to comment on the specifics of those debates. Rather, these tasks are mentioned because they, like the actions of lawyers within the process, send a message to the public that all is well. Curing the insane, placing a catheter in a man's vein, and leaning over a corpse to check for a pulse, are activities that allow executions to take on the appearance of being something akin to a medical procedure.<sup>58</sup> We

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administration of the death penalty in Missouri, particularly as doctors' groups condemn physician participation as unethical).

57. The physicians' role, authorized by many state statutes, of observing an execution and pronouncing death is considered an ethical violation by professional medical organizations. See Andrew A. Skolnick, *Physicians in Missouri (But Not Illinois) Win Battle to Block Physician Participation in Executions*, 274 JAMA 524 (1995). The American Medical Association Council on Ethical and Judicial Affairs issued an opinion that although "[a]n individual's opinion on capital punishment is the personal moral decision of the individual[, a] physician . . . should not be a participant in a legally authorized execution." Council on Ethical & Judicial Affairs, AMA, CODE OF MEDICAL ETHICS: CURRENT OPINIONS (1998); see also Robert D. Truog & Troyen A. Brennan, *Participation of Physicians in Capital Punishment*, 329 NEW ENG. J. MED. 1346, 1347-49 (1993) (analyzing the ethical considerations when medical professionals participate in the various stages of the execution process); Lodder, *supra* note 56 (noting that the American Nurses Association, similar to the AMA, considers it a violation of ethical standards for nurses to participate in executions).

The continued participation of medical professionals in executions raises the issue of how to enforce the professions' ethical codes. Thirteen California physicians sued the California Corrections Department challenging physician participation in executions as a violation of the medical code of ethics. See Diane M. Gianelli, *Physicians Sue Over California's Use of Doctors in Executions*, AM. MED. NEWS, Aug. 11, 1997. Similarly, a group of Illinois physicians requested that the Illinois Medical Disciplinary Board discipline physicians participating in executions. See Skolnick, *supra*. To insulate participating physicians from ethical review by the state medical board, Illinois legislators amended the penal code to provide anonymity for persons participating in executions and to declare that participation in executions is not the practice of medicine. See 725 ILL. COMP. STAT. ANN. 5/119-5(e) & (g) (West Supp. 1999); see also Skolnick, *supra*. However, the explicit rationale behind this "ethical waiver"—that participation is not the practice of medicine—directly conflicts with the reason why Illinois legislators wanted physician participation—"to bring the skills of physicians, and the accompanying legitimacy, to the execution process." Editorial, *Convenient Corruption: A Dispute About Executions Reveals Risk to Medical Ethics*, AM. MED. NEWS, July 24, 1995 [hereinafter *Convenient Corruption*]; see also 725 ILL. COMP. STAT. ANN. 5/119-5(a)(1) (requiring physicians to administer lethal injections and pronounce death "according to accepted standards of medical practice").

58. See Gianelli, *supra* note 57 ("The physicians' brief says that when doctors use 'medical skills and knowledge to kill an individual in a procedure that mimics medical care, the damage to the profession, the plaintiffs and the public is profound and irreparable.'"); *Convenient Corruption*, *supra* note 57 (arguing that physician participation in executions attempts to legitimize the process); Council on Ethical & Judicial Affairs, AMA, *Physician Participation in Capital Punishment*, 270 JAMA 365, 366 (1993) ("The use of physicians and medical technology in execution presents a conceptual contradiction for society and the public. The image of physician as executioner under circumstances mimicking medical care risks the general trust of the public." (citing *The Ethics of Medical Participation in Capital Punishment by Intravenous Drug Injection*, 320 NEW ENG. J. MED. 226-30 (1980))).

are assured that there is no torture taking place. There are no heads flying off. There is only a sterile, mundane, routine medical practice underway.<sup>59</sup>

Many reports out of death row inform us that the condemned was ministered to by a member of the clergy just before he was led into the death chamber and killed.<sup>60</sup> Without intending to suggest that any condemned person, if he is so inclined, should not seek solace with the assistance of the clergy, it cannot be overlooked that in a country with a strong sense of its religious tradition, the participation of a pastor or priest in an execution contributes significantly to the public's comfort level with that event. To hear that Karla Faye Tucker read the Bible, prayed with her family, and praised Jesus just before she was killed by lethal injection<sup>61</sup> allows many of us to feel almost as if the execution of this woman was the culmination of a glorious effort to reform a sinner. That the reality of her reformation makes the necessity of the execution all but non-existent gets lost in the fact that we are unwilling to forget that she owes a duty not only to God, but also to man, and we take our duty not in words, but in life's own breath.<sup>62</sup>

While I have suggested that the masking efforts in *The Lottery* offer a parallel to our own efforts to hide the evil of our capital punishment system, on one level the inhabitants of Shirley Jackson's fictional village have something on the inhabitants of our own very real country. While we allow ourselves to turn a blind eye to the injustices and inhumanities of our death penalty, Ms. Jackson's villagers accept the responsibility of facing, in the first person, the consequence of their tradition. They, each and every one,<sup>63</sup> take a direct part in the stoning

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59. See, e.g., Truog & Brennan, *supra* note 57, at 1347 ("As a nurse anesthetist who was hired to perform lethal injections in Missouri notes, 'It's a very sanitary, very sterile, very benign way to do an execution.'"). But see Michales, *supra* note 52, at 151 ("The argument that lethal injection and medical sanction are wrong because they sanitize executioner is based on the supposition that the death penalty is itself immoral. Exactly the same argument can be used to advocate physician participation.").

60. See generally *Crime & Punishment: The Death House* (ABC Nightline television broadcast, Jan. 16, 1995) (discussing with Reverend Carroll Picket, Chaplain to Texas's death row in Huntsville, the practice of ministering to the condemned).

61. See Mike Ward & Rebeca Rodriguez, *Texas Executes Tucker*, AUSTIN AM-STATESMAN, Feb. 4, 1998, at A1.

62. Cf. *id.* (quoting the Chairman of the Texas criminal justice board, who said, "[a]lthough I believe she finally found God, her religious awakening could in no way excuse or mitigate her actions in the world she just left" (internal quotation marks omitted)).

63. Even Tessie Hutchinson's little son, Davy, is encouraged to throw pebbles at his mother. Jackson, *supra* note 1, at 397.

of Tessie Hutchinson.<sup>64</sup> We, on the other hand, sleep soundly in our beds or enjoy some late night television as our fellow citizens receive the prescribed dose of electricity, gas, or drugs that will take their lives.

## II. EXECUTING THE INNOCENT

*Just as Mr. Summers finally left off talking and turned to the assembled villagers, Mrs. Hutchinson came hurriedly along the path to the square, her sweater thrown over her shoulders, and slid into place in the back of the crowd. "Clean forgot what day it was," she said to Mrs. Delacroix, who stood next to her, and they both laughed softly. "Thought my old man was out back stacking wood," Mrs. Hutchinson went on, "and then I looked out the window and the kids was gone, and then I remembered it was the twenty-seventh and came arunning." She dried her hands on her apron, and Mrs. Delacroix said, "You're in time, though. They're still talking away up there."*

*Mrs. Hutchinson craned her neck to see through the crowd and found her husband and children standing near the front. She tapped Mrs. Delacroix on the arm as a farewell and began to make her way through the crowd. The people separated good-humoredly to let her through; two or three people said, in voices just loud enough to be heard across the crowd, "Here comes your Mrs., Hutchinson," and "Bill, she made it after all." Mrs. Hutchinson reached her husband, and Mr. Summers, who had been waiting, said cheerfully, "Thought we were going to have to get on without you, Tessie." Mrs. Hutchinson said, grinning, "Wouldn't have me leave m'dishes in the sink, now, would you, Joe?," and soft laughter ran through the crowd as the people stirred back into position after Mrs. Hutchinson's arrival.<sup>65</sup>*

It is about a third of the way into the story that the reader is introduced to Tessie Hutchinson, and from this introduction a number of things can be surmised about her. She is a wife and mother, and apparently a homemaker. She is well-known to the community, and seems to be liked by many. And she is, for all appearances, an innocent.<sup>66</sup> At no point in *The Lottery* is it ever even remotely suggested

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64. It has been suggested that instead of devoted followers of tradition, the villagers are "bloodthirsty victimizers" who look forward to the annual slaughter of one of their own. See A. R. Coulthard, *Jackson's The Lottery*, 48 EXPLICATOR 226, 228 (1990).

65. Jackson, *supra* note 1, at 392-93.

66. This is one of the reasons the response to the publication of *The Lottery* was so "instant and cataclysmic" and reflected "an unprecedented outpouring of fury, horror, rage, disgust, and intense fascination." *Id.* at 128-29.



that Tessie Hutchinson earned the fate of being stoned to death because she committed a criminal offense or even a communal *faux pax*.<sup>67</sup> Although Mrs. Hutchinson's character falters as she senses the possibility of her own demise increasing in step with the lottery's progression,<sup>68</sup> in the eyes of our criminal law she is an innocent person that is nevertheless killed.<sup>69</sup> In this sense, Tessie Hutchinson shares the sad fortune of some of our fellow citizens who find themselves accused of capital crimes. Just as Mrs. Hutchinson is innocent of any crime, so are some percentage of the men, women, and children<sup>70</sup> who are executed within the United States innocent<sup>71</sup> of the crimes that get them killed.

The danger of executing an innocent person has been a source of concern for at least a century and a half in the United States.<sup>72</sup> At

67. See OPPENHEIMER, *supra* note 2, at 131 (quoting Shirley Jackson as describing the events depicted in *The Lottery* as "pointless violence").

68. When Mrs. Hutchinson realizes that a member of her family will be stoned that year, she tries to pull her married daughter and son-in-law into the pool to reduce the likelihood that she will be selected. See Jackson, *supra* note 1, at 395. One scholar has suggested that this was Tessie's "most grievous failure." Fritz Oehlschlaeger, *The Stoning of Mistress Hutchinson: Meaning and Context in "The Lottery,"* 15 *ESSAYS IN LITERATURE* 259, 262 (1988).

69. On a different level, Tessie Hutchinson is not so innocent. Not only does she attempt to make her married daughter and son-in-law eligible for that year's lottery, see *supra* note 68, but, prior to her family's selection in the first drawing, she is a willing participant in a process that will shortly result in the murder of someone in her village. See Jay A. Yarmove, *Jackson's The Lottery*, 48 *EXPLICATOR* 242, 244 (1990).

70. See *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (plurality opinion) (holding that the Eighth Amendment's prohibition against cruel and unusual punishment is not violated by a sentence of capital punishment for an individual who committed murder at sixteen or seventeen years of age). For some, this practice of executing teenagers is not extreme enough, as they would support even younger children being sent to death row. See, e.g., Sam Howe Verhovek, *Texas Legislator Proposes the Death Penalty for Murderers as Young as 11*, *N.Y. TIMES*, Apr. 18, 1998, at A1 (noting that Texas State legislator Jim Pitts, Republican, proposed a bill that would allow Texas to impose the death penalty on murderers as young as eleven years old).

71. The term "innocent" in this context is meant to be equated with "actual innocence." See MICHAEL KRONENWETTER, *CAPITAL PUNISHMENT* 227 (1993) (defining actual innocence as a "claim that a defendant, or convicted person, did not commit the crime," and distinguishing actual innocence "from the mere legal innocence of someone found not guilty because of lack of proof, or whose conviction may be overturned on technical grounds"); *Carter Center Symposium on the Death Penalty—July 24, 1997*, 14 *GA. ST. U.L. REV.* 329, 376 (1998) [hereinafter *Carter Center Symposium*] ("Innocence means basically that . . . [a person] has been charged with something and convicted of something that [he] did not do." (comments of Bryan Stevenson)); Mark V. Tushnet, *The Politics of Executing the Innocent: The Death Penalty in the Next Century?*, 53 *U. PITT. L. REV.* 261, 261 (1991) ("When I say that an innocent person will be executed, . . . I mean that a state will execute a person for a crime that he or she did not commit." (footnotes omitted)).

72. See HERBERT H. HAINES, *AGAINST CAPITAL PUNISHMENT* 87 (1996) ("[C]oncern over the possibility of miscarriages of justice . . . was expressed at least as early as the 1820s by

various points in that history, critics and proponents of the death penalty have debated the possibility of this event, but for most of this time the debate remained on a hypothetical level due to a lack of reliable information on the subject.<sup>73</sup> However, this changed dramatically in 1987 with the publication of a law review article by Professors Bedau and Radelet that claimed, with great support, that between the years 1900 and 1986, 139 people had been wrongly convicted of a capital crime and twenty-three had been executed.<sup>74</sup> These findings have subsequently been updated by Bedau and Radelet<sup>75</sup> and others,<sup>76</sup> and the totality of these efforts have established with certainty that we have

reformer Edward Livingston, and throughout the nineteenth and twentieth centuries by such critics as Charles C. Burleigh, Horace Greeley, William Howells, and Sing-Sing warden Lewis Lawes, as well as by the American League to Abolish Capital Punishment." (internal citations omitted)).

73. See THE DEATH PENALTY IN AMERICA, *supra* note 14, at 234-35 (discussing conflicting positions on the likelihood of the danger and the editor's own efforts to define the extent of the problem).

74. See Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 36 tbl. 2 (1987) [hereinafter *Miscarriages of Justice*]. But see Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 126-33, 145-50 (1988) (claiming that Bedau and Radelet's study was flawed because much of the material they relied on was irrelevant and their methodology was overly subjective, and rebutting the study's conclusion that the risk of erroneous executions was too high to justify the imposition of the death penalty). For Bedau and Radelet's response to Markman and Cassell's critique, see Hugo A. Bedau & Michael L. Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161, 169-70 (1988) (concluding that Markman and Cassell's criticisms of the authors' study stemmed from "unacknowledged political roots," as both of the critics were members of the Department of Justice under the Reagan Administration, which "made quite clear its support for the death penalty").

75. See MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES 369 (1992) (identifying 416 cases on wrongful convictions); Michael L. Radelet et al., *Prisoners Released From Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 T.M. COOLEY L. REV. 907, 916 (1996) ("Our Appendix includes 68 cases of death row inmates later released because of doubts about their guilt. With 313 executions in the United States between 1970 and the end of 1995, one death row inmate is released because of innocence for every five inmates executed." (footnotes omitted)).

76. See STAFF OF HOUSE SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS, 103D CONG., INNOCENCE AND THE DEATH PENALTY: ASSESSING THE DANGER OF MISTAKEN EXECUTIONS 3 & n.3 (Comm. Print 1994) (identifying, since 1973, fifty-two people who were released from death row because of their innocence). The House Subcommittee's report information principally comes from newspaper articles, Bedau & Radelet, *Miscarriages of Justice*, *supra* note 74, RADELET ET AL., *supra* note 75, and the National Coalition to Abolish the Death Penalty. But cf. Alan I. Bigel, *Justices William J. Brennan, Jr. and Thurgood Marshall on Capital Punishment: Its Constitutionality, Morality, Deterrent Effect, and Interpretation by the Court*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11, 86 (1994) ("The precise number—or, indeed, whether any verifiable instances of wrongful execution have taken place—can never be determined because methods of ascertaining the reliability or admissibility of evidence, both at the time of an arrest and trial many years after a sentence is pronounced, are imprecise.").

executed innocent people in the past and that we will continue to do so in the future.<sup>77</sup>

For three reasons, it is not enough to say in response to these findings that the small number of innocent persons who have been executed or put under the threat of execution is proof that the system works. First, just as it was no comfort to Tessie Hutchinson that she was to be the only member of her village that was stoned that year, it is no comfort to those whom we send to their death or threaten with death notwithstanding their innocence that they are one of a small few.<sup>78</sup> Statistically, the numbers may not be overwhelming,<sup>79</sup> but for each of those who suffer this undeserved fate the number is too large by one.<sup>80</sup> Second, it is an insult to those "lucky" few who are released

77. See Justice John Stevens, Opening Assembly Address at the American Bar Association Annual Meeting (Aug. 3, 1996) ("[R]ecent development of reliable scientific evidentiary methods has made it possible to establish conclusively that a disturbing number of persons who had been sentenced to death were actually innocent."); Ken Armstrong & Steve Mills, *Ryan Suspends Death Penalty Illinois First State to Impose Moratorium on Executions*, CHI. TRIB., Jan. 31, 2000, at 1. Based upon the fear that an innocent person might be executed, Governor George Ryan declared a moratorium on capital punishment in Illinois. *Id.*; see also Radelet et al., *supra* note 75, at 920-21 (noting the increasingly hostile reception that claims of innocence receive at all levels of government—from funding cuts, to the provision of legal assistance to capital inmates, to stagnant review of sentences by governors, to restrictive case law). See generally *Herrera v. Collins*, 506 U.S. 390, 393 (1993) (holding that claims of actual innocence, based on newly discovered evidence, are not grounds for federal habeas relief absent an independent constitutional violation); Betty B. Fletcher, *The Death Penalty in America: Can Justice be Done?*, 70 N.Y.U. L. REV. 811, 818-24 (1995) (discussing how the Supreme Court has limited the availability of habeas corpus review in recent years, thereby adding to the already difficult task of overturning an erroneous conviction); Tara L. Swafford, Note, *Responding to Herrera v. Collins: Ensuring That Innocents are not Executed*, 45 CASE W. RES. L. REV. 603 (1995) (analyzing the impact of the Supreme Court's decision in *Herrera* and concluding that this decision makes executions easier to impose).

78. Cf. RADELET ET AL., *supra* note 75, at 273 ("[T]he small number of cases . . . in which an innocent person was executed is an indication not of the fairness of the system but rather of its finality.").

79. See Joseph P. Shapiro, *The Wrong Men on Death Row*, U.S. NEWS & WORLD REP., Nov. 9, 1998, at 22 ("For every 7 executions—486 since 1976—1 other prisoner on death row has been found innocent."); see also *supra* note 75 and accompanying text.

80. Cf. HAINES, *supra* note 72, at 91 (noting that even if a wrongful execution is averted, a tragic error has still taken place given the "depriv[ation] . . . of freedom" and the "psychological torment" that accompanies life on death row); Shigemitsu Dando, *Toward the Abolition of the Death Penalty*, 72 IND. L.J. 7, 14 (1996) (characterizing the imposition of the death penalty upon an innocent prisoner as a crime "committed by nobody else but the state itself"). Dando commented:

The terrific agony felt by the innocent prisoner being executed must be far beyond the imagination of others. The anguish of the innocent person executed must be incomparably greater than that ordinarily felt by a prisoner who had actually committed the crime. Just imagine the prisoner who mounts the gallows shouting and crying aloud desperately: "I am not the offender! I did not commit the crime!" This is nothing but what Dostoyevsky called "an outrage on the soul."

from death row after their innocence is finally accepted by the criminal justice system to hold them up as examples of the system working properly to correct its mistakes.<sup>81</sup> Any system that brands innocent men, and women, and children as murderers, locks them behind bars, threatens them with a state sanctioned execution can hardly be said to be working properly.<sup>82</sup> Third, it would be the height of arrogance to believe that we are only talking about those cases where researchers and investigators have been able to determine that an innocent person was executed or threatened with execution. On top of all of the cases where evidence has uncovered a wrongful capital conviction or, worse yet, an execution, there are others that pass into and through our death chambers undetected.<sup>83</sup>

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*Id.*

81. See Henry Weinstein, *Death Penalty Foes Focus Effort on the Innocent*, L.A. TIMES, Nov. 16, 1998, at A1 ("The fact that some innocent people have been found on death row does not mean that the system is failing, contends Paul G. Cassell, a former federal prosecutor and now a law professor at the University of Utah. 'They were exonerated through the system we have today,' he said."); Stephen A. Chaplin, *Death Penalty Foes Don't Make Case*, RICHMOND TIMES DISPATCH, Nov. 23, 1998, at A8 ("[T]he reversals demonstrate, if anything, that the legal mechanisms now in place work.").

82. On average, it takes a little over seven years to correct a miscarriage of justice. See Radelet et al., *supra* note 75, at 966 tbl.4. During this time, the lives death row inmates left behind continue on without them. See, e.g., Don Terry, *Survivors Make the Case Against Death Row*, N.Y. TIMES, Nov. 16, 1998, at A14 ("After six years on death row, [Walter McMillian] lost his logging business and his marriage. Sonia Jacobs went to prison as a wife and a mother. When she got out, she was a widow and a grandmother.").

83. Sentiments to this effect have been expressed by members of the high courts at both the federal and state levels. See *Furman v. Georgia*, 408 U.S. 238, 367-68 (1972) (per curiam) (Marshall, J., concurring) ("No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging how many innocent persons have been executed but we can be certain that there were some." (footnote omitted)); KRONENWETTER, *supra* note 71, at 46 ("As Supreme Court Justice William O. Douglas once wrote: '[O]ur system of criminal justice does not work with the efficiency of a machine—errors are made, and innocent as well as guilty people are sometimes punished . . . . [T]he sad truth is that a cog in the machine often slips; memories fail; mistaken identifications are made; those who wield the power of life and death itself—the police officer, the witness, the prosecutor, the juror, and even the judge—become overzealous. . . ." (alteration in original) (quoting *Furman*, 408 U.S. 238 (Marshall, J., concurring)) *Justice has 'doubts about inmates' guilt*, F.W. STAR TELEGRAM, Dec. 24, 1998, at A5 (retiring Florida Supreme Court Justice Gerald Kogan expressed "grave doubts" about the guilt of those individuals executed during his tenure); see also Charles L. Black, Jr., *The Crisis in Capital Punishment*, 31 MD. L. REV. 289, 296 (1971) (noting that "the possibility of mistake, however small in each single case, adds up to affirmative probability in a long run of cases, and to virtual certainty in a sufficiently long run"); Dando, *supra* note 80, at 14 ("[J]udges are well trained and have enough experience in dealing with findings. Even so, as long as they are human beings, nobody can claim that they do not make mistakes. They are not God; they are not omnipotent. Gullibility is inherent to human beings."); Joseph M. Giarratano, "To The Best of Our Knowledge, We Have Never Been Wrong": *Fallibility vs. Finality in Capital Punishment*, 100 YALE L.J. 1005, 1008 (1991) ("No careful student of the *reality* (as opposed to the *theory*) of capital punishment

Just as the ghost of Tessie Hutchinson lingers on the page as one finishes *The Lottery*,<sup>84</sup> so does the ghost of the innocent man linger over our system of capital punishment.<sup>85</sup> This has long been the one issue that has caused even ardent proponents of the death penalty to hesitate,<sup>86</sup> because, notwithstanding the benefits we incur by bringing criminal proceedings to an expeditious end, "[t]here is little societal interest in permitting the criminal [justice] process to rest at a point where it ought properly never to repose."<sup>87</sup> When Old Man Warner, Steve Adams, and Mrs. Graves pick up their stones and cast them at the pleading Tessie Hutchinson they are participating in murder. When we execute an innocent person, we come perilously close to murder ourselves.<sup>88</sup>

### III. ARBITRARILY SELECTING THOSE WHO DIE

*"All right," Mr. Summers said. "Open the papers. Harry, you open little Dave's."*

*Mr. Graves opened the slip of paper and there was a general sigh through the crowd as he held it up and everyone could see that it was blank. Nancy and Bill, Jr., opened theirs at the same time, and both beamed and laughed, turning around to the crowd and holding their slips of paper above their heads.*

*"Tessie," Mr. Summers said. There was a pause, and then Mr. Summers looked at Bill Hutchinson, and Bill unfolded his paper and showed it. It was blank.*

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can cling for long to the notion that ours is an infallible system. On the contrary, we are admittedly fallible people struggling to approximate infallible judgments.").

84. See James M. Gibson, *An Old Testament Analogue for "The Lottery,"* 11 J. MOD. LITERATURE 193, 195 (1984) (characterizing Tessie's fate as a undeserved punishment "which can only be labeled senseless, meaningless, and capricious").

85. Cf. *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923) ("Our procedure has been always haunted by the ghost of the innocent man convicted."). In writing these words, Judge Learned Hand made it clear that he was not offering a sympathetic ear. He called the specter of this ghost "an unreal dream" and complained of the "archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime." *Id.*

86. See, e.g., HAINES, *supra* note 72, at 91-92 ("Nevertheless, the shadow of doubt concerning the infallibility of the judicial system seems to temper the enthusiasm of many people for capital punishment. . . .").

87. *Mackey v. United States*, 401 U.S. 677, 693 (1971) (Harlan, J., concurring in part and dissenting in part).

88. See *Herrera v. Collins*, 506 U.S. 390, 446 (1993) (Blackmun, J., dissenting) ("The execution of a person who can show that he is innocent comes perilously close to simple murder."); see also Dando, *supra* note 80, at 14 ("[Execution of an innocent] is no longer a punishment for the criminal. This is indeed a crime, and a most atrocious one, committed by nobody else but the state itself.").

*"It's Tessie," Mr. Summers said, and his voice was hushed. "Show us her paper, Bill."*

*Bill Hutchinson went over to his wife and forced the slip of paper out of her hand. It had a black spot on it, the black spot Mr. Summers had made the night before with the heavy pencil in the coal company office. Bill Hutchinson held it up, and there was a stir in the crowd.<sup>89</sup>*

Selecting who will be stoned in Ms. Jackson's fictional village is a two-step process. First, the head of each household draws a lot to determine whether the victim will come from his or her family. Second, each member of the household then draws a slip of paper to determine which of them will be killed.<sup>90</sup> At the culmination of this process, Tessie Hutchinson is marked for death by a black spot on a slip of paper.<sup>91</sup>

While I earlier wrote that the process that condemned Tessie Hutchinson to die is worlds apart from what goes on in American courtrooms wherein the fate of capital defendants are decided; upon reflection, maybe the two have more in common than I, or we, would like to acknowledge. When we stop to consider the role that arbitrary factors play in deciding who gets the death penalty and who does not, maybe it is that earlier statement that is of another world and not the effort to draw comparisons between the process that condemned Mrs. Hutchinson and the process that condemns capital defendants across this country. Too often in our criminal justice system, the effort to separate those who will die from those who will live is arbitrarily influenced by the skill or commitment, or lack thereof, of the defendant's lawyer, by the personal biases of the trial judge who presides over the case, or even by the race of the defendant and/or his victim.

In 1994, Stephen Bright, the Director of the Southern Center for Human Rights, produced an article that is a list of horrors of the kind of representation that too many capital defendants receive.<sup>92</sup> In his article, Bright details instances of defense counsel falling asleep during trial,<sup>93</sup> showing up drunk for the day's proceedings,<sup>94</sup> referring to

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89. Jackson, *supra* note 1, at 397.

90. *Id.* at 393.

91. *Id.* at 397.

92. See Bright, *Counsel for the Poor*, *supra* note 47.

93. *Id.* at 1843.

94. See *id.* at 1835, 1843 (citing *Haney v. State*, 603 So. 2d 368, 377 (Ala. Crim. App. 1991); *People v. Garrison*, 254 Cal. Rptr. 257, 278 (1989)).

their clients in racially derogatory ways,<sup>95</sup> not having any understanding of the law of capital punishment,<sup>96</sup> and failing to undertake even the bare minimum of an investigation so that they may effectively represent people who are on trial for their lives.<sup>97</sup> Bright is not alone in pointing out that, in too many cases, whether you get the death penalty or not, depends far too heavily on whether you have a minimally qualified attorney or one of the incompetents detailed in Bright's and others' works.<sup>98</sup> This situation has gotten so bad and achieved such recognition, that in 1997 the American Bar Association took the extraordinary step of calling for a moratorium on capital punishment prosecutions across the country until qualified attorneys are made available to represent these defendants.<sup>99</sup> The fact that this plea has largely fallen on deaf ears in those places where it counts,<sup>100</sup>

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95. See *id.* at 1843 (citing *Dunge v. Kemp*, 782 F.2d 896 (4th Cir. 1985); *Issacs v. Kemp*, 778 F.2d 1482 (11th Cir. 1985); *Goodwin v. Balbeim*, 684 F.2d 794, 825 n.13 (11th Cir. 1982); *Ex parte Guzman*, 730 So. 2d 724, 736 (Tex. Crim. App. 1987)).

96. See *id.* at 1859.

97. See *id.* at 1835.

98. See Berlow, *supra* note 29, at 82 ("Among the evidence marshaled to demonstrate the abysmal representation that many capital defendants receive, the author cites to an investigation by the Kentucky Department of Public Advocacy which found that 25 percent of death-row inmates (in that state) had been represented at trial by attorneys who had since been disbarred or had resigned to avoid disbarment."); Goodpaster, *supra* note 49, at 300-03 (contrasting two capital cases with comparable crimes and defendant life stories, but in only one case did the defendant receive a death sentence and attributing this difference in outcomes to the competency of the counsel arguing the cases); Michael L. Perlin, "The Executioner's Face is Always Well-Hidden": *The Role of Counsel and the Courts in Determining Who Dies*, 41 N.Y.L. SCH. L. REV. 201, 202-07 (1996) (reviewing a large variety of sources detailing the shortcomings of the capital defense bar and the lack of judicial action to alleviate these shortcomings); Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 69 (1990) ("[T]he inadequacy of [defense] representation at the trial level greatly increases the risk of convictions that are flawed by fundamental factual, legal, or constitutional error.").

99. See American Bar Association, House of Delegates Resolution 107 (Feb. 3, 1997) (visited Feb. 14, 2000) <<http://www.abanet.org/irr/rec107.html>>. The ABA called for a moratorium until such time when a jurisdiction implements guidelines to ensure the appointment of competent counsel, to improve the post-appellate review process, to work toward the elimination of racial discrimination in sentencing, and to prevent the execution of mentally retarded persons and defendants who were minors at the time of their offenses. *Id.*; cf. Michael D. Wims, *Debating ABA's Death Penalty Resolution: Bad Process, Bad Result*, A.B.A. SEC. CRIM. JUST. REP., Fall 1998, at 18, 19 (reprinting the dissent by the ABA Criminal Justice Section's Prosecution Function Committee opposing the ABA call for a death penalty moratorium). It should be noted that only 53% of the House of Delegates voted in favor of the resolution. *Id.* at 18.

100. No state has changed its death penalty practices in direct response to the adoption of the ABA resolution. See *id.* There have been developments, however, that have limited or attempted to limit the death penalty that have probably been facilitated by the ABA resolution. For example, Illinois Governor George Ryan declared a moratorium on capital punishment on January 31, 2000, in response to his state's record of sentencing innocent people to death. See Armstrong & Mills, *supra* note 77, at 1. Prior to this action by Gover-

suggests that fairness is not the priority of the process; rather, the priority is to keep the conveyor belt of death moving.<sup>101</sup>

Even more disturbing than the inadequacies of defense counsel are the recurrent failures of the judiciary to insist upon fairness in selecting those who will die in our death chambers. In many jurisdictions, judges are responsible for assigning defense counsel to indigent criminal cases, to include capital cases, and not only do they assign the incompetents discussed above, but all too often they continue to assign them even after their shortcomings are evident for all to see.<sup>102</sup> Even if the initial assignments are the result of a system that refuses to pay a living wage to attorneys who will take capital cases,<sup>103</sup> the old adage "fool me once, shame on you; fool me twice, shame on me" has deadly application when these counsel return to court seeking another death eligible client. Worse yet, where the initial and the follow-on assignments are the result of political favoritism, as they apparently are in some parts of the country,<sup>104</sup> the criminal justice system literally

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nor Ryan, the Illinois Supreme Court and General Assembly appointed separate committees to study possible reforms of capital punishment in that state. See Maurice Possley & Ken Armstrong, *Revamp Urged in Handling of Capital Cases: Study Seeks Higher Attorney Standards*, CHI. TRIB., Nov. 4, 1999, at 1. Additionally, on May 20, 1999, the Nebraska Legislature passed a bill that would have put a two-year ban on executions while a study was conducted to see if the penalty was being applied fairly in the state. See *State Votes to Halt Executions*, NAT. L.J., May 31, 1999, at A6. This measure, however, was vetoed by Nebraska Governor Mike Johanns just six days later. See Robynn Tysver, *Moratorium Vetoed Death-Penalty Timeout Is Poor Policy, Johanns Says*, OHAMA WORLD-HERALD, May 26, 1999, at 1.

101. See Richard Perez-Pena, *The Death Penalty: When There's No Room for Error*, N.Y. TIMES, Feb. 13, 2000, at 3 (quoting Professor Franklin Zimring that "[t]here is a great desire to have assembly-line executions" (internal quotation marks omitted)).

102. See Bright & Keenan, *supra* note 29, at 802 (providing examples of judicial assignment of incompetent attorneys). Bright and Keenan noted:

[J]udges in Houston, Texas have repeatedly appointed an attorney who occasionally falls asleep in court, and is known primarily for hurrying through capital trials like "greased lightning" without much questioning or making objections. Ten of his clients have received death sentences. Similarly, judges in Long Beach, California, assigned the representation of numerous indigent defendants to a lawyer who tried cases in very little time, not even obtaining discovery in some of them. The attorney has the distinction of having more of his clients sentenced to death, eight, than any other attorney in California.

*Id.* (footnotes omitted).

103. See Bright, *Counsel for the Poor*, *supra* note 47, at 1838, 1844 (noting that the low compensation for court-appointed lawyers contributes to the lack of experienced attorneys willing to defend capital cases); Viveca Novak, *The Cost of Poor Advice*, TIME, July 5, 1999, at 38 ("Alabama's legislature last year voted an increase in the \$1000 top fee for lawyers handling death-penalty cases only to have the Governor veto it").

104. See, e.g., Bright & Keenan, *supra* note 29, at 803 (citing a study that found that "Philadelphia's poor [capital] defendants often find themselves being represented by ward leaders, ward committeemen, failed politicians, the sons of judges and party leaders, and contributors to the judge's election campaign." (internal quotation marks omitted) (quot-



devolves into trading lives for political gain. Ultimately, whatever the cause of the difficulty in securing qualified counsel for these defendants, there can be no justification for assigning a man on trial for his life an attorney who is not only not going to help his cause, but who is in fact going to increase the probability of a death result because of the attorney's incompetence and/or neglect.

Aside from the appointment of counsel, the trial judge obviously exerts tremendous influence over the outcome of the findings portion of a capital case through his or her rulings on such issues as suppression motions, evidentiary objections, and the drafting of instructions.<sup>105</sup> Furthermore, once a finding of guilt has been returned, in a number of jurisdictions the trial judge either personally decides whether a convicted defendant will receive the death penalty<sup>106</sup> or retains the ability to override a jury's recommendation for life.<sup>107</sup> In the exercise of these powers, one would hope that our judges would strive to maintain their, and the system's, integrity by ensuring that every decision is based soundly upon the law and the facts, but the reality is that the influence of politics plays a disturbing role in this process.

The combination of the political clout of capital punishment as an electoral issue<sup>108</sup> and the popular election of trial court judges<sup>109</sup> has created a deadly mix across the country. Proclamations of support

ing Fredric N. Tulsky, *Big-Time Trials; Small Time Defenses*, PHILA. INQUIRER, Sept. 14, 1992, at A1).

105. *Cf. id.* at 792-93 (arguing that judges fail "to enforce the most fundamental right of all, the Sixth Amendment right to counsel, in capital cases"). The political liability elected judges face for their rulings in well known cases "make it virtually impossible for judges to enforce the constitutional protections to a fair trial for the accused." *Id.* at 793.

106. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-703.B. (West Supp. 1999) (presiding judge determines sentence); NEB. REV. STAT. ANN. § 29-2520 (1995) (presiding judge or, upon request, a panel of three judges determines sentence). The Supreme Court has held that a judge alone sentencing in capital trials is constitutional. *See Clemons v. Mississippi*, 494 U.S. 738, 745 (1990) ("Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court."); *Spaziano v. Florida*, 468 U.S. 447, 464 (1984) ("[W]e cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.").

107. *See, e.g.*, ALA. CODE § 13A-5-46(f), (g) (1994) (describing a jury verdict as only "advisory"); FLA. STAT. ANN. § 921.141(3) (West Supp. 1998) (declaring that the court shall independently weigh the aggravating and mitigating circumstances, and then enter a sentence "[n]otwithstanding the recommendation of a majority of the jury"); IND. CODE ANN. § 35-50-2-9(e) (Michie 1998) (stating that the court need only consider the jury's recommendation prior to determining the sentence). The Supreme Court has upheld the constitutionality of jury override death penalty schemes. *See Harris v. Alabama*, 513 U.S. 504, 515 (1995) (upholding Alabama's statute); *Spaziano*, 468 U.S. at 462-65 (upholding Florida's statute).

108. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (1998) (Kathleen Maguire & Ann L. Pastore eds., NCJ-176356, 1999),

for state sponsored executions have played prominently in judicial candidates' election campaigns<sup>110</sup> and in superfluous homilies from the bench.<sup>111</sup> Furthermore, judges have gone out of their way to use their participation in individual capital cases to encourage re-election to their current station or as spring board towards attaining a position on a higher court.<sup>112</sup> A capital defendant would be justified in wondering how he could possibly get a fair trial once he learns that his judge has let it be known far and wide that he or she adamantly supports the death penalty.<sup>113</sup> And to the extent any of the rest of us care about fairness in the process, we should be wondering the same thing ourselves.<sup>114</sup>

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138 tbl.2.56 (demonstrating that between 1965 and 1997, national support for the death penalty has grown from 38 percent to 75 percent).

109. See *id.* at 71-72 tbl.1.66 (showing that a majority of states elect their trial court judges).

110. See, e.g., *Nevius v. Warden*, 944 P.2d 858, 859 (Nev. 1997) (per curiam) (refusing to disqualify Nevada Supreme Court Justice Cliff Young from a death penalty case because he trumpeted his judicial crime-fighting record in the course of his reelection campaign by stating that he had upheld the death penalty 76 times); BESSLER, *supra* note 23, at 139-40 (reporting that in judicial elections in Texas and in California, individuals have been voted in and out of office because of their death penalty opinions, or distortions thereof); Berlow, *supra* note 29, at 80 (commenting on judges and judicial candidates who campaign "for office with promises to impose the death sentence at every opportunity"); Bright & Keenan, *supra* note 29, at 784-92 (examining how the death penalty impacts upon a judge's career in terms of election, retention, and promotion).

111. See, e.g., BESSLER, *supra* note 23, at 141 (quoting Texas Judge William Harmon, a former prosecutor, as stating in a 1991 capital trial "that he was doing 'God's work' to see that the defendant was executed").

112. See Bright & Keenan, *supra* note 29, at 787-88 (discussing instances when judges sought to be assigned to death penalty cases or refused reasonable requests for continuances because they wanted to have the publicity of a death penalty decision prior to an upcoming election); see also *Walton v. Arizona*, 497 U.S. 639, 713 n.4 (1990) (Stevens, J., dissenting) ("[E]lected judges too often appear to listen . . . [to] the many voters who generally favor capital punishment but who have far less information about a particular trial than the jurors who have sifted patiently through the details of the relevant and admissible evidence.").

113. Cf. *Nevius*, 944 P.2d at 859 (refusing to disqualify a judge on the basis of general pro-death penalty statements made in a re-election campaign, the court noted that a "general philosophical orientation" is not grounds for recusing a judge).

114. See Stephen B. Bright, *Can Judicial Independence be Attained in the South? Overcoming History, Elections, and Misperceptions About the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817, 859-60 (1998) (arguing that a fair judicial process cannot be achieved in the South until the system is divorced from monied special interest groups and passionate public opinion and advocating the elimination of elected judgeships and replacing them with a merit selection system); see also Stephen B. Bright, *Casualties of the War on Crime: Fairness, Reliability and the Credibility of Criminal Justice Systems*, 51 U. MIAMI L. REV. 424 (1997) (arguing that to create a fair system of justice "all parts of the community must be involved in the process").

Perhaps even more distressing than the impact that incompetent defense counsel and biased judges have on our American system of capital punishment, is the role that race plays in administering the sanction. In 1987, in *McCleskey v. Kemp*,<sup>115</sup> the Supreme Court was faced with compelling and uncontroverted proof that whether you received the death penalty in Georgia was slightly influenced by the color of your skin and greatly influenced by the color of your victim's skin.<sup>116</sup> Notwithstanding these facts, the Court denied the petitioner any relief because, in its opinion, the racial discrepancies did "not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process."<sup>117</sup> This result led Anthony Lewis to charge that the Court's opinion "condon[es] the expression of racism in a profound aspect of our law,"<sup>118</sup> and Randall Kennedy to state that "the majority in *McCleskey* repressed the truth and validated racially oppressive official conduct."<sup>119</sup>

Since *McCleskey*, subsequent investigations have established that race continues to play a critical role in administering our American system of capital punishment. One study of Philadelphia's death penalty practices found, among other distressing conclusions, that "the average black defendant's probability of receiving a death sentence is 1.6 . . . times greater than a similarly situated nonblack defendant."<sup>120</sup> A review of the records from the Chattahoochee Judicial District in Georgia has shown that from 1973 through the end of 1990 the district attorney's office "sought the death penalty 38.7 percent of the time when the defendant was black and the victim white, 32.4 percent when both defendant and victim were white, 5.9 percent when both defendant and victim were black, and never when the defendant was white and the victim black."<sup>121</sup> A review of death sentences in Harris

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115. 481 U.S. 279 (1987).

116. See *id.* at 287 (examining a study of the 2000 murder cases in Georgia during the 1970s that found that black defendants had 1.1 times greater chance of receiving a death sentence as other defendants, and defendants who killed whites had a 4.3 times greater chance of receiving a death sentence as defendants who killed blacks). For the complete results of this study, see DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990).

117. *McCleskey*, 481 U.S. at 313 (footnote omitted).

118. See Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1388 (1988) (quoting Anthony Lewis, *Bowing to Racism*, N.Y. TIMES, Apr. 28, 1987, at A31).

119. *Id.*

120. David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings From Philadelphia*, 83 CORNELL L. REV. 1638, 1726 (1998).

121. Michael Kroll, *Chattahoochee Judicial District: Buckle of the Death Belt* (1991) (visited Nov. 8, 1999) <<http://www.essential.org/dpic/dpic.r11.html>>.

County, Texas, by the *Houston Post* found that blacks were sentenced to death twice as often as whites.<sup>122</sup> Furthermore, after analyzing twenty-eight studies of death penalty sentencing results, the General Accounting Office stated that within the states that were the subjects of these studies, "those who murdered whites were . . . more likely to be sentenced to death than those who murdered blacks."<sup>123</sup> In short, a factor which, at another time, the Supreme Court has called "irrelevant and therefore prohibited,"<sup>124</sup> has so attached itself to our system of capital punishment that fairness in the implementation of that system within our multi-racial society seems a near, if not absolute, impossibility.

While there are other ways that arbitrariness sneaks into our American system of capital punishment,<sup>125</sup> the incompetence of defense counsel, the bias of trial judges, and the disheartening role of race, serve as the prime indicators for just how morally bankrupt our system has become.<sup>126</sup> Once the full scope of this disrepair is recognized, it becomes far more difficult to say that the process that condemned Tessie Hutchinson is worlds apart from what goes on in American courtrooms in deciding the fate of capital defendants. To borrow a thought from a different time, the process by which we select the condemned appears to have the same sense of justice as that ex-

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122. See Bryan Denson, *Death Penalty: Equal Justice?*, Hous. Post, Oct. 16, 1994, at A1. The significance of this disparity is intensified when one considers that Harris County is tied with Florida for the second highest number of executions behind Texas. See *id.*; see also Jack Douglas Jr. & Jeff Claassen, *Few Whites Executed for Black Deaths*, Fort Worth Star-Telegram, Feb. 26, 1999, at A1 (noting that the death sentence imposed on John William King for the Jasper dragging murder marks the first time in the twenty-two years since Texas resumed capital punishment that a white has received a death sentence for killing a black in Texas).

123. United States General Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* (Feb. 1990).

124. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (quoting *Hirabayashi v. U.S.*, 320 U.S. 81, 100 (1943)); see also *Graham v. Collins*, 506 U.S. 461, 484 (1993) (Thomas, J., concurring) (describing racial prejudice as "the paradigmatic capricious and irrational sentencing factor").

125. For example, the popular election of appellate court judges who hear death penalty cases on appeal and public prosecutors whose exercise of discretion determines whether a case will be eligible for the death penalty raise concerns similar to those attached to the popular election of trial court judges. Bright & Keenan, *supra* note 29, at 791-99; *supra* note 34. Also, the Court's death-qualifying process for capital juries has been heavily criticized as skewing the fairness of the overall process. See *supra* notes 23-25 and accompanying text.

126. See *supra* notes 92-99 and accompanying text (discussing the incompetence of defense counsel); *supra* notes 102-114 and accompanying text (discussing the bias of trial judges); *supra* notes 115-124 (discussing the effects of racial prejudice).

hibited by a stroke of lightning<sup>127</sup>—that is to say, none or very little. In fact, if I were an indigent black male in an Alabama courtroom, where the trial judge retains the near unfettered right to override jury recommendations for life,<sup>128</sup> and I was wrongly accused of killing a white female, Tessie Hutchinson's random selection for death<sup>129</sup> would look mighty appealing.

#### IV. THE SEARCH FOR JUSTIFICATION

*"They do say," Mr. Adams said to Old Man Warner, who stood next to him, "that over in the north village they're talking of giving up the lottery."*

*Old Man Warner snorted. "Pack of crazy fools," he said. "Listening to the young folks, nothing's good enough for them. Next thing you know, they'll be wanting to go back to living in caves, nobody work any more, live that way for a while. Used to be a saying about 'Lottery in June, corn be heavy soon.' First thing you know, we'd all be eating stewed chickweed and acorns. There's always been a lottery," he added petulantly. "Bad enough to see young Joe Summers up there joking with everybody."*<sup>130</sup>

At the time of the story's publication Ms. Jackson declined to offer any explanation of its meaning.<sup>131</sup> Over time, she provided a number of different accounts, to include that it was based on anti-Semitism<sup>132</sup> and that it was meant "to shock the story's readers with a graphic dramatization of the pointless violence and general inhumanity in their own lives."<sup>133</sup> Within the story itself, the only hints of an

127. See *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (per curiam) (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.").

128. See *supra* note 107 (citing jurisdictions where a judge may override a jury's recommendation for life).

129. Even though over three hundred people resided in Hutchinson's village, the true odds that Tessie Hutchinson faced are unknown because the first drawing was done by heads of households and we do not know how many families there were in the village. See Richard H. Williams, *A Critique of the Sampling Plan Used in Shirley Jackson's "The Lottery,"* 7 J. MOD. LITERATURE 543, 544 (1979).

130. Jackson, *supra* note 1, at 394.

131. FRIEDMAN, *supra* note 3, at 64 (explaining that when Harold Ross, the editor of *The New Yorker* at the time of the original publication of *The Lottery*, "asked if [Ms. Jackson] would care to enlarge upon its meaning, she refused").

132. See OPPENHEIMER, *supra* note 2, at 70-72, 81, 131 (noting that Ms. Jackson possessed a "painful awareness of anti-Semitism [that] she had acquired over the years" as a result of her marriage to a Jewish man).

133. FRIEDMAN, *supra* note 3, at 64; see also OPPENHEIMER, *supra* note 2, at 130 (noting that other readers suggested that *The Lottery* was a communist plot or that the story was simply devoid of any point); Oehlschlaeger, *supra* note 68, at 264 (analyzing the story as a fulfillment of patriarchal purposes as the women villagers surrender control to the men).

explanation for the killing are provided by Old Man Warner, who has lived through seventy-seven village lotteries, when he says, "Lottery in June, corn be heavy soon[.]" and, "There's always been a lottery."<sup>134</sup> The first explanation sounds in some undisclosed pagan tradition,<sup>135</sup> while the second sounds in the not uncommon practice of holding onto the old way of doing things just because that is the way it has always been done.<sup>136</sup> Neither of these justifications offer much support for the stoning of Tessie Hutchinson, just as neither of the justifications put forward for our American system of capital punishment offer much support for the state sponsored execution of our fellow citizens.

The effort to justify the death penalty in America has focused on the purposes of deterrence and retribution.<sup>137</sup> Early in the search for justification, the claim that the death penalty was needed for incapacitation was largely set aside in light of the fact that life in prison could accomplish this same goal in the vast majority of the cases.<sup>138</sup> Instead, the justification controversy has settled on pitting the retentionists' claim that the death penalty deters others from committing murder against the abolitionists' assertions that the death penalty has no net effect on murder rates or, worse yet, actually encourages others to kill,<sup>139</sup> and pitting the retentionists' contention that the death penalty

134. Jackson, *supra* note 1, at 394.

135. See FRIEDMAN, *supra* note 3, at 63 (describing past ritual sacrifices conducted to appease a supernatural being such as "sacrifices in the name of a god of vegetation").

136. See Stark, *supra* note 51, at 358-59 ("[The lottery] has persisted for so long that it has acquired a momentum of its own, which encourages its adherents to maintain it for itself, quite aside from its consequences.").

137. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion).

138. See *Furman v. Georgia*, 408 U.S. 238, 300-01 (1972) (Brennan, J., concurring) ("[I]f a criminal convicted of a capital crime poses a danger to society, effective administration of the State's pardon and parole laws can delay or deny his release from prison, and techniques of isolation can eliminate or minimize the danger while he remains confined."); see also MARK TUSHNET, *THE DEATH PENALTY* 2 (1994) ("A second reason for punishment, incapacitation—preventing each criminal from continuing to commit crime—is almost as irrelevant" as rehabilitation in the death penalty debate.); Donald L. Beschle, *What's Guilt (or Deterrence) Got To Do With It?: The Death Penalty, Ritual, and Mimetic Violence*, 38 WM. & MARY L. REV. 487, 502 (1997) (noting that the incapacitation rationale "does not seem prominently advanced in either scholarly or popular debate. Life imprisonment effectively achieves incapacitation nearly as well as does death").

139. Some abolitionists assert that by carrying out intentional, premeditated executions, the state sends the message that violence, to include killing, is an appropriate way to address one's problems. See John Kaplan, *The Problem of Capital Punishment*, 1983 U. ILL. L. REV. 555, 561 (contending that capital punishment may send the message to the general public that "an appropriate method of settling a dispute is for one of the parties to kill the other"). Another argument is that the availability of the death penalty encourages some to seek suicide by state execution. See *id.* at 560 (discussing how a young woman in California killed two children in the hope that the state would put her to death because she wanted to

is required to satisfy society's need to exact retribution from those who kill against the abolitionists' argument that retribution is an unworthy goal of a civilized society.

The debate over the impact of deterrence in our capital punishment system is best taken up on two different levels. The first level is characterized by struggles between various research efforts, while the second is characterized by a struggle to prevail on what the true intuition is regarding capital punishment and deterrence.

Even though there have been research efforts that have claimed a significant deterrent effect from capital punishment,<sup>140</sup> the weight of the considered opinion holds that the death penalty offers no statistically significant deterrent benefit beyond that offered by long-term confinement.<sup>141</sup> This is not to say that the abolitionists have proven their oft made claim that capital punishment actually encourages the incidence of homicide, as that assertion remains open to debate.<sup>142</sup> However, it is to say that over time the body of research has arrived at

die, but she didn't want to violate her religious proscriptions against suicide); Trisha Renaud, *Killer Asks Jurors, "Why Take the Risk?" of Letting Him Live*, FULTON COUNTY DAILY REPORT, Oct. 7, 1998 (explaining that a capital defendant "insist[ed] he killed a middle-aged . . . couple specifically to get the electric chair because he could not kill himself").

140. See, e.g., Issac Ehrlich, *The Deterrent-Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397, 398 (1975) (estimating that each execution between 1933 and 1969 prevented eight homicides). Ehrlich's estimates have been heavily criticized on many different grounds. See Gordon P. Waldo, *The Death Penalty and Deterrence: A Review of Recent Research*, in THE MAD, THE BAD, AND THE DIFFERENT 169, at 172-76 (Israel L. Barak-Glantz & C. Ronald Huff eds., 1981) (discussing Ehrlich's critics); Brian Forst, *Capital Punishment and Deterrence: Conflicting Evidence?*, 74 J. CRIM. L. & CRIMINOLOGY 927, 939 (1983) (suggesting that Ehrlich's predisposed belief in the value of the death penalty might have affected his research); Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of The Case for Capital Punishment*, 79 MICH. L. REV. 1177, 1210-15 (1981) (citing technical and empirical problems with Ehrlich's sampling poll).

141. See *Furman*, 408 U.S. at 353 (Marshall, J., concurring) ("Despite the fact that abolitionists have not proved non-deterrence beyond a reasonable doubt, they have succeeded in showing by clear and convincing evidence that capital punishment is not necessary as a deterrent to crime in our society. This is all that they must do."); Beschle, *supra* note 138, at 503 ("[T]he general consensus among social scientists is that the deterrent effect of the death penalty is unproven."); Lempert, *supra* note 140, at 1224 ("There is little reason to believe that the availability of capital punishment is—except possibly in certain rare circumstances—a substantial marginal deterrent."); Michael L. Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOLOGY 2-5 (1996) (reviewing empirical research on the deterrent effect of the death penalty and concluding that "the death penalty has virtually the same effect as long-term imprisonment on homicide rates").

142. See Lempert, *supra* note 140, at 1216-17 (referring to empirical studies attempting to establish a link between executions and homicides as "admirable first step[s]"); Radelet & Akers, *supra* note 141, at 10 (arguing that "[t]he brutalization hypothesis . . . has not been tested very well" and that "the research supporting it remains more suggestive than definitive").

a point where it can be said with relative certainty that capital punishment advocates have failed to prove that the death penalty deters more homicides than the readily available option of long-term confinement.<sup>143</sup>

Notwithstanding that the research rests at the point of denying a relative deterrent effect from capital punishment, this has not ended the debate in all circles. Instead, it has simply shifted the argument from one of research results to one of intuition, with the death penalty proponents claiming that there are obviously some individuals out there who are contemplating killing another who will decide not to do so because if they are caught and convicted they may very well be executed.<sup>144</sup> The abolitionists respond by reminding the proponents that this intuition thus far suffers from a severe lack of proof,<sup>145</sup> and by pointing out its implausibility. Specifically, the abolitionists say this intuition is unbelievable because it would apply only to a type of person who thinks rationally and who would commit a capital crime knowing that the punishment is long-term imprisonment, but who would not commit the crime knowing that the punishment is death.<sup>146</sup> Nevertheless, capital punishment supporters argue that their intuition draws its power from a common human experience which says that death must be a more effective deterrent than any less severe penalty.<sup>147</sup> Therefore, they maintain that since they are weighing the in-

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143. See *supra* note 141. Professor Lempert believes this position has been proven to a "moral certainty." See Lempert *supra* note 140, at 1222.

144. See *Gregg v. Georgia*, 428 U.S. 153, 185 (1976) (plurality opinion) (explaining that, for some "the death penalty undoubtedly is a significant deterrent"). The *Gregg* plurality offered the example of "carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act." *Id.* at 186; see also Beschle, *supra* note 138, at 502 (recognizing that the deterrence justification is "intuitively appealing" to many and thus "continues to draw wide support" (footnote omitted)); Ernest van den Haag, *The Death Penalty Once More*, 18 U.C. DAVIS L. REV. 957, 966 (1985) ("Whatever people fear most[—such as death—]is likely to deter most. Hence, I believe that the threat of the death penalty may deter some murders who otherwise might not have been deterred.").

145. See *supra* note 141.

146. See *Furman*, 408 U.S. at 301 (Brennan, J., concurring) (rejecting the assumption that a rational thinking person who would commit a capital crime exists); see also Black, *supra* note 83, at 302 ("[A] mind so far gone down a strange and wild path [as to premeditate murder] would probably not be swayed by the difference between possible (though highly improbable) execution and possible (and much more probable) long imprisonment."); Lempert, *supra* note 140, at 1193 (noting that since "[m]any homicides occur when the offender is highly emotional or under the influence of alcohol" the odds of the offender comparing different forms of punishment is slim).

147. See *Furman*, 408 U.S. at 301 (Brennan, J., concurring) ("The States argue . . . that they are entitled to rely upon common human experience and that experience, they say, supports the conclusion that death must be a more effective deterrent than any less severe punishment.").



nocent lives of potential victims against the guilty lives of murderers, it is not their burden to prove that capital punishment deters homicides; rather, it is the burden of the abolitionists to prove conclusively the lack of a deterrent effect,<sup>148</sup> and this is something the retentionists say has not been accomplished.

The retentionists' intuition based, burden-shifting characterization of the deterrence debate is not only an effort to force the abolitionists to prove a negative,<sup>149</sup> but, more importantly, it is a giant step removed from a true inquiry into whether the death penalty is justified. If we are searching for affirmative proof that the death penalty accomplishes an accepted purpose of criminal punishment, the record on deterrence is lacking to the point of nonexistence.<sup>150</sup> While the proponents' "common human experience" intuition argument may have more to recommend it than Old Man Warner's prophecy of "Lottery in June, corn be heavy soon,"<sup>151</sup> it's not hard to draw a comparison between that position and the old man's statement that the village should continue to stone one of its inhabitants to death each year because it has always stoned one of its inhabitants to death each year.<sup>152</sup>

When the Supreme Court welcomed capital punishment back in 1976, it said of retribution, while it "is no longer the dominant objec-

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148. See Kaplan, *supra* note 139, at 559 (discussing the argument that the burden of proof should lie on the abolitionists because "we should make our errors in favor of innocent lives rather than in favor of guilty ones"); see also Beschle, *supra* note 138, at 503 ("One response to this situation might be to argue that the burden is not on the defenders of a historically common punishment to prove its efficacy, but rather upon its opponents to prove the opposite. Because that probably cannot be done, given the inability to set up a valid controlled experiment, history and intuition should prevail."); Bigel, *supra* note 76, at 44 ("Instead of seeking to measure deterrence from a national, interstate or intrastate perspective, retentionists have argued that, even if only a few randomly convicted felons concede that they refrained from committing murder to avoid the death penalty, the deterrent effect of capital punishment has been fulfilled."); cf. MARK TUSHNET, *THE DEATH PENALTY* 9 (1994) ("The murder victim, killed because there is no death penalty, is entirely innocent; the executed murderer, killed because of the perhaps false belief that the death penalty deters, is not. That is a reason to say that, if we are uncertain about the death penalty's deterrent effect, we ought not to abolish it.").

149. Cf. Beschle, *supra* note 138, at 531 ("[O]nce the burden of proof is placed upon opponents of capital punishment, and set at a level that demands a great deal of certainty, the deterrence debate becomes futile."). Beschle contended that such a burden "will never be possible to disprove . . . with sufficient certainty." *Id.*

150. See *supra* note 141 (noting the lack of evidence in support of the deterrence justification).

151. Jackson, *supra* note 1, at 394.

152. Cf. O.W. Holmes, *The Path of the Law, Address at the Dedication of the New Hall of the Boston University School of Law* (Jan. 8, 1897), in 10 HARV. L. REV. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.").

tive of the criminal law,' . . . neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men."<sup>153</sup> The Court said that capital punishment for murder would serve as "an expression of society's moral outrage at particularly offensive conduct,"<sup>154</sup> thus encouraging its citizens "to rely on legal processes rather than self-help to vindicate their wrongs."<sup>155</sup> As the Court has returned to the issue over the years, it has affirmed the death penalty's outrage expressing function,<sup>156</sup> and it has embraced a "just deserts"<sup>157</sup> conception of retribution by speaking of the need to allow for a sentence that is "directly related to the personal culpability of the criminal offender."<sup>158</sup> These same themes have been echoed by supporters of capital punishment, who have called for the sanction because it satisfies society's insistence on adequate punishment for outrageous crimes,<sup>159</sup> and because it achieves justice by exacting a punishment that is proportional to the crime of murder<sup>160</sup> or enables society to pay murderers back for the harm they have caused.<sup>161</sup>

As one might expect, the abolitionist attack on retribution on the Supreme Court was championed by Justices Marshall and Brennan.

153. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion) (quoting *Williams v. New York*, 337 U.S. 241, 248 (1949)).

154. *Id.* (footnote omitted).

155. *Id.* The idea that capital punishment will prevent vigilantism sounds not in retribution theory, but in utilitarianism, since it anticipates some future beneficial results to spin-off from the use of the sanction. See *id.* at 237-38 (Marshall, J., dissenting) (quoting *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (per curiam) (Stewart, J., concurring). Justice Marshall scorned this defense of the death penalty, saying, "[i]t simply defies belief to suggest that the death penalty is necessary to prevent the American people from taking the law into their own hands." *Id.* at 238.

156. See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 836-38 (1988) (plurality opinion) (holding that despite society's moral outrage, the death penalty could not be imposed on murderers who were younger than sixteen years of age at the time of their offense due to their lesser culpability).

157. See, e.g., *Enmund v. Florida*, 458 U.S. 782, 801 (1981) (rejecting the application of the death penalty because the particular facts did not support a finding that capital punishment would ensure "that the criminal gets his just deserts").

158. *Tison v. Arizona*, 481 U.S. 137, 149 (1987). The Court called this need for culpability "[t]he heart of the retribution rationale." *Id.*

159. See KRONENWETTER, *supra* note 71, at 6 (citing Lord Justice Denning, Master of the Rolls of the Court of Appeals in England, as stating that "some crimes are so outrageous that society insists on adequate punishment because the wrongdoer deserves it" (internal quotation marks omitted)).

160. See *id.* at 5 (citing Professor Ernest van Jen Haag as stating that "we feel a man who has committed a crime must be punished in proportion to the seriousness of the crime" (internal quotation marks omitted)).

161. See Walter Berns, *The Morality of Anger*, in PUNISHMENT AND THE DEATH PENALTY 152 (Robert M. Baird & Stuart E. Rosenbaum eds., 1995) (explaining the different viewpoints as to the purpose of capital punishment).

In *Furman v. Georgia*,<sup>162</sup> both Justices challenged the basic legitimacy of retribution as a justifying principle for the death penalty. Justice Marshall wrote that “[r]etaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government in a free society,”<sup>163</sup> and he claimed that the Court had “consistently denigrated retribution as a permissible goal of punishment.”<sup>164</sup> In that same case, Justice Brennan characterized retribution as the belief that “criminals are put to death because they deserve it,”<sup>165</sup> and he scoffed at the idea that any state would “wish[ ] to proclaim adherence to ‘naked vengeance.’”<sup>166</sup> In direct response to the argument that capital punishment was necessary to express society’s abhorrence of certain crimes, Justice Marshall said, in *Furman*, that the Eighth Amendment was there to provide “insulation from our baser selves.”<sup>167</sup> Four years later in *Gregg v. Georgia*,<sup>168</sup> Justice Marshall returned to this same theme and again rejected the retributive justification because, in his opinion, the death penalty conflicts with the basic concept of human dignity at the core of the Eighth Amendment by entailing a “total denial of the wrongdoer’s dignity and worth.”<sup>169</sup>

Other opponents of capital punishment have also responded in the retribution debate around the same two themes of expressing societal outrage and exacting just deserts on offenders. Like Justices Marshall and Brennan, abolitionists have argued that societal outrage is either the same as, or not far from, societal vengeance, and vengeance is not an emotion or desire that should be indulged by the state.<sup>170</sup> Furthermore, if capital punishment is employed as a means

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162. 408 U.S. 238 (1972) (per curiam).

163. *Id.* at 343 (Marshall, J., concurring).

164. *Id.* at 344.

165. *Id.* at 304 (Brennan, J., concurring).

166. *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 112 (1958) (plurality opinion) (Brennan, J., concurring)).

167. *Id.* at 345 (Marshall, J., concurring). Marshall explained that but for this insulation, “the rack and other tortures would be possible in a given case.” *Id.*

168. 428 U.S. 153 (1976) (plurality opinion).

169. *Id.* at 241 (Marshall, J., dissenting).

170. See TUSHNET, *supra* note 148, at 4 (noting that societal vengeance once expressed may become uncontrollable, causing the execution of innocents); Black, *supra* note 83, at 304 (supporting the notion that although there is intense support among the people for retribution or vengeance, these desires are misplaced, as their fulfillment will not return the victim to his family); see also Reverend Bernice A. King, *Uprooting the Seeds of Violence*, THE OTHER SIDE, Sept.-Dec. 1997, at 36. King stated:

Those who thirst for revenge may experience the illusion of satisfaction, but this never lasts long in people of conscience, because every act of violence leaves in its wake the seeds of more violence. We don’t redeem the loss of our loved ones by adding to the misery of our society and the callousness of our government. In the short term, the death penalty may satisfy the very human impulse to seek revenge.

of expressing society's collective anger, that practice could "too easily get out of hand" and result in "the death penalty [being] imposed on people who—even on the society's own retributivist terms—do not deserve it."<sup>171</sup> Finally, since a significant number of the condemned experience positive change in their personal character and respect for humanity during the years they linger on death row,<sup>172</sup> by the time executions roll around whatever societal outrage remains is often directed at persons who are remarkably different from who they were when they committed their crimes.<sup>173</sup>

As for the just deserts conception of retribution, abolitionists have argued that whatever appeal this claim might have in a world with a just system of capital punishment, that appeal quickly fades in the context of how the death penalty is carried out in America.<sup>174</sup> It is a fact that our system of capital punishment generates unprincipled death sentences based upon such things as the incompetence of counsel, the bias of the judiciary, the influence of race,<sup>175</sup> and the mistaken allocation of responsibility, to include the wrongful conviction of the innocent and the insane.<sup>176</sup> This, in turn, presents an insurmountable barrier to a legitimate and complete just deserts argument in sup-

In the long run, however, compounding acts of brutality add to the suffering of the loved ones of offenders and victims alike.

*Id.* (available on-line at <<http://www.theotherside.org/archive/sep-dec97/king.html>>).

171. TUSHNET, *supra* note 148, at 4.

172. See Lempert, *supra* note 140, at 1184 (explaining that a death row experience may bring about a "change in moral identity" thereby raising the question of whether the inmate still deserves to die); see also Ward & Rodriguez, *supra* note 61, at A1 (describing Karla Faye Tucker's religious transformation while she awaited execution on the Texas death row).

173. See Lou Jones & Lorie Savel, *Portraits from Death Row: Final Exposure*, THE OTHER SIDE, Sept.-Dec. 1997, at 8, 11 (explaining that one of the tragedies of capital punishment is "that they almost never execute the same man they convict" because "[e]veryone changes in time" and "[d]eath row escalates that change whether for good or bad, because you spend so much time alone").

174. See Jack Greenberg, *Against the American System of Capital Punishment*, 99 HARV. L. REV. 1670, 1677 (1986) (explaining that "the moral force of any retribution argument is radically undercut by the hard facts of the actual American system of capital punishment," a system that "violates fundamental norms because it is haphazard, and because it is regionally and racially biased").

175. See *supra* notes 92-99 and accompanying text (noting the incompetency of many defense counsels); *supra* notes 102-114 and accompanying text (noting the biases of the judiciary); *supra* notes 115-124 and accompanying text (noting the greater likelihood of minority defendants receiving a death sentence than their white counterparts).

176. See *Callins v. Collins*, 510 U.S. 1141, 1145-46 (1994) (denial of cert.) (Blackmun, J., dissenting) (conceding that "no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies," and that the current system "must wrongly kill some defendants"); see also *supra* notes 72-88 and accompanying text (noting the incidence of mistaken convictions and the likelihood that the innocent will be executed).

port of capital punishment.<sup>177</sup> Since just deserts depends upon the punishment being absolutely and truly deserved, it cannot possibly support "a policy that trades the wrongful execution of a few for the proper execution of many."<sup>178</sup>

Since the retribution debate is largely an argument over morality,<sup>179</sup> it is tempting to say that both sides should be respected and no further discussion is necessary. This, however, cannot be done due to the imperfections in our system of capital punishment. The flaws in the way that our death penalty is administered present a direct challenge to the just deserts retributive rational.<sup>180</sup> Additionally, these same infirmities significantly detract from the strength of the societal outrage claim, in that we should hardly welcome the sacrifice of undeserving souls simply to satisfy the blood lust of the populace. Therefore, it is extremely problematic to base state-sponsored executions on retributive theories in the face of the available alternatives of life in prison, with or without parole. Respect for conflicting views may demand that I not correlate the retentionists' retribution claims with Old Man Warner's pagan chant or blind adherence to tradition, but that respect does not warrant continued support for the American system of capital punishment. Given the state of the evidence regarding deterrence and the infirmities of the retentionists' retribution claims, the inescapable conclusion is that we do not have a rational reason for continuing to send men, women, and children to their deaths in execution chambers across the country.<sup>181</sup>

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177. See David J. Gottlieb, *The Death Penalty in the Legislature: Some Thoughts About Money, Myth, and Morality*, 37 U. KAN. L. REV. 443, 457 (1989) (explaining that "[t]he moral force of capital punishment is undercut by the realities of executions," and the "system violates notions of just punishment because it is haphazardly administered against a small, almost randomly selected sample of eligible persons").

178. Lempert, *supra* note 140, at 1184.

179. See Lempert, *supra* note 140, at 1183 (reporting that modern retributivists "respect the law's determination that capital punishment should be reserved for the most morally culpable").

180. See Greenberg, *supra* note 174, at 1670 (finding that the death penalty has been administered inconsistently and is thus incompatible with its proponents' stated objectives). See generally *supra* notes 72-88, 102-124 and accompanying text (discussing the failings in the administration of the death penalty in America, including race factors, politics, mental incapacity, and mistake).

181. It has been suggested that capital punishment survives and prospers not because it is considered a rational policy choice, but because it "serves an important ritual or mythical function" by informing the public that "opinion leaders are concerned with the feelings of victims rather than the perpetrators; it affirms that society is doing something . . . about violent crime." Gottlieb, *supra* note 177, at 458-59; see also Beschle, *supra* note 138, at 518 ("To hypothesize that the primary reason behind the death penalty is its function as a symbolic sacrifice . . . permits one to explain a number of features of the contemporary

## V. THE BRUTALITY OF THE DEATH PENALTY

*Although the villagers had forgotten the ritual and lost the original black box, they still remembered to use stones. The pile of stones the boys had made earlier was ready; there were stones on the ground with the blowing scraps of paper that had come out of the box. Delacroix selected a stone so large she had to pick it up with both hands and turned to Mrs. Dunbar. "Come on," she said. "Hurry up."*

*Mrs. Dunbar had small stones in both hands, and she said, gasping for breath, "I can't run at all. You'll have to go ahead and I'll catch up with you."*

*The children had stones already. And someone gave little Davy Hutchinson a few pebbles.*<sup>182</sup>

It is just after Davy is given a few pebbles that the full village falls upon Tessie Hutchinson and stones her to death.<sup>183</sup> The mental picture spawned by this ending is brutal in a very basic way. There is blood. There is a palatable sense of pain. There is an overwhelming force against which physical resistance is futile. There is absolute hopelessness. Tessie Hutchinson is going to die a violent death at the hands of the stone wielding mob and there is nothing that she can do about it.

The unvarnished picture of our American system of capital punishment can also be said to be characterized by blood, pain, futile resistance, and hopelessness. While it is true that lethal injection does not necessarily entail the letting of blood from the body, our other methods of putting the condemned to death most certainly do. It does not take much imagination to draw parallels between killing someone by hanging,<sup>184</sup> shooting,<sup>185</sup> gassing,<sup>186</sup> or electrocution<sup>187</sup> and stoning. All either necessarily present us with a bloody and

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death penalty that simply are not consistent with the rationalist theories that either deterrence or retribution serve as its basis.").

182. Jackson, *supra* note 1, at 397.

183. *See id.*

184. Delaware, New Hampshire, and Washington allow for the possibility that a condemned inmate will be executed by hanging instead of lethal injection. *See* DEATH PENALTY INFORMATION CENTER, *Methods of Execution by State* (visited Feb. 18, 2000) <<http://www.essential.org/dpic/methods.html>>.

185. Idaho, Oklahoma, and Utah allow for the possibility that a condemned inmate will be executed by a firing squad instead of by lethal injection. *See id.*

186. Five states allow for the possibility that a condemned inmate will be executed in the gas chamber instead of by lethal injection. *See id.*

187. Eleven states use the electric chair as either their sole means of execution or as one of their potential alternatives. *See id.*

marred corpse, or allow for ample possibility of the same.<sup>188</sup> Additionally, all of these methods can result in pain being inflicted upon the condemned, and this includes lethal injection. It is well-documented that some inmates die an excruciatingly slow death because an improper dose of drugs allows them to awaken paralyzed and unable to breathe.<sup>189</sup>

Like Tessie Hutchinson, the condemned on America's death rows are faced with a force against which physical resistance is futile. Once an inmate has landed on death row, the strictness of the security all but eliminates the possibility of escape,<sup>190</sup> and that last walk to the execution chamber does not allow for any dramatic dash for freedom.<sup>191</sup> Furthermore, when an inmate has reached this point, his situation is certainly as hopeless as was Tessie Hutchinson's when she pleaded that her selection wasn't fair or right. Taking the "dead man's walk"<sup>192</sup> and then being strapped down in the execution chamber ensure that the absolute finality and inevitability of death is fully appreciated. All hope of life evaporates as the inmate realizes that in a moment he will die—in a moment the State will take his life.<sup>193</sup>

In addition to the basic brutality<sup>194</sup> that pervades both *The Lottery* and our system of capital punishment, there are other more refined brutal parallels that can be drawn between Ms. Jackson's fiction and our real lives. The first of these, as previously discussed, is that in Tessie Hutchinson's village and in America there is a willingness to

188. See, e.g., Michales, *supra* note 52, at 143-44 (providing some eyewitness accounts of executions by electrocution and hanging).

189. See *supra* note 26 (discussing examples of botched executions).

190. See MARQUART ET AL., *supra* note 22, at 138-41 (describing the security measures that are a part of life on death row).

191. See generally JOHNSON, *supra* note 17, at 142-66 (explaining that the emphasis during the final hours approaching an inmate's execution is on social control, rather than physical control, because "modern execution etiquette" requires that a prisoner walk unbound to his death); MARQUART ET AL., *supra* note 22, at 236-38 (describing Texas security procedures attendant to the final day of the execution process).

192. HELEN PREJEAN, *DEAD MAN WALKING* (1993).

193. See JOHNSON, *supra* note 17, at 175 ("At the end, resistance of any kind seemed unthinkable. Like so many of those before him, . . . [the inmate] appeared to have given up on life before he died in the chair.").

194. The use of various forms of the word "brutal" herein should not be taken to be synonymous with the long debated question of whether the death penalty has a brutalizing effect on society. This idea asserts that state executions lower respect for life rather than sustaining respect for life; hence, capital punishment may stimulate rather than deter murder. See John K. Cochran et al., *Deterrence or Brutalization? An Impact Assessment of Oklahoma's Return to Capital Punishment*, 32 *CRIMINOLOGY* 107, 108 (1994) (discussing a research study that suggests that highly publicized executions actually brutalize society by legitimating lethal violence, leading to unintended increases in the level of criminal homicide). I do not intend to implicate this issue in this section of the Article.

sacrifice the innocent<sup>195</sup> upon the respective alters of the lottery and the death penalty. Beyond this, two other parallels are that neither world is put off by the brutality of executing children or the mentally retarded.

After Bill Hutchinson draws the lot that isolates the selection process on his family, each of the Hutchinsons is then required to take his or her chance in the lottery. This includes all three of the Hutchinson children who are still at home; Bill Jr., Nancy, and little Davy.<sup>196</sup> The reader is told that Nancy is twelve, and although Ms. Jackson never gives the specific ages of the two boys, there are plenty of hints in the story to enable a reader to guess their approximate ages. Bill Jr.'s "overlarge feet" and order in the lottery mark him as an adolescent, while little Davy's inability to reach into the box and draw out a lot on his own tells us that he is the youngest in the family.<sup>197</sup> We, therefore, have a boy who is in his middle teens, a girl of twelve, and a boy who is certainly less than ten, and all three had an equal chance of being stoned to death in place of their mother.

As shocking as the potential killing of the Hutchinson children may seem in Ms. Jackson's work of fiction, the reality of the American system of capital punishment is that we sentence children to death and execute them, all in the name of justice.<sup>198</sup> In 1988, in *Thompson v. Oklahoma*,<sup>199</sup> the Supreme Court held that offenders who were younger than sixteen at the time of their crimes were not constitutionally eligible for the death penalty.<sup>200</sup> However, just one year later, in *Stanford v. Kentucky*,<sup>201</sup> the Court, in a five to four vote, refused to extend that same immunity to children aged sixteen and seventeen.<sup>202</sup> Accordingly, while we would not execute Nancy or Davy, it is entirely possible that Bill Jr., would qualify for our death penalty. This may

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195. See *supra* notes 72-88 and accompanying text.

196. Jackson, *supra* note 1, at 396-97.

197. Cf. Oehlschlaeger, *supra* note 68, at 263.

198. Seventy individuals, all male, currently sit on death row as a result of sentences they received as juveniles. DEATH PENALTY INFORMATION CENTER, *Juveniles and the Death Penalty* (visited Feb. 18, 2000) <<http://www.essential.org/dpic/juvchar.html>>. Since 1976, thirteen males have been executed for crimes they committed as juveniles. See *id.*

199. 487 U.S. 815 (1988) (plurality opinion).

200. *Id.* at 838 ("[W]e are not persuaded that the imposition of the death penalty for offenses committed by persons under 16 years of age has made . . . any measurable contribution to the goals that capital punishment is intended to achieve. It is . . . thus an unconstitutional punishment." (internal citations omitted)).

201. 492 U.S. 361 (1989) (plurality opinion).

202. *Id.* at 380. By so holding, the Court rejected the dissenting argument that "juveniles as a class have not the level of maturation and responsibility that we presume in adults and consider desirable for full participation in the rights and duties of modern life." *Id.* at 395 (Brennan, J., dissenting).



tempt us to pat ourselves on the back while proclaiming that two out of three is not bad, but this would be false pride in light of the fact that our willingness to execute someone similar to Bill Jr., puts us in the elite company of countries like Iran, Nigeria, Pakistan, Saudi Arabia, and Yemen.<sup>203</sup>

In the course of *The Lottery*, the reader is told that the village contains "about three hundred people."<sup>204</sup> In light of this, although Ms. Jackson's never writes as much, if the village's demographics are reflective of the rest of the United States, it is fair to assume that it would have at least three mentally retarded individuals amongst its members.<sup>205</sup> Therefore, given that there is no indication that these members of the village are exempt from the lottery, it can be said that this is yet another brutal parallel that is shared between Ms. Jackson's community and our own system of capital punishment.

In the 1989 case of *Penry v. Lynaugh*,<sup>206</sup> the Supreme Court refused to allow the mentally retarded to be excluded from the application of the death penalty.<sup>207</sup> Notwithstanding that the condemned man in that particular case had an IQ of between fifty and sixty-three,<sup>208</sup> and a mental age of 6½,<sup>209</sup> the Court held that the petitioner, and all others like him, could constitutionally be put to death for the worst of their crimes.<sup>210</sup> As a consequence of this decision, death rows around the country include hundreds of inmates who are

203. See Amnesty International, *Facts and Figures on the Death Penalty* (last modified Dec. 18, 1999) <<http://www.amnesty.org/ailib/intcam/dp/dpfacts.htm>>. Of these six countries, the U.S. has committed the most executions since 1990 of child offenders. See *id.*

204. Jackson, *supra* note 1, at 390.

205. See JASKULSKI ET AL., PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, *THE JOURNEY TO INCLUSION* 26 (1996) (citing a national prevalence rate for mental retardation of one percent).

206. 492 U.S. 302 (1989) (plurality opinion).

207. See *id.* at 340 (concluding that the Eighth Amendment does not preclude execution solely on the basis of mental retardation because sentencers can take into consideration in their sentencing the mitigating effects of mental retardation).

208. See *id.* at 307-08 (explaining that the defendant's impairment qualified as mild to moderate mental retardation).

209. See *id.* at 308 (noting that Penry, who was 22 years old when he committed his crime, had a social age of nine or ten).

210. See *id.* at 340. Justice O'Connor explained:

[W]e cannot conclude today that the Eighth Amendment precludes the execution of any mentally retarded person of Penry's ability convicted of a capital offense simply by virtue of his or her mental retardation alone. . . . While a national consensus against execution of the mentally retarded may someday emerge reflecting the 'evolving standards of decency that mark the progress of a maturing society,' there is insufficient evidence of such a consensus today.

*Id.*

mentally retarded,<sup>211</sup> and they are constantly being put to death,<sup>212</sup> despite their inability to understand fully their crime, its consequences, or the reality of the State taking their lives. On this last point, the record is replete with stories about how mentally retarded defendants have been led to their deaths even while they display a lack of comprehension of what was happening to them.<sup>213</sup> Tessie Hutchinson might have thought her being stoned to death was unfair and not right, but at least she was able to understand what was happening to her and voice her protests. Many of the mentally retarded inmates who are executed across America are denied even that recognition of their humanity.

### CONCLUSION

*Ultimately one finds that the ritual of the lottery, beyond providing a channel to release repressed cruelties, actually serves to generate a cruelty not rooted in man's inherent emotional needs at all. Man is not at the mercy of a murky, savage id; he is the victim of unexamined and unchanging traditions which he could easily change if he only realized their implications. Herein is horror.*<sup>214</sup>

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211. See NATIONAL COALITION TO ABOLISH THE DEATH PENALTY, *Mental Competency and the Death Penalty* (visited Apr. 14, 2000) <<http://www.ncadp.org/facts.html>> (estimating that more than 300 people on death row suffer from mental retardation). But see Victor L. Streib, *Executing Women, Children, and the Retarded: Second Class Citizens, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT* 211-12 (James R. Acker et al. eds., 1998) (discussing the lack of reliable and conclusive statistics on the number of mentally retarded serving on death row).

212. See DEATH PENALTY INFORMATION CENTER, *Mental Retardation and the Death Penalty* (visited Feb. 18, 2000) <<http://www.essential.org/dpic/dpicmr.html>> (stating that 34 individuals with mental retardation have been executed).

213. See JOHNSON, *supra* note 17, at 5 (explaining that mentally retarded offenders often do not understand the concept of death); NATIONAL COALITION TO ABOLISH THE DEATH PENALTY, *supra* note 211 (reporting that Morris Odell Mason, who was mentally retarded, made the following statement to another inmate while walking to the execution chamber: "When I get back, I'm gonna show him how I can play basketball as good as he can." (internal quotation marks omitted)); *Crime & Punishment: An Execution in Texas* (ABC Nightline television broadcast, Jan. 17, 1995) (recounting a discussion between attorney Robert McClassen and his mentally retarded client, Mario Marquez, where Marquez stated his hope that after his execution he would go to heaven where he could work either as a gardener or in a position that takes care of animals). Cf. Rick Bragg, *A Killer Racked by Delusions Dies in Alabama's Electric Chair*, N.Y. TIMES, May 13, 1995, at A7 (reporting on the execution of Varnall Weeks, "a convicted killer described by psychiatric experts as a paranoid schizophrenic who believed he would come back to life as a giant flying tortoise that would rule the world"); SOUTHERN CENTER FOR HUMAN RIGHTS, *Capital Punishment on the 25th Anniversary of Furman v. Georgia* 28 (June 26, 1997) <<http://www.schr.org/reports/docs/furman3.pdf>> ("When . . . [Jerome Bowden] received a last minute stay from an execution, he asked his lawyer if that meant he could watch a television program that night.").

214. Nebeker, *supra* note 8, at 102.

One of the real ironies of Ms. Jackson's effort is that by stoning Tessie Hutchinson to death she assures herself of immortality. Given the ability of her story to resonate with readers years after its publication, there is every reason to believe that Shirely Jackson will live on, as each new generation discovers the horror that awaits Mrs. Hutchinson at the end of *The Lottery*. Recognition of this lasting fascination, however, does not tell us what drives it in the first place. Is it that we wish for a similar event in our own lives to release our repressed cruelties? Is it that the thought of a isolated village's tradition of an annual stoning holds some anthropological interest for us? Or is it that we cannot help but afford ourselves a peak into Shirely Jackson's village just as we cannot help but look at a terrible car crash when we pass one on the highway?

Similarly, do one or more or all of these explanations tell us why we continue to be fascinated with capital punishment? Whatever the explanation, what is clear is that we do not need it, and we have, over a long period of time, proven ourselves totally incapable of administering it fairly—if indeed that is even possible. Therefore, it is hard to avoid the conclusion that our love of the death penalty springs from an infirmity similar to that which one commentator has subscribed to Ms. Jackson's villagers: "their thinly veiled cruelty keeps the custom alive."<sup>215</sup>

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215. Coulthard, *supra* note 64, at 226. Consider an alternative point of view and consequent action:

In the midst of anxiety and fear, complexity and doubt, perhaps our greatest need is reverence for life—mere life: our lives, the lives of others, all life. Life is . . . an end in itself. A humane and generous concern for every individual, for his safety, his health and his fulfillment, will do more to soothe the savage heart than the fear of State-inflicted death which chiefly serves to remind us how close we remain to the jungle.

*To Abolish the Death Penalty: Hearings on S. 1760 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong. (1968) (statement of Ramsey Clark, U.S. Attorney General).