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THE DEATH PENALTY: A DIALOGUE ON MORALITY AND THE LAW: REMARKS BY STEVE KAPLAN

BY STEVE KAPLAN¹

First of all, thank you very much to the Law School and Bridget for inviting me here. I'm not much of a mathematician, but if my arithmetic's right I think this is the fourth time I've been here speaking about capital punishment. Professor Shea² has had me over here a few times in the dead of winter and, as compensation for that, he flew me down to Tucson one February to talk about capital punishment to the students down there, so I think we are even.

I want to congratulate the Law School and all of you for your interest in capital punishment even though it's not an issue that we deal with as Minnesotans very often at the state level. As Jeanne³ was mentioning, we don't have it at all. We haven't had it since 1911.⁴ At the federal level, we have only had it in connection with the *Dru Sjodin* case, which some of you may remember involved the abduction and murder of a University of North Dakota student who lived in Minnesota and was transported across interstate lines, and for that reason the federal government went after the murderer for capital punishment.⁵ He is on death row as we speak.

Even though it may or may not be part of our everyday practice here or consciousness as Minnesotans or Minnesota lawyers, the reason we focus

¹ Steve Kaplan, attorney at Fredrickson & Byron, has worked on appealed death penalty cases and has received the "Never Forgotten Award" from the Innocence Project of Minnesota. These remarks were given at the Fall 2018 symposium "THE DEATH PENALTY: A Dialogue on Morality and The Law" at the St. Thomas Sch. of Law (Nov. 9, 2018).

² Professor Hank Shea is a Senior Distinguished Fellow and is a Fellow of the Holloran Center for Ethical Leadership in the Professions at the University of St. Thomas School of Law in Minneapolis, Minnesota.

³ Jeanne Bishop, a public defender in Cook County, Illinois, provided a personal look into capital punishment at the University of St. Thomas Journal of Law and Public Policy's fall 2018 symposium, "THE DEATH PENALTY: A Dialogue on Morality and the Law."

⁴ *Minnesota General Information*, Death Penalty Information Center, <https://deathpenaltyinfo.org/minnesota-0> (last visited 4 Jan. 2019).

⁵ *U.S. v. Rodriguez*, 581 F.3d 775 (8th Cir. 2009).

on this is because it forces us to think about what is just. What do we hold dear? What stage of development are we at as a people? What do we expect of ourselves? Not the least of it, and you will appreciate this as a Catholic institution in the same way I value it as a practicing Jew, is it forces us to look at our religious principles we value and what we have come to learn is worth doing and not worth doing. For all those reasons, we are drawn to it. As Professor Stinneford just mentioned, we are dealing with just a nano-piece, a just tiny fraction, of the total population in our nation's prisons. We are talking today about roughly 2,850 people on death row nationwide, of whom about one-fourth are in California.⁶ Most of them will die from natural causes because it takes so long to grind through the state and federal court system.⁷

As Mark⁸ indicated, for about thirty years, I was happily practicing as a civil litigator. Most of it was tax related. I've been at the DOJ Tax Division for five very happy years learning the nuances of federal court litigation and enough tax law to do my own tax return – barely. When I came out here in 1980, I graduated into civil, business and tax litigation. If you got into trouble with the IRS or the controller of the currency or the SEC, I was your guy. If you needed somebody who knew about forensic pathology, blood spatter, crime scene reconstruction, police interrogation techniques, polygraphs, or capital jurisprudence, I was not your guy. But in 2001, I was walking down the hall at Fredrickson, my law firm, and was accosted by a fellow colleague of mine who was working on the Damon Thibodeaux death penalty case.⁹ He asked me if I would mind working on it. Would I be willing to join the team that had just taken on the case? I said to him, “Dean, I’m happy to do that as long as I don’t become the lead lawyer on it.” I walked back to my office, sat down, and wondered what I’d gotten myself into. Three months later, I was the lead lawyer on it, at least at Fredrickson & Byron. You know how that goes. It was, in retrospect, one of the most rewarding experiences of my life. I would not change it for anything. I have worked on death penalty cases that are still in progress. I had a client executed two weeks ago. I’ve seen the gambit of the system. I want to talk to you about things that I learned as a newcomer to the system – things I observed over the last eighteen years of working on death penalty

⁶ *Facts about the Death Penalty*, Death Penalty Information Center, <https://deathpenaltyinfo.org/documents/FactSheet.pdf> (last visited 4 Jan. 2019).

⁷ See, *Capital Punishment, 2016*, U.S. Department of Justice Bureau of Justice Statistics, <https://www.bjs.gov/content/pub/pdf/cp16sb.pdf> (last visited 7 Jan. 2019) (In 2016, twenty death row inmates were executed; nineteen died from natural causes).

⁸ Professor Mark Osler is a professor at the University of St. Thomas School of Law in Minneapolis, Minnesota. Professor Osler served as moderator of the University of St. Thomas Journal of Law and Public Policy’s fall 2018 symposium, “THE DEATH PENALTY: A Dialogue on Morality and the Law.”

⁹ *State of Louisiana v. Thibodeaux*, 750 So. 2d 916 (La. 1999).

cases – and get you to understand why, putting aside the morality of it or the penological justifications for it, it is a broken system, many of us have come to conclude, as did the late Justice Blackman, that no matter how much we tinker with the machinery of death, we can't fix what is broken.¹⁰ I want to try, in the time that I have, to speak to you about some of the things that I have found not only disturbing, but worth talking about to keep people who do not practice or do not necessarily understand the inner-workings of how we go from the investigation through the capital sentencing of capital defendants.

The issue of “cruel and unusual” gets boiled down in recent Supreme Court rulings. Not so much to the method by which we kill people, but to whether the system is constitutional or not. To my surprise, and here's surprise number one that I had as a newbie to this, the focus has been on whether the system is arbitrary in its application or not. I remember, in 1972, sitting at my desk and reading in the newspaper – because that's where we got the news back then – that the Supreme Court had voided the death penalty in a case called *Furman v. Georgia*.¹¹ Then I remember sitting at my desk four years later when I was reading the newspaper and learning that the capital punishment was back in practice. I thought that was rather head snapping, but I didn't understand or take the time then to figure out what had gone on. As I started working on the Damon Thibodeaux case, Damen was, at the time at 2001, about twenty-five years old.¹² He had been on death row at lovely Angola Prison in Louisiana for about three and a half years.¹³ He got there because he had confessed to raping and murdering his fourteen-year-old cousin. So, I started doing what lawyers do, particularly tax lawyers who don't know a damn thing about capital punishment. I started reading the jurisprudence, and I learned what had caused the Supreme Court, in 1972, to void capital punishment was that they declared it was arbitrary and, because it was arbitrary, it violated the Cruel and Unusual Punishment provision of the Eighth Amendment.¹⁴

What concerned them was that we were only, as a nation, executing about fifty people a year and the sheer minimal nature of how many people were being executed suggested to the Court that maybe it is too arbitrary.¹⁵ How did these fifty, out of the total universe of people who committed a first-degree murder, end up being dead and the rest of the thousands stay alive? When the Court looked at the underlying statutes (in this case, the prototypical statute was out of Georgia), they said, “You know, there are no

¹⁰ *Callins v. Collins*, 510 U.S. 1141, 1145 (1994).

¹¹ *Furman v. Georgia*, 408 U.S. 238 (1972).

¹² *Id.* at 8.

¹³ *Thibodeaux*, 750 So. 2d at 928.

¹⁴ *Furman*, 408 U.S. at 242.

¹⁵ *Supra* note 5.

standards. There are no safeguards as to who is going to be executed and who isn't." So, they declared it arbitrary. In the words of one justice, freakish in its application. The states that wanted capital punishment had to go back to the drawing board, and they had to revamp the system. What they did was they created the following, and I'll just give the very basics of it.

We will now have a two-part system. We will have a guilt and innocence phase, which will be a conventional trial before a jury. Then if the jury convicts, we are going to go to a sentencing phase or penalty phase. If it convicts and we have this sentencing hearing, we will determine whether there are statutorily enunciated aggravating factors. For example, was the victim a law enforcement officer performing his or her duties? Was the victim a child? Was the murder conducted in a particularly heinous manner? Did the defendant have a previous history of violence? Those would be the aggravating factors that the jury would have to make a finding about. There could not be a death sentence unless there was an aggravating factor found by the jury. On the other hand, there were also mitigating factors. What was a mitigating factor? It was basically anything that would convince even one juror out of the twelve that this defendant, notwithstanding the horrible thing that he had just done, still merited life. In the so-called mitigation or penalty phase, we would now hear from family members, neighbors, psychologists, teachers, psychiatrists, counselors, correctional officers – the whole gambit – that would try to explain how did this fellow get from birth to where he is today. Is there any explanation for it? Was he abused as a child? Was he addicted to drugs? Anything that might suggest that it was in essence beyond his control what he did?

So, we were off. The Supreme Court said that was good enough. We have a system now with sufficient standards. The governors, if all hell breaks loose and the system yields the wrong result, well, they can always grant clemency. There is no reason to think governors won't do that, so they approved the capital punishment system in 1976. So, we were off with what we now call the modern death penalty system. The question that opponents of capital punishment – and there are four of them on the Supreme Court today – raise is, after some forty-two years of this modern death penalty system experiment that we have been on as a nation, whether in fact we have cured the arbitrariness and freakishness problem. That was one of the things I learned right away: we were not dealing with the morality of the death penalty. We were just dealing with kind of the administration of it and whether it was being done in a way we could say was fair.

When I got into the Damon Thibodeaux case and started reading the trial transcript, the first thing that I came upon, of course, was the *voir dire* – the

jury selection process.¹⁶ That, quite honestly, threw me for a loop. Because instead of talking to jurors about whether they could be fair and impartial and could assume that the defendant was presumed to be innocent – and the burden of proof was on the prosecutor – the standard stuff of criminal case voir dire, it was whether you as a prospective juror could impose the death penalty if the fellow sitting over there is convicted. If we prove that he committed the murder and that he did it in an aggravated way, can you vote to send that young man to the death house? So, we are not talking about the presumption of innocence, we are presuming now that he is guilty and the question is “What will you do about it?” Now the government, the prosecution, has the right to what is called the “death-qualified jury.” That means that a juror has to be willing to tolerate the notion of imposing the death sentence on the defendant if that person is convicted and if the aggravating factors are found and no mitigating factors are found.¹⁷

We now go to voir dire where it’s something like the following. Let’s assume I am called for jury service. I’m in the pool and prosecutor has me and he says, “Mr. Kaplan, what are your views about capital punishment, and if we prove that Mr. Jones over here committed this murder and did it in the way we said he did, can you vote for death?” I say in response to the prosecutor, “You know, that would be a really, really difficult thing for me to do. My religious, my moral, my cultural views would make it really hard, and you know what? I don’t know what the evidence would be to make me change my mind, but it would be extremely, extremely difficult.” Well, I will be tossed off the jury for cause. The prosecution will not need to use a preemptory challenge to get rid of me. I am gone because of my various views. If I were in Louisiana, if I were a practicing Catholic, and I said it violates my religious beliefs, I am gone. I’m off the jury. I will not be allowed to sit.

Now suppose in voir dire I’m asked, “Mr. Kaplan, would you be able to impose the death sentence on Mr. Jones if we convict him of all the things we say he did?” I say to the prosecutor, “You know, yeah. I would be able to do that. I believe if somebody takes a life, they should pay with their own life. Yeah, I can vote for death.” The prosecutor now says to me, because he does not want me stricken for cause, “Well, Mr. Kaplan, before you did that, would you listen to the evidence and would you listen to the judge’s instructions at the end of the case, and would you be able to apply the law to the facts?” “Oh, absolutely.” So, the prosecutor has now saved me from being stricken for cause. The defense lawyer for Mr. Jones is now in the position of having to decide, “Do I spend one of my precious preemptory

¹⁶ *Id.* at 8.

¹⁷ *Death-Qualified Jury*, American Law Britannica, <https://www.britannica.com/topic/death-qualified-jury> (last visited 4 Jan. 2019).

challenges getting rid of Kaplan, or are there worse jurors sitting out there that I need to save them for?" The defense lawyer must swallow hard in accepting me as a juror, even though he or she knows that I am going to be a pro-prosecution judge or juror.

Playing through this process, as I read the voir dire in Damon Thibodeaux's case, it was clear to me that the jurors that were selected to hear his case were not only tolerating of the death penalty but were also probably pro-prosecution with respect to Damon's guilt of the crime. This means that in phase one they were going to be pro-prosecution and, phase two, they were going to definitely be pro-prosecution. The first thing that struck me was, wow, this is different and the jury is going to be tilted in favor of the State of Louisiana in this case, even before we get to the evidence. Due to the nature of the case (that this is a death penalty case), the jury, not the judge, will determine whether there are aggravating or mitigating factors. Unlike any other criminal case, the jury does the sentencing. The Supreme Court, in the case called *Ring v. Arizona* a few years ago, made it clear that any findings of fact relevant to whether a defendant gets the death penalty or a life in prison sentence has to be found by the jury.¹⁸ We put jurors into the position of being the judge of who lives and who dies, which then raised the next question in my mind. What is it about jurors, people drawn from the voting rolls in their community, that enables them to have the life experience, the intelligence, and the judgment to determine whether I should live or I should die if I'm the defendant? Why do we assume that the courtroom is the place to make this decision? What is it that imbues the average citizen with this kind of judgment, with this ability to make that judgment?

The next question that came to me is, what set of instructions can a judge give to jurors that is going to help them make that determination? The judge is going to read from the statute in the sentencing phase of the case.¹⁹ He or she is going to read off the list of aggravating factors, they are going to read of the list of mitigating factors, and then twelve jurors are going to retire into the jury room and make some judgment about whether this guy should live or die.²⁰ Again, what equips them to do it? It then dawned on me that this is not really a legal question at all; it is a moral question whether somebody deserves to die. It is well and good to list the aggravating factors and the mitigating factors, but it still comes down to what the jury thinks

¹⁸ *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

¹⁹ *Role of the Judge and Other Courtroom Participants*, U.S. District Court Northern District Fla., <http://www.flnd.uscourts.gov/role-judge-and-other-courtroom-participants> (last visited Jan 1, 2019).

²⁰ *Mitigation in Capital cases*, Cap. Punishment in Context, <https://capitalpunishmentincontext.org/issues/representation> (last visited Jan 1, 2019).

should be done to this person.²¹ Is there anything salvageable about them? Is there anything in their lives where they were a victim of other people who did them wrong?²² Is there some explanation that we can accept that will cause us to grant this person a life sentence, rather than a death sentence?²³ We use the courtroom and the judicial process to make a judgment that I don't think is necessarily legal at its core. It is really, as I said, moral, cultural, and religious. If I gave you the facts of one hundred different cases where defendants were tried for capital murder, and I said to you, "I want you to put in one pile the cases where the defendant convicted was given a life sentence, and I want you to put in the other pile, where the defendant was given a death sentence, you would only be guessing. You would be guessing because you would be applying your own judgment, your own sense of moral, religious, and cultural values rather than those values of the twelve people who were called to hear the particular facts of a particular case with a particular defendant in a particular community much different than your own. We are talking mainly in the Deep South, where I can tell you from my travels is a different world. Wonderfully nice people who think completely differently than most of us here in Minneapolis-St. Paul, my native New England, or in wherever you folks are from. It came to me that if we are worried about arbitrariness, what can be more arbitrary than the process I have just described?

Now the only factor that, if you were placing bets, would guide you as to whether a person got a death sentence or a life sentence is the one that I think Jeanne²⁴ alluded to in her remarks, and that is the race of the victim. If the victim is Caucasian, there is a many times greater chance, irrespective of the race of the perpetrator, that the jury will give a death sentence.²⁵ If the victim is white rather than black or brown, there is a greater incidence that a death sentence will be imposed.²⁶ That's a matter of statistics.²⁷ You can go on the Death Penalty Information Center website and they will tell you in Louisiana, it is a ninety-seven percent greater chance of the death sentence being imposed if the victim is white than if the victim was a person of color.²⁸ In California, it's three times more.²⁹ The State of

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Rodriguez, 581 F.3d 775.

²⁵ David C. Baldus, Charles Pulaski & Susan Wachter, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. Crim. L. & Criminology 661, 709–10 (1983).

²⁶ *National Statistics on the Death Penalty and Race*, Death Penalty Information Center, <https://deathpenaltyinfo.org/race-death-row-inmates-executed-1976#Vic> (last visited Jan. 1, 2019).

²⁷ *Id.*

²⁸ Glenn L. Pierce & Michael L. Radelet, *Death Sentencing in East Baton Rouge Parish, 1990-2008*, 71 La. L. Rev. 647, 671 (2011); *In Louisiana, Odds of a Death Sentence 97% Higher If*

Washington Supreme Court, just a couple weeks ago, voided its death penalty system on the grounds that it is not only arbitrary, but racially discriminatory.³⁰ Of course, it won't surprise you to learn that African Americans form a disproportionate number of people on death row.³¹ Additionally, it won't surprise you to learn that African Americans form a disproportionate number of people on death row, in terms of what is the total percentage of black people on death row versus what is the total population of African Americans in this country.³² There is this racial component that won't go away.

The next thing that caught my attention was the disparity of resources between the state that was doing the prosecuting and the defendant that was being defended. It occurred to me, as I was getting into this, that the state had all the time and money in the world if it wanted badly enough to impose the death penalty in a particular case.³³ The defendant on the other hand, according to an ABA study on the subject, found that 99.7% of those accused of capital murder are indigent and cannot afford a lawyer.³⁴ The question then becomes one of money and resources. Does that skew the outcome of the capital punishment system? The answer that I concluded was yes, it would have to – it couldn't *not* affect it.

First and foremost, the defendant has a Constitutional right under the Sixth and Fourteenth Amendments to the effective assistance of counsel.³⁵ So, the question is, “If you can't afford your own lawyer, where does your lawyer come from?” As I learned, the lawyer comes from one of three places. Either a public defender and, depending on where the public defender's office is, they may or may not have enough people, enough money in their budget, or enough skilled people to take on the task of a capital murder case – because I can tell you from my experience it takes more time than you

Victim is White, Death Penalty information Center, <https://deathpenaltyinfo.org/studies-louisiana-odds-death-sentence-97-higher-if-victim-white> (last visited Jan 7 2019).

²⁹ Glenn L. Pierce & Michael L. Radelet, *Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999, The Empirical Analysis*, 46 Santa Clara L. Rev. 1, 39 (2005).

³⁰ State v. Gregory, 427 P.3d 621, 642 (Wash. 2018).

³¹ NAACP *Death Penalty Fact Sheet*, NAACP (Jan. 17, 2017), https://www.naacp.org/latest/naacp-death-penalty-fact-sheet/#_edn1.

³² *Id.*

³³ *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, American Bar Association (Dec. 2004)

https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sc_laid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf.

³⁴ Cf. Sam Glover, *Minnesota Lawyers Protect Rights of Those on Death Row*, Minn. Post (Nov. 11, 2009) <https://www.minnpost.com/business/2009/11/minnesota-lawyers-protect-rights-those-death-row/> (99.5% of death row inmates are impoverished and cannot afford lawyers).

³⁵ Missouri v. Frye, 566 U.S. 134, 138 (2012).

can possibly imagine.³⁶ I worked on Damon's case for twelve years. I spent somewhere between 4,500 and 6,000 hours on this case and I was only one of the lawyers.³⁷ I worked with the Capital Post-Conviction Project of Louisiana, the Innocence Project of New York, and the incomparable Barry Scheck for ten years of the twelve that I worked on the case. The Capital Post-Conviction Project, to give you an example of what I am talking about, is tasked by state law with representing every death row inmate in the State of Louisiana.³⁸ There are about ninety to ninety-five of them at any moment.³⁹ There are between four and six lawyers at the Capital Post-Conviction Project of Louisiana.⁴⁰ Can they represent all of these people in post-conviction? No, because in post-conviction it is even more complicated and more fact-intensive than it was before the trial.⁴¹ Because now we have had the trial, so we have not only all the investigative work that was done before the trial, we have now all of the work that was done at the trial like exhibits and trial transcripts. As post-conviction counsel, we are tasked with conducting our own investigation to determine whether the individual was given an effective lawyer.⁴² Were there violations of due process? We can talk about some of those in a minute.

The task of representing somebody in post-conviction capital defense work is daunting. The question is, “Well, who's going to do it?” Because after you are convicted and once you are on death row, you do not have a Constitutional right to a lawyer.⁴³ Louisiana says, and rightly so, “Well, if we are going to kill people, we better give him a lawyer in post-conviction.”⁴⁴ The Capital Post-Conviction Project of Louisiana and others like it, which are parts of the public defender offices in those jurisdictions, are tasked with representing people that exceed their ability to represent.⁴⁵

³⁶ Counsel and Witnesses in Capital Cases, 18. U.S.C.A. § 3005 (1982).

³⁷ Cf. *Freed Louisiana Death Row Inmate Thrives in Minnesota*, Kare 11 (May 8, 2013), <https://www.kare11.com/article/news/local/freed-louisiana-death-row-inmate-thrives-in-minn/89-306739126>.

³⁸ See Representation of Capital Defendants La. Stat. Ann. § 15:169 (2007) (State Statute mandating Louisiana Public Defender Board to find counsel for defendants sentenced to death, LPDB tasked Capital Post Conviction Project with this responsibility).

³⁹ See *Capital Post Conviction Project of Louisiana*, Louisiana Public Defender Board, <http://lpdb.la.gov/Serving%20The%20Public/Programs/Capital%20Post%20Conviction%20Project%20of%20Louisiana.php> (last visited Jan. 1, 2019) (CPCP of Louisiana currently has 27 clients and gives additional resources to twelve other cases).

⁴⁰ *Id.* (As of Jan. 2, 2019, there are currently 11 attorneys at the CPCP of Louisiana).

⁴¹ See *Trial Versus Appellate Versus Postconviction Work*, Michigan Law School, <https://www.law.umich.edu/mdefenders/students/Different-Types-of-Indigent-Defense/Pages/Trial-versus-Appellate-versus-Postconviction-Work.aspx> (last visited Jan. 1, 2019).

⁴² *Id.*

⁴³ *Murray v. Giarratano*, 492 U.S. 1, 10 (1989).

⁴⁴ Stat. §15:151.2.

⁴⁵ *Supra* note 27.

There is just too many of them, too complicated, too time consuming, and too expensive. So, what do they do?

They look for private lawyers from places like Minneapolis, Washington D.C., Philadelphia, up and down the east coast, in the Midwest, Denver, on the West Coast, L.A., and San Francisco to come in and do the work that local lawyers in the jurisdictions where we are talking about – Louisiana, Texas, the Death Belt states – where those lawyers are not willing or unable financially to do the work.⁴⁶ It falls mostly to larger law firms that have the money to spend in this effort.⁴⁷ My law firm has represented now four or five people on death row in Louisiana plus the fellow I represented in South Dakota.⁴⁸ We are being asked to take on other cases in Louisiana, because they know that we are committed to doing the work as well as we can and we have got the money. We have enough paying clients to foot the bill to let us spend money on people like Damon's case.⁴⁹

So, if you are looking for a public defender, you may get a wonderfully talented committed lawyer but one who still cannot do the work. The judge may get even with some private lawyer in the community and appoint him or her to represent the indigent capital defendant.⁵⁰ For that task the lawyer gets to spend, in theory, a hell of a lot of time for, let's say, twenty percent of what the average billing rate would be if they were working on a paying client matter.⁵¹ Additionally, they are being asked to do it in a community that is hostile to the defendant and presumably the majority of people are in favor of capital punishment and want to see this person executed.⁵² That is option two, a privately appointed, judge appointed lawyer, who wants to be anywhere but in that courtroom.⁵³ The third thing, and I've seen this, is the family scrapes up a small amount of money – ten, twenty or thirty thousand dollars – to do what would cost a half a million or more to do the right way. The lawyer willing to take it, sees the retainer and does the work that the retainer warrants, and then often stops working once they burn through the retainer. When you read the transcripts in those cases, you are left to

⁴⁶ *Supra* note 33.

⁴⁷ *Id.*

⁴⁸ *Fredrikson & Byron is the First Private Law Firm to Receive the Sam Dalton Capital Defense Advocacy Award*, Fredrikson & Byron, P.A. (Nov. 15, 2018) https://www.fredlaw.com/news__media/2018/11/15/2028/fredrikson_byron_is_the_first_private_law_firm_to_receive_the_sam_dalton_capital_defense_advocacy_award.

⁴⁹ *See Client Successes*, Fredrikson & Byron, P.A., https://www.fredlaw.com/client_successes/ (last visited Jan. 1, 2019).

⁵⁰ *Inadequate Representation*, ACLU, <https://www.aclu.org/other/inadequate-representation> (last visited Jan. 1, 2019).

⁵¹ 18 U.S. Code § 3005.

⁵² 38 U.S.C. § 3599(g)(1).

⁵³ Ann Farmer, *Death Penalty Lawyers: A Fight That Never Finishes*, American Bar Association, https://www.americanbar.org/content/dam/aba/publishing/perspectives_magazine/women_perspectives_careersdeathpenalty.pdf (last visited Jan. 1, 2019).

wonder – not wonder, you know that the defendant was not afforded the effective assistance of counsel. When we show up in post-conviction, we see this.

The Supreme Court said in its landmark case, *Strickland v. Washington*, a 1984 death case that an “effective” lawyer meant one who investigated every actual or potentially relevant fact before they formed the defense strategy and presented it ably.⁵⁴ That was the good news of *Strickland*.⁵⁵ The bad news of *Strickland* is it is full of soft language that says, “Well, but in judging what the lawyer did, whether they were effective, whether they did something, did everything they should, we can't judge them too harshly because we can't look at it in the light of after-the-fact hindsight. We have to live in their shoes and understand why they decided to pursue this avenue or this issue or this theory and not some other.” When you come in at post-conviction and you show all of the evidence that the trial attorneys did not present – because they did not investigate issues that they ought to have – state court judges looking to salvage the conviction will say, “Well, it was reasonable not to do that or it was a strategic decision not to pursue a certain line and strategic decisions are O.K.”⁵⁶ Whatever *Strickland* gives to the defense, it takes away in some of the softer, squishier language.⁵⁷ The Supreme Court, having written *Strickland* in 1984, set off a wave of ineffective assistance of counsel cases in the death penalty setting where post-conviction lawyers, like me, would come in and argue that the defense counsel was inept and deficient, and not only was it deficient but it had a reasonable probability of affecting either the guilty verdict or the death sentence that was imposed by the jury.⁵⁸ The Supreme Court has used ineffective assistance of counsel in the last twenty-five years or so as the major means for overturning death penalty convictions.⁵⁹

The problem then is – well all right, we have looked at ineffective assistance of counsel – the other major ground for overturning a conviction is the denial of due process. For due process we are looking mainly at the manner in which the law enforcement and the prosecution conducted the trial. We are looking to see: Did the police detectives, who testified, perjure themselves? Did they coerce perjured testimony from other witnesses? Did the prosecution offer, under the guise of scientific evidence,

⁵⁴ *Strickland v. Washington*, 466 U.S. 668 (1984).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Dr. Emily W West, *Court Findings of Ineffective Assistance of Counsel Claims in Post-Conviction Appeals Among the First 255 DNA Exoneration Cases*, Innocence Project (September 2010), https://www.innocenceproject.org/wp-content/uploads/2016/05/Innocence_Project_IAC_Report.pdf.

⁵⁹ *Id.*

what is really junk science? Was evidence concealed? Was it tampered with? Was it altered? In essence, was the defendant denied the right to a fair trial? So, that is the other issue that now confronts you in post-conviction.

Now the problem is that when you present all of this new evidence, and let's say that there were *Brady* violations – the police concealed evidence, like they did in the case of John Thompson in Louisiana, where he came within five weeks of being executed when it was found that the prosecutor in that case had hidden a blood test that was exculpatory.⁶⁰ The question is, we have got ineffective assistance of counsel, we have got due process violations, and now we are going to go back into court in what is called “post-conviction” or “habeas proceedings.” We are going to likely show up in front of the same judge that just tried the case at the trial. We are going to be dealing with the prosecutor that prosecuted the case, the detectives who got the conviction. We are going to be dealing, now, with the victim's family. We are going to be dealing with public outrage that these guys from Minneapolis are down here saying that this guy, who we all know is guilty, is really innocent or doesn't deserve the death penalty, etcetera. So, we are now not only confronted with what the legal burden is – to show a violation of one or more constitutional rights that prejudiced the defendant – but we are doing it in the context that is not pure. It's not a laboratory; it's not a classroom. We are down in the belly of the beast, dealing with the people who convicted this guy to begin with. Without going into chapter and verse, you are not dealing with people who are open to the notion that they either perpetrated, participated in, or presided over a gross miscarriage of justice. So, there is that issue.

I want to talk, in the few minutes I have got left, about another legal issue that bothered me to no end once I became aware of it. That is, the 1996 passage of the so-called Anti-Terrorism and Effective Death Penalty Act of 1996 – AEDPA for short.⁶¹ It was in response to really two events I think: the first bombing of the World Trade Center in the early '90s and then, as Jeanne alluded to, the bombing of the Oklahoma City Federal Building. What Congress did there was basically do what it could to keep federal courts from reversing state court decisions, convictions – particularly in death penalty cases.⁶² The ripple effect of AEDPA is that it applies to almost any felony case.⁶³ What ADEPA did was it said the following: you must bring your federal habeas petition, in which you were attacking the

⁶⁰ Sam Roberts, John Thompson, *Cleared After 14 Years on Death Row, Dies at 55*, (October 4, 2017), <https://www.nytimes.com/2017/10/04/obituaries/john-thompson-cleared-after-14-years-on-death-row-dies-at-55.html>.

⁶¹ *Antiterrorism and Effective Death Penalty Act*, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

⁶² Lincoln Caplan, *The Destruction of Defendant's Rights*, *The New Yorker* (June 21, 2015) <https://www.newyorker.com/news/news-desk/the-destruction-of-defendants-rights>.

⁶³ *Id.*

state court conviction, within a certain period of time. Then, even if you do it on time, the federal court cannot reverse a state court conviction unless the opinion flies in the face of established Supreme Court law – not lower federal courts, but U.S. Supreme Court law on point – or it is an unreasonable application of Supreme Court precedent or the Supreme Court has announced a new Constitutional right that is retroactive and applicable to your case.⁶⁴ The federal courts now, even if they review a case and conclude that it was wrong – that the State Supreme Court of Louisiana or Texas or Alabama got it wrong – nonetheless, they didn't get it unreasonably wrong. Now wrap your head around that, it is wrong but not unreasonably wrong. What the heck matter does it make whether it is unreasonable or just wrong? It is wrong, but the federal courts were told to stay the heck out of state court convictions. Why? Because federal habeas relief, at that time, for death row inmates basically allowed defense lawyers to come in multiple times and seek relief on a variety of grounds. It was taking too damn long to kill people, Congress said. In the wake of the political fallout from the Oklahoma City bombing, this is what we got. With this, the federal courts are largely removed from state court conviction review.

If you have watched *Making a Murderer*⁶⁵ – and close your ears if you don't want me spoiling this for you or if you have not otherwise followed the case – Brendan Dassey confessed.⁶⁶ This is a fellow with about a sixty IQ.⁶⁷ He was convicted on that. It went up to the Wisconsin Court of Appeals; they affirmed it. The Wisconsin Supreme Court refused to hear it. The Federal District Court in Milwaukee said the confession was involuntary and threw it out, and the conviction got tossed out with it. The state of Wisconsin appealed it to a panel of the Seventh Circuit, which voted two to one to affirm the judge's finding in the District Court that it was involuntary and should be tossed. Then it went up en banc to the entire court in Chicago, the whole Seventh Circuit, which voted to reverse the panel's decision. It was not done so much, I don't believe, on the merits of whether Brendan Dassey was coerced; it was whether the state courts had been unreasonable in concluding he had not been.

This is why people get upset with lawyers and judges – because we are focused on an issue, not whether what he said was reliable or not. Not even whether it was voluntary or not, but whether the state court – the Court of

⁶⁴ *Id.*

⁶⁵ Laura Ricciardi and Moira Demos, *Making a Murderer*, Netflix (Dec. 18, 2015), <https://www.netflix.com/title/80000770>

⁶⁶ Heather Schwedel, *What's really going on in Making a Murderer? A Comprehensive Breakdown.*, (January 6, 2016, 8:02 AM), <https://slate.com/culture/2016/01/making-a-murderer-plot-timeline-and-questions-breakdown.html>.

⁶⁷ *Id.*

Appeals of Wisconsin, the last one that ruled on the merits – if they got it wrong and if it was unreasonably wrong. If there is any logic to that, you can explain it to me because I do not see it.

The last thing that I will talk about and that really jolted me was visiting Damon and then, later, others on death row. Over the course of my work with Damon, he and I talked probably once or twice a week from about 2005 until he was exonerated and released back into the real world in late September of 2012. Then I visited him on various times down on death row in Louisiana. What struck me was how anybody could survive in solitary confinement for a week, let alone fifteen years, for a crime you did not do. Then I learned, well, everybody on death row in Louisiana and in most other states is sent to solitary confinement, just as a matter of course. Not because they are necessarily in need of being restricted in that manner, but because the presumptions are that they are violent, they are desperate, and we are going to confine them.

For twenty-three hours a day, death row inmates are kept in solitary. Damon had an eight-by-ten cell. He was allowed out one hour a day. On three of the seven days in the week, he could go out into what I would call a dog run – an enclosed fenced area where he could run. He could use his hour to call me or to do other things. When I would listen to him on the phone, I could hear shrieking of other men down the concourse that he was on. The lights never go off at night. There is no air conditioning – in the summer in Louisiana, imagine that. The guys stripped down naked and lay on the concrete to try to ameliorate the heat.⁶⁸ The food is dreadful. The healthcare is next to non-existent, and so, diabetes and heart disease are rampant on death row.⁶⁹ If you were not crazy when you got there, you will become next to crazy in a relatively short time. So, the conditions on death row create in many people what is known as “death row syndrome.” That is, a number of people will volunteer to be executed rather than continue the legal fight for life because they can't bear to live another day on death row.⁷⁰ They would rather end it. In Damon's case, he not only wanted to sign a waiver giving up his case even though he was innocent, he figured that it was the only way he could control his own life. Because if he spent another ten years fighting – and he had already lost in the justice system because they sentenced him to death to begin with – spent ten years fighting, living in in solitary, and then get the death penalty anyway, “Why would I want to do that?” So, he actually had to be talked out of giving up

⁶⁸ Lydia Pelot-Hobbs, *Louisiana's Turn to Mass Incarceration: The Building of a Carceral State*, (February 1, 2018) <http://news.aag.org/2018/02/louisianas-turn-to-mass-incarceration-the-building-of-a-carceral-state/>.

⁶⁹ *Id.*

⁷⁰ Harold Schwartz, *Death Row Syndrome and Demoralization*, *Journal of the American Academy of Psychiatry and the Law Online* June 2005, 33 (2) 153-155.

by one of the lawyers down at the Capital Post-Conviction Project of Louisiana. The rest of the world calls this torture. We have another name for it, I don't know what we call it, but it is Constitutional; it is acceptable.

Once we finish up with the rest of the prepared remarks, I will be interested to take any of the questions that you folks have.

Thank you again.